THE ENGLISH REPORTS

KING'S BENCH DIVISION

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Reports of divers SPECIAL CASES, ADJUDGED in the COURTS of KING'S BENCH, COMMON PLEAS, and EXCHEQUER, in the Reign of KING CHARLES II. Collected by SIR THOMAS RAYMOND, Knight, late one of the Judges of the King's Bench and Common Pleas, and one of the Barons of the Exchequer. Printed from the original Manuscript, written with his own hand. The Third Edition, Corrected. 1803.

[1] TERM. MICH. 12 CAR. 2, B. R.

The Justices being Sir Robert Foster, Sir Thomas Mallet, Sir Thomas Twisden, Sir Wadham Wyndham, Justices.

MARY GRIGGS'S CASE.

Witness. 2 Roll. Ab. 686.

Mary Griggs was indicted upon the statute of 1 Jac. 1, cap. 11, for that she the 28th of February 1653, was married to one Nicholas Coats, and that she afterwards, viz. the 10th of October, 1659, the first husband being then alive, married Edward Cage, &c. Upon not guilty pleaded, the first husband was produced at the trial as a witness to prove the first marriage; but the Court totally refused to admit of his testimony, and said, that a wife could not be admitted to give evidence against her husband, nor the husband against his wife in any case, excepting treason, because it might occasion implacable dissention, according to 1 Inst. 6 b. And they denied *The Lord Audley's case* in Hutton 116 to be law; so the prosecutor having no other considerable witness, the jury brought in the prisoner not guilty.

BATEMAN AND LAWRENCE, SHERIFF OF MIDDLESEX, *versus* SWIFT.

Parliament. Show. 363. Salk. 331.

Debt upon the Statute of Eliz. for poundage, for executing a writ of execution. Upon *nil debet*, pleaded, and a verdict for the plaintiff, Sparks moved in [2] arrest of judgment, that the statute is mis-recited, for the plaintiffs in their declaration say, that the Parliament was held 28 Eliz. and the book at large says it was held the 29 of Eliz. but upon examination it appeared by the Parliament roll that it was held the 28 of Eliz. and the printed book is false, therefore judgment was given for the plaintiff. *Vide* 1 Anderson 291, pl. 303, a good case concerning the commencement of this Parliament.

SEAMAN *versus* BARNES.

Trover. 1 Danv. Abr. 24, p. 5. 1 Sid. 263, 98. 3 Keb. 253, 507. 2 Keb. 765. Stile 358. 1 Vent. 114, 106.

Trover for two pair of pot-hooks, &c. and hangers, &c. after not guilty pleaded, and a verdict for the plaintiff, Allen moved in arrest of judgment, that hangers is a too incertain and equivocal word. Baldwin for plaintiff insisted upon it, that since pot-hooks preceded the word hangers, the Court could not intend these were any other hangers than such upon which pot-hooks use to hang. And he cited a case of trover for a billiard-table, port, sticks and balls, and adjudged good, because the port, sticks and balls should be intended things appurtenant to the table. But the Court was of opinion that it was too incertain a word, for the word does not immediately follow the word pot-hooks, but there are divers other things mentioned between; therefore judgment was stayed.

[3] TERM HILL. 12 CAR. 2, B. R.

WOODWARD *versus* BONITHAN.

[See *Martin* v. *Mackonochie*, 1878-81, 3 Q. B. D. 750; 6 App. Cas. 424.]

Court. 2 Danv. Ab. 262. Lat. 11. Moor. 891, pl. 1225. 4 Inst. 139, 140. 12 Rep. 103. Hob. 107, 109.

A master of a ship agreed with certain merchants concerning a voyage, and received orders from them to lay in provision of meat and drink, and also to provide mariners, &c. and after the voyage was finished the merchants refused to pay the master of the ship what they had agreed for; upon which refusal he libelled against them in the Court of the Admiralty, &c. And now Serjeant Wild for the merchants moved for a prohibition, because they are sued upon a contract made upon land, and so the Admiralty has no jurisdiction. Turner against the prohibition, insisted upon it, that when a thing is in its nature maritime, as here the mariners wages, the Admiralty shall have the conusance of it; and so it was agreed by all the justices, Hil. 8 Car. 1, 1 Cr. and of this opinion was Mallet Justice: but Foster Chief Justice and Twisden Justice held a prohibition would well lie, for the statute of R. 2, 15, cap. 3, was made at the great complaint of the Commons, and should therefore be construed most beneficially for the good of the subject; and when the ordinances and orders in the time of the late troubles were made, the constant and generally received opinion was, that for mariners wages, &c. the parties could not sue in the Admiralty, and for that reason pretended orders were made on 12 April 1648, cap. 11, and another 23 April 1649, cap. 21, to enable the Admiralty to hold plea of such things: and as to that case of 8 Car. 1, they said, that that had not only been denied by several other Judges as well as by themselves at this time, but had been renounced even by several of those Judges who are said to have subscribed to it, for which reason a prohibition was granted. But all the Judges agreed, that the granting of prohibitions is not a **[4]** discretionary act of the Court, but are grantable *ex debito justitiæ*, and they denied my Lord Hobart's opinion in his Reports 67, which Roll Chief Justice they said had frequently done before.

REYNOLDS *versus* BURTON.

Words. 1 Roll. Ab. 65, p. 1. 1 D. Abr. 149, p. 3.

Error upon a judgment given in C. B. in an action upon the case for words: the plaintiff declared, that the defendant being seised of certain land, &c. said of the plaintiff, Burton had forged a deed to cheat me of my land, and he gave A. B. 40s. for ingrossing it. Resolved the words are actionable, and judgment was affirmed.

WINDHURST *versus* GIBBES.

Custom.

Covenant. The plaintiff declared upon a custom in London, that every freeman may take an apprentice, and that infants may bind themselves to serve, &c. After a verdict for the plaintiff, Jones moved in arrest of judgment, that this custom is only alledged *in fieri*, and not *in facto*, and consequently naught; for prescription consists in the reiteration of acts, which this custom, as here set out, has not to support it; and he cited the case of 22 E. 4, 8, a custom that every man may turn his plow upon the next land adjoining, if it is not sown with corn; adjudged naught for not adding the usage. So Pasch. 37 Eliz. *Bishop's case*, a custom found within a manor, that every tenant of the said manor *potuit & potuisset sursum reddere, &c.* and adjudged naught. So 21 Jac. *Sir William Hatton's case, licet & licuit* for the lord to assess a pain for the breach of a by-law, adjudged void. And the pleading of gavelkind lands, which are *partita* as well as *partibilia*, and of copy-hold lands *dimissa* as well as *dimissibilia*, seems to demonstrate that the law is so. But the Court was of the contrary opinion, and compared it to case of 21 E. 4, 28, and the Old Book of Entries 141. A custom, that every citizen and freeman might devise in mortmain, and allowed good; and to this [5] opinion the Judges inclined in *The King and Bagshaw's case*, 1 Cr. 347, so the plaintiff had his judgment.

DETHICK *versus* BRADBOURNE.

Error. 3 Danv. Abr. 242, p. 4. 2 Sid. 110, 117.

The plaintiff had a judgment given for him in B. R. upon which the defendant brought a writ of error returnable in Parliament, and the transcript of the record was certified, and errors were assigned, and the Parliament dissolved before they were determined. Now Jones moved in B. R. for execution upon this judgment, and cited 1 H. 7, pl. 5, page 20, *Flourdew's case*, and 2 Cro. 342, *Heydon* versus *Godsalve*, that a writ of error in Parliament is determined by the dissolution of the Parliament; the Court after grand debate how it should appear to them that the errors are indetermined above, and that the judgment is not there reversed, at another day granted execution, and the reason they gave was, because the record it self was never out of this Court, but only the transcript carried up by the Chief Justice, and there left; and when a judgment of this Court is reversed in Parliament, the transcript is returned hither, and this record made according to the transcript so returned. *Quod nota.*

NEWCE *versus* PARKER.

Intr. Mich. 12 Car. 2, Rot. 672.

Error.

Error out of C. B. upon a judgment there given in an action upon the case upon a wager, whether the eldest son of a puisne knight bachelor, or the grandchild of an elder knight bachelor should have the precedence by the judgment of a herald; and the herald gave precedence to the grandchild of the elder knight, and accordingly judgment was given in C. B. and that judgment they were here affirming, but the writ of error abated for false direction and misrecital.

[6] PAYNE *versus* MINSHAL.

Baron and feme. 1 Danv. Abr. 718, G. p. 1. 1 Lev. 25. 1 Keb. 20, 22.

Debt for 15l. for rent. Upon demurrer to the declaration, the case was such, the plaintiff demises by indenture, to Dame Ashfield a widow, a house in St. Giles's in the Fields, rendering 30l. a year rent; the defendant marries her, and the rent is behind during the coverture; the wife dies, and the plaintiff brings this action upon

the indenture against the husband for this rent; and it seems the action well lies according to 10 H. 6, 11 a. But it was adjourned; and afterwards it was adjudged for the plaintiff.

BOYLESTONE *versus* RADCLIFFE. DEBT ON OBLIGATION.

Intr. Hill. 1657, Rot. 243.

Bankrupts. 1 Danv. Abr. 691, p. 5. 1 Lev. 17. 1 Keb. 167.

The plaintiff declares upon the Statute of Bankrupts, and on the pleadings the case was, that the defendant was indebted to one Studder and the plaintiff in a joint obligation; Studder becomes a bankrupt, and this debt is assigned to the plaintiff by the commissioners, to the use of the creditors. Finch Solicitor General for the plaintiff; This is a good assignment; and in this case we shall inquire, *First*, What interest the obligees have? *Secondly*, What power the commissioners have? *Thirdly*, If the commissioners here have executed their power? *As to the first*, the obligation cannot properly be the debt of them both, because an interest cannot be both joint and several, as *Slingsby's case*, in Coke's 5 Rep. 19 a. and therefore they are both possessed *per my & per tout;* and then one of them being a bankrupt, the commissioners have power to assign the whole debt due to the bankrupt, and for necessity, because the statute of 1 Jac. says, that the assignee shall have the same remedy as the bankrupt. *Objection.* The debt is not the debt of the bankrupt only, but the debt of another also. *Answer.* It is also the debt of the bankrupt: if the husband be jointly seised in the right of his wife, and is **[7]** attainted and dies, the wife dies, the issue is barred, Co. 8 Rep. 72 a. *Greenley's case.* And by the frank-tenement of the wife, that is intended, that she hath jointly with her husband, by the statute of 32 H. 8, cap. 28. So when the husband loseth by default land which was the right of his wife, *jus uxoris* is that which she had jointly with her husband within Westm. 2, cap. 3, there, and this debt is in some sort belonging to the estate of Studder, for he may discharge it. *Secondly*, Assignment ought to be favoured, and therefore Mich. 23 Car. *Baker* against *Edmonds*, Styles's Rep. 62. An assignee brings an *indebitatus assumpsit* for 42l. upon an assignment of a debt due by contract of 43l. and upon *non assumpsit*, and a special verdict, resolved for the plaintiff; for although in strictness of law it is not good, yet in favour of creditors it was held good. *Thirdly*, Whatsoever a bankrupt may forfeit, that may be assigned, and there he might have forfeited the whole obligation: and there is a difference betwixt a personal chattel in action and in possession; for of a joint personal chattel in action the King shall have all: but of a joint chattel personal in possession the King shall have only the moiety. 8 E. 4, 4 a. Plowden 259 a. Co. 3 Inst. 35. *Object.* Perhaps the other obligee hath released. *Resp.* That is not found in the verdict, and it may be as well surmised that it was in trust for the bankrupt. Wyndham, If there be two obligees, the one cannot release to the other, because a thing in action, and the statute shall not go by the rule of what thing the bankrupt may do, for he cannot assign a thing in action. Twisden, The case of the forfeiture of *felo de se*, of a joint debt is by prerogative, but he cannot assign the whole, and if he may, then the other may release it. *Secondly*, the statute saith, that the assignee shall have the same action. Here the bankrupt cannot have an action without the other. Foster, The question is, if the commissioners have power to take away the power of the other obligee to release the debt, and if the assignee dies, this survives to the other obligee; when the common law and statute-law concur, the common law shall be preferred. *Et adjournatur.*

[8] JERMY *against* SIR ARTHUR JENNY. ASSUMPSIT. SUFF.

Assumpsit. When the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be incumbered in the length thereof, the law allows of a general pleading. Cro. Eliz. 749, *Mints* versus *Bethill.* 3 Bulst. 31, *Cryps* vers *Bainton.* *Vide* Sid. 18.

The plaintiff declares, that whereas the defendant the 8th of June 1655, at Layston, in consideration that the plaintiff at the special instance and request of the

defendant would from thenceforth admit, entertain and board the defendant and his retinue in the house and family of the plaintiff, and would find, provide and allow to and for the defendant and his retinue, meat, drink and lodging, and horse-meat for his horses whensoever, and so often as should please the said defendant to repair and come to the dwelling-house to the plaintiff, did assume and promise to pay to plaintiff so much money for the same, as he should reasonably deserve, upon request. The plaintiff avers, that afterwards, (viz.) the aforesaid 8th day of June, and divers other days and times afterwards, he did admit, entertain and board the defendant and his retinue into the house and family of the plaintiff, and did find, provide and allow the defendant and his retinue, meat, drink and lodging, and horse-meat for his horses several times, and whensoever, and so often as it pleased the defendant after the same 8th of June, to repair and come to the dwelling-house of the plaintiff, and that he doth deserve 33l. 12s. and so brings his action. The defendant demurs upon this declaration, and shews for cause, 1. That the plaintiff doth not shew the time of notice when the defendant came to his house. 2. He doth not shew that the defendant after the 8th of June came to the house of the plaintiff. 3. Because the count is so defective, insufficient, incertain, and wants form, &c. Scroggs for the defendant. The declaration is incertain, because it doth not appear what days the defendant came to the house of the plaintiff, or that the plaintiff found him meat, drink, horse-meat, &c. and therefore on another action brought this action cannot be pleaded in bar; for he ought to have said, that divers days between the said 8th of June and the exhibition of the bill he entertained, &c. Raymond for the plaintiff. The count is certain enough, for as to the shewing that he entertained him from such a day **[9]** till such a day, perhaps the truth of the fact was not so; and then if he had declared so, and the defendant had taken issue upon it, the issue would have been found against the plaintiff. 2. If it had been divers times betwixt the 8th of June and such a day, this had been as uncertain as it is here, for the number of days would not appear, more than here, so that the jury may be ascertained what damages to give. 3. It is shewn that all was after the promise, and that nothing incurred after the bill; for the bringing of the bill shews that he hath not paid; and it seems that it cannot be better; for if he ought to have shewn all the days, or the time in particular, this would have made the declaration too prolix, and to no purpose, for upon the evidence it will appear what the plaintiff hath deserved; and upon this reason it was here adjudged in a case of the same nature, Mich. 1654, B. R. *Pratt* against *Banks*, error of judgment in the Common Bench, where the plaintiff brought an action upon the case upon a special promise, and the count was such, that whereas he was an attorney of the Common Bench, the defendant promised, that if he would prosecute a suit for him in the said Court betwixt him and A. B. that he would give to him 3s. 4d. every term; and also if he would solicit another suit for him in Chancery, and disburse the money that should be due to the officers and counsel, &c. that he would repay him, and give to him so much for his salary; the plaintiff avers that he did prosecute the said suit in the C. B. and solicited for him in Chancery, and *paid divers sums of money* to several officers and counsel amounting to so much, and that the defendant had not paid him, and judgment was for the plaintiff in C. B. and the defendant brought a writ of error, and assigned for error that the plaintiff did not set forth to whom the fees and money was paid, so that if the officers will sue the defendant again for the same money, he cannot plead this action in bar. But resolved, that it doth not behove him to alledge the particulars, for there is a difference where the action is grounded upon the duty, as in debt upon the contract, as *Gardner and Bellingham's case*, Hob. Rep. 5. And this is for conciseness of pleading, as in an action upon the statute of sending knights to Parliament, the election shall be said *per majorem numerum*. Plow. Com. *Bulkeley's case*. 2. The entertainment is at the request of the defendant, and therefore he best knows what time he was entertained; and **[10]** upon this reason it is adjudged, Hill. 15 Car. B. R. *Canwey* against *Aldre*, Cro. Car. 573. In an *assumpsit* the plaintiff declares, that where he at the request of the defendant amended such a boat, and divers other boats of the defendant, he assumed to pay to him for his labour and charges *tantum quantum*, and avers that he amended one and divers other boats, and that he deserved so much; and this objection was there made, but adjudged that

it is good enough, by Jones, Barkeley and Croke; and the reason is, because the defendant (at whose request the said boats were mended) might well take conusance what boats they desired to have amended; and this case was well scanned, for that Justice Barkeley doubted of it at first, and there were precedents searched, and the Secondary there said, that divers precedents were in the case, and one was cited by Croke himself. *Assumpsit* was brought by a taylor, and he declared, that where he had made a gown, and divers other suits of apparel at the request of the defendant, he promised to pay him *tantum quantum*, and in Cro. James 370, in *Shepheard and Edwards's case*, in *assumpsit* for curing a fistula, the plaintiff avers, that he such a day, and divers other days and times betwixt such a day and such day, caused to be applied medicines, and that he deserved so much; and judgment for the plaintiff; Noy Rep. 16, *Tayler and Charey, assumpsit* to pay 4l. at Lady-Day, *circiter illud tempus*, and avers, that he paid it not within forty days after; and adjudged for the plaintiff, because it appears that it was not paid when the suit was commenced. 3. The entertainment is according to the agreement, which is so often as the defendant pleased to come, &c. which cannot be set forth without great prolixity and hazard; and upon debate judgment was given for the plaintiff at another day.

[11] TERM. PASCH. 13 CAR. 2, B. R.

ROBINS *against* COX AND WARWICK.

Debt. 2 Danv. Abr. 494, p. 16. 1 Lev. 22. 1 Keb. 1, 42, 71, 153, 250.

The case was, Kenne seised of land in fee demises to the defendants for twenty-one years, rendering rent during the term, and then grants the rent only (without the reversion) to the plaintiff and his assigns during the term, and the defendants atturn; and for rent behind the plaintiff brings debt, and shews this whole matter in his count; and the defendants plead *nil debent*, and found for the plaintiff. And Powis moved in arrest of judgment, because debt, as this case is, lieth not, because there is no privity betwixt the defendants and the plaintiff, and of a rent-seck there is not any remedy without seisin. Baldwin for the plaintiff. 1. Rent-service may come to be rent-seck, Lit. sect. 225, and here by the attornment there is *quasi* a new contract between the plaintiffs and the defendants. Wyndham Justice for the plaintiff, L. 5 E. 4, 42. Debt lies for an annuity granted for years; and 45 E. 3, 8, privity of contract may be transferred; and debt lies upon a lease of a fair, and therefore a bishop may grant a fair for years, but not for life, because debt lies. 2. The law favours remedies. Twisden of the same opinion, because the rent was originally subject to an action of debt, and therefore, although it is now in another hand, yet the contract remains, as distress for rent, which is overplus of common right; and Coke lib. 4, *Ognel's case*, if an annuity be arrear, and the grantee dies, his executors shall have debt, because the person of the grantor was originally charged, 9 H. 7, 16. A seignory in fee is granted for years, the grantee shall not have debt, because it is out of a fee, but after the term expired he shall have debt, 19 H. 6, 42, per Ascough, and 44 El. *Bendlows* against *Philips*, and Cro. Eliz. 895. It was adjudged that grantee of a rent-seck shall have debt, because the law favours remedies.

Mallet Justice *contra*, because no privity is betwixt the parties; and of the same opinion was Foster Chief Justice; **[12]** and therefore the Court being divided no judgment was given; *mes vide* Cro. Eliz. 637 & 651, *Ards* versus *Watkins*, where it is adjudged that an action of debt lies.

Mandamus. 1 Sid. 40. 1 Keb. 5.

A *mandamus* was prayed for one Stamp to restore him to be a steward of a court-leet and court-baron of the manors of Stepney and Hackney, of which he was displaced in the troublesome times for his affection to the King, and one Northey put in his place; and York who moved for it, insisted that such writ well lies, because it is an office of administration of justice; and it is more reasonable than for an usher

of a grammar-school, which was granted in the year 1655, in *Craford's case*, and for an alderman, 2 Bulst. 122, in *Shuttleworth's case*, for a common council-man, Stiles Rep. 32. *Estwick's case*, for a town-clerk and constable, Noy 78. Poph. 167, for a burgess, Cro. Jac. 506, *Clark's case*. And the Court inclined that the writ lay to restore one to the stewardship of a court-leet, but not to a court-baron; but it was adjourned, and precedents directed to be searched.

Privilege. 1 Sid. 42, 192. 1 Keb. 3, 13, 16, 727.

Sir Richard Temple being chose burgess for Buckingham, and having a trial at the Bar to be had on Tuesday before the sitting of the Parliament, moved by Serjeant Maynard to have his privilege allowed him, but his motion was denied in regard the Parliament were not sitting, nor to sit till after the trial had, (viz.) the 8th of May, but the trial did not go on. *Vide* Moor Rep. 340, pl. 461, *Fitzherbert's case*.

RAWLINS *versus* HILL.

Words. 1 Keb. 6, 17.

I will indict Richard Rawlins at the next sessions, and he shall lose his estate, and it shall go hard with him for his life: but his estate he shall surely lose for marking my sheep. After verdict for the plaintiff, it was moved in arrest of judgment; and Jones being for the plaintiff said that these words tantamount to felony; but by Wyndham Justice, the latter words mitigate all, and therefore judgment was stayed until, &c.

[13] JOHNSON *versus* SAMWORTH.

Assumpsit. 1 Keb. 9.

The plaintiff counts, that the defendant in consideration that the plaintiff would give to him 5s. he would give to the plaintiff 40s. if he ever played at a game called even and odd for money or wine, and avers that he gave to him 5s. and that the defendant played at the said game such a day, *unde actio accrevit*. Upon *non assumpsit*, and verdict for the plaintiff, it was moved in arrest of judgment, that there was not any such play; but it was allowed, and the Court approved of the consideration to restrain young men from gaming; and judgment was given for the plaintiff.

Pardon. 1 Sid. 41, 4. 1 Keb. 9, 19, 108.

Memorandum, Thomas Howard (brother to the Earl of Carlisle) and his two servants, Michael Naylor and John Mills, were indicted for murder, for the killing one Proby servant of a horse-courser at St. Giles in the Fields, and found guilty of the murder, and attainted; and now on this 4th day of April they were brought to the Bar to shew a pardon which they had obtained, and shew cause why they should not be executed; and they pleaded the pardon, which was read, and it (as I well observed) recited all the proceedings upon the indictment, and then the King was informed that no evidence was given that there was any malice prepense in them in other manner than by construction and implication of law, and for that the King pardoned the killing and felony, &c. but no word of murder was in it but by description; and the Court were troubled to hear such a suggestion in the patent, because they knew the contrary to be true, and therefore they said, that upon such a pardon a *scire facias* might be brought seven years hence, and they might be hanged notwithstanding this pardon, and therefore they advised Mr. Howard to procure a better pardon; and Wyndham Justice said, that the suggestion of the pardon might have been grounded on the merits of the prisoners, &c. But upon this charter the prisoners have not produced any writ of allowance, and therefore the pardon was not allowed; but their execution respited till another day, at which day they produced a patent without any suggestion at all, and a writ of allowance, but the date was mistaken, and did not agree with the writ, and therefore execution was respited over.

[14] GODLINGTON *versus* LEE.

Debt. Debt lies on a judgment given on the *sci. fac.* against the bail. Inst. 236. Upon the recognizance. 1 Roll. 600. pl. 7, 8. *Vide un president*, Trin. 8 Jac. Rot. 805. 1 Brown. 65. *Booth* against *Davenant*, Winch 61. *Sparrow* vers. *Sowgate*, Hetley 129.

The case was, the defendant became bail in this Court for another, and judgment was given against the principal, and now the plaintiff brings debt upon this recognizance; and Allen moved for an imparlance, because debt lieth not in such case, because by this means the bail shall be ousted of his plea of no *capias* filed against the principal, and also abridged of his time of bringing the principal, which he hath until the second *scire facias* returned, for now immediately he shall be liable to the debt; and although it was objected, that there had been precedents of such action, and Bendlows in the time of H. 8 makes mention of it, he said those precedents passed *sub silentio*, and therefore they are not to be regarded; and for these reasons the Court granted an imparlance that such action lies not; *quod nota.*

BARNARD *versus* EWENS.

Tithes. *Contra* Hob. 176. Cro. Jac. 137. *Hawles* versus *Bayfield*, 2 Danv. Abr. 621, p. 7. 1 Lev. 24. 1 Keb. 5, 21.

Debt upon 2 E. 6 for tithes. The defendant pleads an agreement between the plaintiff and him for three years, and doth not alledge this to be by deed, and issue upon it, and found for the defendant; and Powis moved for the plaintiff to have a repleader, because the issue is not good; but resolved by the whole Court, although it is not such an agreement which may pass the right, yet it is a good agreement within the statute to bar the plaintiff in his action of debt; Yelv. 94, *Hawks* versus *Brothwick* 131, accordingly.

GLINISTER *versus* AUDLEY.

Debt. 1 Keb. 58.

Debt upon an obligation; the defendant demands oyer of the condition, which was to perform covenants, one of which was, that the defendant covenanted that he was seised of an indefeasible estate in fee-simple, and the defendant pleads covenants performed; the plaintiff replies, that he was not seised of an indefeasible estate in fee-simple, and the defendant demurs generally, because he supposed that the plaintiff ought to have shewn of what estate the defendant was seised, in regard he had departed with all his writings **[15]** concerning the land in presumption of law, and therefore the plaintiff well knew the title; and it is not like to *Bradshaw's case*, because there the covenant was with the lessee for years, who had not the writings. But resolved the breach was well assigned according to the words of the covenant; and judgment was given for the plaintiff.

GRAVES *versus* SAWCER.

Case. 1 Lev. 29. 1 Keb. 38.

In an action upon the case, the plaintiff declares that he was owner of a sixteenth part of a ship, and the defendant was owner of another sixteenth part of the same ship, and that the defendant frandulently and deceitfully carried the said ship *ad loca transmarina*, and disposed of her to his own use, by which the plaintiff hath lost his said sixteenth part, to his damage. On not guilty pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, that this action doth not lie; for although it be found to be deceptive, yet this does not help it, if the action doth not lie on the subject matter; and here they are tenants in common of the ship; and Littleton saith, that between tenants in common there is no remedy; and there

cannot be any fraud between tenants in common, because the law supposes a trust and confidence betwixt them; and upon these reasons judgment was given *quod querens nil capiat per billam.* *Vide* Noy 14. *Crosse* versus *Abbot*, M. 11 H. 4. 13 a. pl. 29.

SMITH *versus* WARNER. TRESPASS.

Damages. 1 Keb. 49, 61. Herne's Ent. 320.

Trespass for taking goods: the plaintiff counts *de una satagine, Anglice* a frying-pan: and after verdict for the plaintiff, it was moved in arrest of judgment, because it ought to be *sartagine*, for *satago* signifies nothing; and adjudged for the plaintiff; for if *satago* signify nothing, then no damages were given for it, and the difference was taken where the word signifies another thing, there it is ill, but where it is insignificant it doth not vitiate.

[16] TERM. TRIN. 13 CAR. 2, B. R.

USHER *versus* BUSHNEL.

Trespass. If they were taken in the warren or wood of the plaintiff, they might be his pheasants. Cro. Car. 553. *Child* versus *Greenhill.* 1 Sid. 39. 1 Keb. 53, 60.

Trespass *vi & armis quare phasianos suos & perdices suas cepit;* and not guilty found for the plaintiff; and moved in arrest of judgment, because they are *feræ naturæ*, and therefore there cannot be any property in them: but adjudged for the plaintiff, because after verdict they shall be presumed dead, and then a property may be in them.

WYNNE *versus* LLOYD.

Error. *Postea* 55, 70, 96, 134. 3 Danv. Abr. 49, p. 7. 1 Lev. 72, 130, 146. 1 Keb. 351, 388, 459, 717, 748, 809, 914. 1 Sid. 213. *Vid.* Moor, 524, pl. 693. *Clark* versus *Hardwick.*

Error to reverse a common recovery in Anglesey, the errors assigned were in the writ of summons, and in the *dedimus potestatem*, and upon this a *scire facias* issues against the demandant in the recovery, who pleads *in nullo est erratum*, and then upon suggestion that Wynne was concerned, a *scire facias* issued to him, and he pleads that another had lands comprized in the said recovery, who is not named in the said writ of error, judgment of the writ, and on this plea the plaintiff demurred. Allen for the plaintiff; This plea is not good, because the process had been good without naming this party, for the ter-tenant only is to be there of necessity, Dyer, 321 a. and he shall only plead the thing, for which judgment shall not be reversed, and not in abatement of the writ of error, 30 H. 6, 2 b. per Fortescue. 2dly. This plea is not to any purpose, for the Court may proceed without the other ter-tenants. 3dly. Such plea is against the return of the sheriff expressly, for he hath returned the ter-tenants. 4thly. This plea is ill, because he pleads that A. is ter-tenant of divers, and doth not say what lands.

Williams *contra.* These questions are inquirable; 1st. If a *scire facias* be necessary against the ter-tenants in this **[17]** case. 2. If every ter-tenant ought to be returned. 3. If another ter-tenant that is not returned may be suggested at the Bar.

As to the first. A *scire facias* in this case is necessary against the ter-tenants, because none gains or loses but they, Dyer 321, before; and all the precedents mention this, Cro. Jac. 392, *Harbert* versus *Binion*, 160. *Champernoon* against *Godolphin*, 41 Eliz. *Lee* versus *Holland*, and *Row* versus *Eveley*, and Owen 157. *Carew* versus *Warren*, 21 E. 3, 56, Bridgman 70. *Holland* versus *Jackson.*

To the second. A *scire facias* being awarded generally, every one ought to be summoned.

Object. The party shall not be concluded, although he be not summoned.

Answ. He shall not be concluded if he come in due time; but the discretion of the Court will support a common recovery, and here if this ter-tenant doth not come, he shall be concluded, for it is not like to Dyer 321.

To the third. It now appearing to the Court that there is such a ter-tenant, a *scire facias* ought to issue against him, Fitz. Scire Facias, 38. 21 E. 3, 56, and it was adjourned, *post.*

NUTTAL *versus* PAGE.

Words. 1 Keb. 50, 56.

Nuttal that was Solomon Smith's clerk is a knave, and rogue, and I will prove it, and he is in Newgate, and is to be hanged for counterfeiting the King's hand and seal; adjudged for the plaintiff.

WINDSER *versus* SEYWELL. EJECTMENT.

Outlawry. 1 Keb. 57, 74, 76. 1 Lev. 33.

On a special verdict, the case was, A. outlawed in a personal action levies a fine, and the King seizeth the land in the hands of the conusee, and whether such seizure be good or not, was the question; and resolved, that if the seizure was before the fine levied, then the King may well retain against the conusee: but if the fine was levied before the seizure, the conusee may well take; and the book of 21 H. 7, f. 7, was denied, that the King cannot dispose of the land it self of a person outlawed, for the course of Exchequer is against that book. *Vide* Stamf. Prerogat. 57, and 24 Car. *Pickering's case* in the Exchequer. T. 9 H. 6, 21 a. pl. 15, per Babington, 1 Leon. 63, pl. 84. Cro. Eliz. 270. *Ognel's case*, H. 15, H. 7, 2, pl. 4.

[18] TIPPIN AND GROVER.

Rent. 1 Keb. 62.

Debt for rent brought by executors, the plaintiffs count, that their testator was seized for another's life of certain tithes, and demised them to the defendant for years, rendering rent, and for 400l. arrear they bring debt; and on demurrer on this declaration, Jones argued it is a rent, and that the executors shall not have this rent, because it appertains to the reversion, for it is a rent although not in point of remedy. Cro. Jac. 112 & 453.

Allen *contra.* Debt lies upon the contract, which goes to the executors. But he perceiving the opinion of the Court to be against him, prayed a discontinuance, which was granted him.

BLACK *versus* MOLE. REPLEVIN.

Attornment. 1 Danv. Abr. 614, p. 8. 1 Lev. 40. 1 Keb. 93.

A copyholder makes a lease for years rendering rent, and then surrenders two parts of the reversion, and he to whose use the surrender was made distrains for the two parts of the rent, and mentions not any attornment of the tenant in his avowry, nor any notice; and upon this avowry the plaintiff demurs; and adjudged that attornment and notice are not necessary, because the surrender is a thing notorious of it self.

ANDREWS *versus* SHOWELL.

Attorney.

The case was, The defendant gave a warrant of attornment to one to confess judgment in debt to the plaintiff by *non sum informatus* at eight a clock in the morning, and at ten a clock before the judgment signed by the Secondary, the defendant dies, and now the executors of the defendant move to set aside this judgment; but resolved it was well obtained, it being for a good debt; *quod nota.*

[19] Term. Mich. 13 Car. 2, B. R.

Sir Robert Foster, Chief Justice; Sir Thomas Mallet, Sir Thomas Twisden, Sir Wadham Wyndham, Justices.

Memorandum, The last vacation Serjeant Glanvil, who was the King's first Serjeant, died.

Day *versus* Guilford. Ejectment.

[See *Staffordshire Banking Company* v. *Emmott*, 1867, L. R. 2 Ex. 220.]

Hill. 12 Car. 2, Rot. 952.

Audita querela. 1 Danv. Abr. 630, p. 15, 633, p. 12. 1 Keb. 112, 141. 1 Sid. 54. 1 Lev. 41. 1 Danv. Abr. 671, B. p. 1. 3 Danv. Abr. 42, p. 2. Styl. 281, 288.

On a special verdict the jury found Edward Guilford, father of the defendant, was seized of the lands in question for life, the remainder to the defendant in tail; the father enters into a recognizance in Chancery, to the lessor of the plaintiff, and dies, the lessor sues a *scire facias* upon the same recognizance, the sheriff returns the defendant heir and ter-tenant, *& quod scire fecit* the defendant, and he makes default and doth not plead; and judgment is given, that the conusee have execution, who leases to the plaintiff.

Wild Serjeant for the plaintiff, Here by the judgment upon default in the *scire facias* the defendant is bound until he reverses it either by writ of error, or relieves himself by *audita querela*, F. N. B. 104 b. Kel. 25 a. Pasch. 1652, B. R. *Barcock* versus *Thompson*, Styles's Rep. 323. If judgment be given against the bail upon two *nichils*, and no *capias* is returned against the principal, although the bail cannot reverse the judgment by error, yet he may have an *audita querela*, but not upon a *scire feci* returned. *Vide* Mich. 1657, B. R. *Kilburne* versus *Rack*, Ejectment, B. R. Intr. Trin. 1656, Rot. 876.

[20] Wyndham for the defendant, It seems this case differs from the cases put, because here execution is sued upon another estate than the conusor had; as if the sheriff return J. S. ter-tenant, who never had any thing in the said land of the conusor, yet J. S. may maintain an ejectment, Mich 6 R. 2, Fitz. Assise 69. And here the conusor had only an estate for life, and not the estate of which the defendant was seized at the time of the action.

Twisden for the plaintiff, *Vigilantibus & non dormientibus jura subveniunt*, the defendant ought to have pleaded when he had warning, and now he shall not falsify his recovery, and there is a difference when the conusor is tenant in tail, and when for life; and now the defendant is estopped by the return of the sheriff; and this differs from the two *nichils*.

Mallet for the defendant, *Res inter alios actæ nemini nocere debent.*

Foster for the plaintiff, Here is a wilful contempt in the defendant, for that he came not in on the *scire feci*. It was adjourned, and after judgment was given for the plaintiff.

Mich. 13 Car. 2, B. R.

He is a base fellow, and I will question him ere long, for that he would have taken away the King's life. Verdict for the plaintiff. And Jones moved in arrest of judgment, but it seemed to the Court that the words were actionable, because in case of the King the intent is punishable; but adjourned.

Ursula Austen *versus* John Mander.

Error of a judgment in Oakhampton in Devon.

Error. 1 Keb. 113.

The errors taken by Alleyn were, 1st, The *venire fac.* is, therefore it is commanded by the Court that he make to come twelve, &c. by whom, &c. and who, &c. in a brief

manner, as in the Courts at Westminster, where it ought to be at large in all inferior jurisdictions. *Answ.* In the case of *Osborne and Gregory* of a judgment in Excester, this exception was moved and disallowed. 2dly, He doth not say that process of distringas is awarded by the Court, but as before, &c. *Answ.* It is good because it refers to the matter before. 3dly, The judgment is *quod recuperet*, and also 39s. *pro misis & custagiis de incremento*, and doth **[21]** not say *circa sectam suam*, and it may be that the increase was for sickness or battery, or some other collateral matter. *Answ.* The precedents are all so at Westminster, and it shall not be presumed for any other thing than for the said suit; and Twisden said, that the reason, for which nothing out of Inferior Courts shall be taken by intendment, is, because there they only enter short notes of their proceedings, and when they are to certify, the attornies here draw the records at large; and judgment was affirmed.

PALMER *versus* STAVICK. REPLEVIN.

Estoppel. Pas. 1652, B. R. *Carter* versus *Wicker*, Rot. 448. 3 Danv. Abr. 273, p. 56. 1 Keb. 95, 113. 1 Sid. 44. 1 Lev. 43.

The defendant made conusance for a rent-charge due anno Dom. 1658. The plaintiff pleads, that the defendant upon another replevin at another time, together with A. B. made conusance upon the said plaintiff for rent arrear in the year 1660, and demands judgment, if against the said avowry he shall make conusance for rent due before, and relied upon the said estoppel, and the defendant demurred. Jones for the plaintiff, It seems the defendant is estopped by the avowry as by an acquittance, and *a fortiori* because it is matter of record, and that an acquittance is a bar of arrearages, the books are plain, Dyer 271 a. 3 Coke 65 b. *Pennant's case*, 11 H. 4, 55 a. But the truth is Fitz. Bar. 79 is against me; but that case I deny, and also the case of the annuity. *Obj.* The avowry here is not betwixt the same parties. *Answ.* They are the same defendants, and the same parties in whose rights the distress is made; and if this shall not be the same action, there will be infinite vexation.

Allen for the defendant, Here is not any estoppel, because not between the same parties, and in truth the duty remains, and the bailiff cannot conclude his master.

Wyndham is clear for the defendant; and the opinion of Fitz. Bar. by three justices is good, because an annuity may be paid without acquittance.

Twisden of the same opinion.

Mallet for the plaintiff, Because an avowry is a thing upon record, and more than an acquittance; but judgment was given for the defendant.

[22] GRANGER *versus* HEMBOROUGH. DEBT.

Departure. 1 Sid. 77. 1 Keb. 115, 178, 185, 230, 283.

Debt upon an obligation of 50l. to perform covenants in an indenture, and one is, that the defendant pay 12l. a year for a messuage to him demised quarterly, at four feasts. The defendant pleads performance of all covenants. The plaintiff assigns for breach, that he did not pay 3l. one quarter's rent. The defendant rejoins, that before the said 3l. was due, the plaintiff entered upon him, and expelled him. The plaintiff demurs.

Baldwin for the plaintiff, The rejoinder is a departure, for he might have pleaded this matter in his bar, as Dyer 291, *Fitz Williams's case*. In a *formedon* the tenant pleads a fine, the demandant replies, *quod partes finis nihil habuerunt*, but that such a one was seised; the tenant rejoins that the party that levied the fine was seised in use; and resolved a departure, for he alledges before a seisin at common law, and now would make this good by the statute.

Jones for the defendant, This rejoinder is a corroboration of the bar, and he ought not to have pleaded this thing at the first, because there are several covenants, and he could not know in which of them he would have assigned the breach; and there is a difference where the condition is to perform all covenants comprised, and where it is all covenants and payments, as *Chapman's case* is, Cro. Car. 76, there the

defendant pleaded performance of all; the plaintiff assigned a breach in non-payment of the rent; the defendant cannot rejoin, that it was not demanded, because it is a departure.

Wyndham, It is a departure, and it is not like to the case of demand, because it is a discharge.

Twisden agreed with Wyndham, where the defendant pleads a general plea, he shall not make this good after by a particular thing in the rejoinder; but it was adjourned, and after ruled to be a departure, and judgment given for the plaintiff. *Vide* Cro. Eliz. 828, *Specot and Sheers*, a case directly in point.

[23] HARRIS *versus* ———.

Words. 1 Keb. 115.

Thou art a traytor and a rebel; the defendant justifies, that 28 Sept. 1659, the plaintiff was a soldier under one Captain Ceely, against the King: plaintiff demurs, presuming the general pardon had restored him to his good fame, as Hob. 81. *Cuddington* against *Wilkins;* but adjudged for the defendant, because the plaintiff ought to have shewn that he was not one of the persons there excepted.

NICHOLSON *versus* SHERMAN.

Case for a Legacy.

Case. 1 Danv. Abr. 207, p. 4. 1 Sid. 45. 1 Keb. 116.

The plaintiff declares, that James Glassebrook made his will, and devised to the plaintiff 100l. and that his executors should double the said 100l. and for the 200l. he brings this action, and avers the defendant hath assets beyond debts; and the defendant demurs.

Jones for the plaintiff. Here are two points. 1. If the doubling the 100l. be a devise, or that it shall be only at the discretion of the executors; and it seems clear that it is a devise, and the other part doth not oppose it. 2. If an action upon the case lies for a legacy; and held that it does. 1st, I will not insist whether there be any remedy for a legacy at common law. Glanvil, lib. 7, chap. 6, 7. 2dly, An action of the case lies against an executor upon a breach of trust, as it lies against a shepherd for not regarding his charge. And first, the law takes notice of legacies to collateral purposes, as a promise to forbear a legacy is a good consideration to ground an *assumpsit;* and in an action against an executor in his own wrong, it is a good plea to say that he hath paid all in legacies; and an action upon the case lies for a tort, as for not performing a contract, Cro. Jac. 544, *Healy* versus *Duntley*. Here is a breach of trust, because the executor takes upon him to perform the will of the plaintiff. *Object.* Legacies cannot be sued for here in specie, and it was never known before. *Answ.* The action of *indebitatus assumpsit* was a rare action before *Slade's case.*

[24] Wyld *contra.* An action doth not lie for a legacy, because it is a testamentary thing, and one of the principal, as appears by the writ of prohibition, Register 38, and the same argument that Littleton uses for the Statute of Merton may be here used, that never such an action had been used; and the rule of the civil law is not current in Westminster-Hall, *boni Judicis est ampliare jurisdictionem;* and true it is, the common law takes notice of a legacy; but so, as it is a testamentary thing, and as to the *indebitatus assumpsit* which was so rare, yet it was within the jurisdiction of the common law; and although of late time such actions have been used, yet this was left there should be a failure of justice when there was no Ecclesiastical Court; and so it was adjudged in *Harwood and Peytoe's case*, that an *elegit* might be executed in the glebe land of a parson; but if it were to be adjudged now, it would not be so ruled as it was then. 2dly, If it be a breach of trust, then it is a personal tort, *& moritur cum persona*, as an executor shall not be responsible for an escape suffered by the testator. Dyer 322 a.

Wyndham, The action doth not lie, for the conusance of a legacy doth not

appertain to the common law, for that by our law a man cannot give any thing after his death, because *post mortem tunc tua non sunt*, and there is not any such duty at the common law as a legacy; and an action of the case doth not lie for every tort, for it doth not lie for non-payment of rent, and a pension raised by the constitution of the Ordinary is not suable here.

Twisden, It was adjudged here, that a legacy issuable out of land is suable here, and originally legacies were suable in the County Court; and Rastal Entries 301 a. title Execut. in Action 5, debt is brought against an executor for a legacy, but a demurrer is on the count, and no judgment given; but that which moves me against this action is, that by this way an action upon the case will be brought for every thing suable in the Ecclesiastical Court.

Mallet and Foster for the defendant. And judgment was given for the defendant, *nisi, &c.*

[25] EDEN *versus* CHALKHALL. EJECTMENT. MIDDLESEX FOR LANDS IN SOUTHMYMS.

1 Keb. 40, 117.

Upon evidence in a trial at Bar, the case was, that Henry Crawley 6 Nov. 1645, conveys by indenture to Web and Taylor in fee, and levies a fine accordingly without any consideration, and 13 March 1645, he covenants to stand seised to the use of himself for life, the remainder to his first son in tail, who is the lessor of the plaintiff and levies a fine accordingly; the 28 March 1653, Henry Crawley and his wife, with Web and Taylor join in a voluntary conveyance by fine to William Godfrey and his heirs; Henry Crawley having issue the lessor of the plaintiff dies; William Godfrey makes his will, and of this makes the Lord Windsor and the Lord Castleton his executors, and devises the lands to be sold by them; they the 19 March 1657, sell to Skinner and Skinner for 2000l. who convey to Sir Thomas Bide and his heirs. And it was resolved by the Court, that although Skinner and Skinner paid a valuable consideration, yet the estate to Godfrey being voluntary, if the conveyance of 6 Nov. 1645, was forged, the plaintiff hath good title; but the jury found the first conveyance good, and found for the defendant.

ELIZABETH ROBINSON *against* MARGARET AMPS. COVENANT.

Condition. 2 Danv. Abr. 44, p. 10, 79, p. 1. 1 Keb. 103, 118. 1 Sid. 48.

The plaintiff declares, that the defendant by indenture dated 1659, reciting, that there was a lease made to the defendant, and a recognizance acknowledged by Humfry Robinson to the defendant, bearing date with the said indenture, the defendant covenanted that if Humfry Robinson pay to the defendant such a sum 24 June 1660, &c. that then the said recognizance shall be void, and then the defendant, his executors and administrators, &c. at the costs of the plaintiff will regrant the said indenture, and redeliver the said recognizance to be cancelled and vacated, and the plaintiff assigns for breach, that 21 October 1659, the defendant prosecuted an extent upon this recognizance. The defendant pleads, that he did not **[26]** prosecute upon this recognizance, and issue upon it, and found for the plaintiff; and Jones moved in arrest of judgment, that here is only an implied breach, for the recognizance may be delivered up, and yet the recognizance be prosecuted.

Allen for the plaintiff. 1. Where a covenant terminates in it self, it is properly a covenant but a defeazance, Plow. 138 a. But here is an engagement to deliver up the said recognizance. 2. Here is a present breach, for when he extends, the plaintiff shall not be compelled to stay till a farther day, when the extent is a breach of the covenant, as 5 Co. 22, *Sir Anthony Maine's case.*

Wyndham. A covenant to do a present act is not properly a covenant; as to stand seised. And as to the second, the defendant hath disabled himself to deliver up the recognizance, as feoffee on condition takes wife, &c. and the breach here is well assigned.

Twisden to the same intent, and so the other Judges; and judgment was given for the plaintiff, *nisi, &c.*

EDSAR *versus* SMART.

Execution. 3 Danv. Abr. 311, p. 5, 334, p. 5. 1 Lev. 30. 1 Keb. 92, 132.

Judgment in debt is had against two, and one dies, and the plaintiff brings a *scire facias* against the survivor, and recites the death of the other, and prays execution against the survivor; the defendant pleads, that he which died had an heir, who is in full life, and demands judgment if execution, &c. plaintiff demurs. Wynnington for the plaintiff: It seems to me that the execution is well against the survivor: and as to that, 1. We ought to inquire what the common law is. 2. What alteration the Statute of Westm. 2 hath made. As to the first, at common law, if judgment had been given against two, and the one dies, the charge survives, *Sir William Herbert's case.* To the second, the Statute of Westm. 2, which gives the *elegit*, doth not take away the privilege of the plaintiff, but that he may have execution at the common law if he will, for the words of the statute are, *sit in electione*, and this statute was made only for the benefit of the plaintiff. *Obj.* And as to the 29 of Assizes, *Longford's case*, I answer, the same case is reported 29 E. 3, 39, and there by Thorpe the lands are equally liable, and by that it may be easily collected, they intended execution only upon the lands, and not a personal charge; but here may be a personal charge, and **[27]** that is the difference; for when the charge is upon the lands then it doth not survive, but when it is personal it shall; and for authorities direct in the point, *vide* 3 E. 3, 11, pl. 37. 1 E. 3, 13, p. 41.

Wyndham Justice. The books of 1 and 3 E. 3 are direct in the point, and the reason why this execution shall be against the survivor, is, because the plaintiff may take a *fieri facias* if he will, and perhaps he will not charge the land.

Twisden of the same opinion; and if upon this *scire fac.* the plaintiff takes an *elegit*, the defendant, may have an *audita querela;* or, 2dly, he may suggest this matter upon the return of the *elegit* and have a *supersedeas*, F. N. B. 166. 44 E. 3, 10. 4 E. 4, 39. 7 H. 4, 30. and judgment was given for the plaintiff, *nisi, &c. Vide* Pasc. 1 H. 5, 5 a. pl. 6.

RICHARD CAPENHURST *versus* CAPENHURST.

Covenant. 2 Danv. Abr. 228, p. 5. 3 Danv. Abr. 209, p. 1. 1 Lev. 45. 1 Keb. 130, 164, 183.

Debt upon an obligation to perform covenants; the case was such, A. possessed of a term for years grants so much of the term, that shall be unexpired at the time of his death; the grantee assigns, and covenants that the assignee shall enjoy against all persons, and the plaintiff assigns a breach, and issue upon it, and verdict for the plaintiff; and Bigland moved in arrest of judgment, that the action did not lie, because the original grant being void for the incertainty, as in *The Rector of Chedington's case*, the covenants are void also, because the bond depends on the covenants, and the covenants depend on the lease; and he cited Yelv. fol. 18, *Soprani and Skurro.*

Jones for the plaintiff. The term is not well assigned, but here is a covenant which stands distinct by it self, and if there be not any covenant, then the obligation is single.

Wyndham Justice. If the deed is void, no covenant in it shall bind. And judgment was stayed; but it was after adjudged for the defendant. *Vide* Owen Rep. 136. Waller against the Dean and Chapter of Norwich, that the covenant shall bind, though the deed be void.

[28] PLUNKET *versus* HOLMES.

Devise. 2 Danv. Ab. 519, p. 15. Eq. Ab. 188, p. 12. 1 Lev. 11. 1 Sid. 47. 1 Keb. 29, 119.

The wife having two sons by divers husbands (which were dead) and being seised of the lands in question, in fee, devised them to Thomas her son for the term of

his natural life, and if he die without issue of his body living at the time of his death, then to Leonard another of her sons, and his heirs for ever; but if Thomas have issue living at the time of his death, then the fee shall remain to the right heirs of Thomas for ever; the woman died, Thomas entered and suffered a common recovery, and dies without issue, the recoveror made a lease to the defendant, Leonard entered upon him, and made a lease to the plaintiff; *et si, &c.*

Allen for the plaintiff. The points which I shall raise here are, 1st, What estate Thomas and Leonard have by the will. 2ly, What operation the recovery had upon the estate of Leonard. *As to the first*, There is not any estate tail to Thomas, but another estate, for the limitation to Leonard is not upon failure of issue of Thomas, but upon failure of issue living at his death. 2dly, The contingency is repeated in the second limitation, and this point hath been agreed in the argument of this case before; but now I shall consider whether Thomas hath an estate for life, or a fee determinable. And first, I hold he hath a fee determinable. 2ly, Leonard takes by executory devise, and not by way of contingent remainder.

When a particular estate is limited, and the inheritance passes out of the donor, this is a contingent remainder, and in abeyance, Plow. 35 a. But if the fee be vested in any person, and to be vested in another upon a contingency; this is an executory devise; and here Thomas had a fee-simple immediately, because first he is heir at law to the devisor; and if there had not been any devise to Thomas, but if Thomas had died, Leonard there would have been his heir.

Object. Here is an express devise to Thomas for life, and the remainder here shall be in abeyance, as in *Archer's case.*

Answ. In *Archer's case*, Robert had not only an estate for life, but also a reversion in fee-simple expectant upon an estate-tail, and therefore the case is not well reported in 1 Co. 66 b. But the remainder there was of necessity contingent, because it is only a devise in tail, and not a gift of **[29]** all the estate; and in our case the question is upon the limitation of the fee-simple. 2ly, Thomas hath the fee-simple, because although it be given to him for life only, yet after it is limited to his right heirs; and the words, If Thomas hath issue, then, &c. are only declaratory. 3ly, This is the meaning of the will; for the devisor took care for the younger son when the eldest died without issue, as appears by the disposition of the writings by him. 4thly, If the will be capable of divers interpretations, that shall stand which consists with the meaning of the parties, and that is, that Thomas shall have fee.

2dly, As to the operation of this common recovery, it seems to me that this executory devise is not barred by it. The reason of a bar in a common recovery, is the intended recompence; therefore if tenant in tail make a feoffment in fee, and the feoffee suffer a common recovery, this does not bar the estate-tail, because the recompence cannot go to the estate-tail; but if the tenant in tail be vouched, then it is a bar, 3 Co. 3 a. *The Marquis of Winchester's case*, and fol. 6 a. *Cuppledike's case.* Here the recompence in value cannot go to Leonard, because the one estate hath no dependance upon the other, for Leonard hath no estate in him, but in contingency. 2. Recompence in value cannot serve a fee after a fee.

3dly, Leonard cannot falsify this recovery, because he is *quasi* a stranger to it, and there is not any privity of estate betwixt Thomas and him; and the very same point is resolved in *Pell and Brown's case*, Cro. Jac. 590. And if Leonard that hath only a possibility may falsify, many conveyances may be destroyed: for admit that A. upon marriage with Jane a-Style makes a feoffment to the use of himself and his heirs till marriage; now by this way if he may destroy this contingency by feoffment or fine, &c. at any time before marriage, it would be very inconvenient.

Finch Solicitor General *contra.* Leonard takes by way of remainder. This case is out of the reason of *Pell and Brown's case*, because the devise here was first to Thomas and his heirs, and there is not any case in law where the devisee takes by way of executory devise, but for necessity, as Dyer 330 b, *Clache's case*, Cro. Jac. 415, *Webb and Herring*, and it was adjourned. *Vide post.*

Wyndham Justice for the defendant. The principal point in the case is upon the words of the will, what estate Thomas had by them; and it hath been objected that Thomas **[30]** had a fee-simple to avoid a contingency. *Answ.* Thomas hath only an estate for life, and not more by the will, because the express words of the

will are so. 2ly, If he hath an estate in fee, there ought to be a transposition in the words of the will. 3ly, This construction avoids all the inconveniences which otherwise would happen; for otherwise it shall be to Thomas and his heirs by way of executory devise, and so such estate cannot be cut off, as *Pell and Brown's case*, Cro. Jac. 590. But here is a contingent remainder which may be destroyed, and it is more suitable to the rules of law, as it is agreed in *Colthurst and Bejushin's case*, in Plowd. Com.

2dly, When Thomas hath only an estate for life, with a remainder contingent, the estate for life being destroyed by the common recovery, the remainder falls to the ground, for the recovery vests a fee in the recoverer, and is a discontinuance to the remainder. Littleton, sect. 690.

3dly, Until the contingency happen, the fee descends to the heir in some sort, but not to confound the estate for life, but there shall be an hiatus to let in the contingency when it happens; so is *Archer's case*. If tenant for life grant over his estate, the grantee shall support the contingent remainder; but if he surrender, then the contingent estate is destroyed.

Twisden of the same opinion. The main stress lies upon the construction of the will; if Thomas here had been a stranger, and not heir, he had an estate for life, remainder to Leonard upon a contingency, remainder to the heirs of Thomas upon a contingency, and here the contingency doth not depend on a contingency, but the same contingency which may happen several ways. 2d, Thomas being heir, the fee in the mean time till the contingency happen is in Thomas, and not in abeiance, Hutton, Rep. 118. *Napper* against *Sanders*, and here as to Leonard, Thomas takes only for life, but by operation of law he hath a fee. And *Archer's case* is express *in terminis*, for there Robert hath an estate only for life by the will, but by operation of law he hath the fee also; and *Pell and Brown's case* is not like to this case, because there Thomas had an estate to him and his heirs; and in the case of *Howel and Auger*, Hut. 60, and Winch. 30. The Judges will not meddle with the point of limiting one fee upon another, which the Lord Hobart there calls the mounting one fee upon another; and here the recovery destroys the contingent remainder to Leonard.

[31] Mallet and Foster Chief Justice of the same opinion; and judgment was given for the defendant, *nisi, &c.*

WIDDRINGTON'S CASE.

Mandamus. *Postea* 68. 1 Lev. 23. 1 Sid. 71. 1 Keb. 2, 50, 61, 68, 79, 131, 150, 234, 458.

Doctor Ralf Widdrington, fellow of Christ-College in Cambridge, was ejected out of his fellowship by the master and fellows, and he brings a *mandamus* to be restored to it; and upon this writ the master and fellows return (amongst other things) that if any fellow be peccant he shall be corrected by the master and dean, and if he find himself aggrieved with his punishment, it is lawful for him to appeal to the chancellor of the university, and two senior doctors; and upon this return the Court resolved, that Doctor Widdrington shall not have remedy here; but he ought to resort to the visitors mentioned in the return; for, by Wyndham, of every hospital or eleemosynary foundation, appeal ought to be made to the visitors, for they have the supervising of all things concerning them; and if they have no visitors, then the Ordinary, *vide* Lindwood, tit. de Religiosis Domibus, cap. Episcop. *& licebit ei appellare*, is intended, that he may appeal if he will, or acquiesce in the penalty inflicted by the college, and not to give liberty to appeal to a visitor, or to this Court. And Twisden cited a case 15 Jac. Dr. Lewys was elected Provost of Oriel-College in Oxford by one part of the fellows, and Dr. Day by another part; Dr. Day appealed to the Bishop of Lincoln who was visitor of the college; Dr. Lewys appealed to the archbishop, who inhibited the Bishop of Lincoln; and then Dr. Day appealed to the chancellor; and this was referred to the Attorney and Solicitor General; and resolved the decree made by the visitor was good, and the other ill, and the doctor enjoyed it accordingly; and every one ought to appeal to the next Court, Fitz-herb. Error 87. And it was adjourned, and afterwards a writ of restitution was denied for the reasons aforesaid. *Vide post.*

[32] FITCH *versus* SMALBROOK. EJECTMENT.

Evidence. 1 Sid. 51. 1 Keb. 134.

In evidence upon a trial at Bar, it appeared that one Alcot, one of the witnesses for the defendant, was before indicted of perjury in the time of Cromwell, and verdict against him; but by the death of Cromwell judgment was not entered, but all proceedings vacated; and now the counsel of the plaintiff would offer this verdict in evidence to weaken the credit of the witness; but resolved by the Court, that the said verdict is now totally destroyed, and cannot be given in evidence.

TRAVERSE *versus* MERES. ASSUMPSIT.

Assumpsit. 1 Sid. 57. 1 Keb. 135, 146, 163.

The plaintiff declares, that whereas the husband of the defendant now dead, was indebted to the plaintiff, the defendant promised, that if the plaintiff would manifest and make appear that her said husband was indebted, she would pay it; and avers, that he had been at all times ready to manifest the said debt; and on *non assumpsit* found for the plaintiff. And Allen moved in arrest of judgment, that there is not any consideration, for that the wife was neither executrix nor administratrix. Trin. 51, Rot. 1446, *Hunce* versus *Hinton*. The son of the defendant was indebted to the plaintiff, and the defendant promised upon forbearance to pay; and there judgment was for the plaintiff, because forbearance shall be taken for total forbearance; but if he had said, that if he will forbear him, then it had not been actionable. Trin. 8 Jac. *Smith* versus *Jonas*, Rot. 882.

Twisden Justice. The difference is betwixt forbearance generally, there is a good ground of action, although the defendant be neither executor nor administrator; but upon forbearance of the defendant it ought to appear that there was some cause of forbearance.

Wild for the plaintiff. The making of the debt appear, is trouble and pains to the plaintiff, and therefore a good consideration. It was adjourned, and afterwards judgment was given for the plaintiff.

[33] TIBBS *versus* SMITH.

Words. 1 Danv. Abr. 146, p. 32.

Thou hast stolen our bees (innuendo a stock of bees) *they are hidden under the old woman's hemp-seck, and thou art a thief.* On not guilty, and verdict for the plaintiff, Serjeant Merrifield moved in arrest of judgment, that bees are *feræ naturæ*, and felony cannot be committed of them, Bro. Property 37, so of trees, &c. Stroud *contra*. The reason of stealing of trees, the words are not actionable, is because they are annexed to the free hold, but not here: and after verdict they shall be intended such bees of which felony may be committed. And words of stealing trees, apples, &c. are actionable, and of corn. Cro. Jac. 39, *Kellan* against *Mannesby*, and 114, *Minors and Leeford*, 231.

Wyndham Justice. There is this difference where he says, *Thou hast stolen my trees, apples, corn, &c.* these words are not actionable: but to say, *Thou art a thief, and hast stolen my trees, &c.* are actionable, because it shall be intended such trees, corn, &c. whereof thievery may be committed; and as to the justification after, that doth not make the words actionable which were not actionable before; and judgment was given for the plaintiff; *nisi, &c.*

FRENCH *versus* KENT.

Venue.

Action of the case was brought for forging and contriving a will. This action was brought in Middlesex, and the land which is comprised in it, lies in Suffolk, and

the will being affirmed twice upon trial in an *ejectione firmæ*, they endeavoured this way to disprove it.

Jones moved to change the venue to Suffolk, and resolved it shall be altered; and the Court seemed to discountenance such action.

Replevin. *Nota. Vide* Noy 50. *Webb* versus *Hind. Vide postea* 474. *Designey's case.*

In a replevin in the county, the plaintiff doth not declare, and the avowant removes the cause to the King's Bench by *recordare*, and the plaintiff is non-suited without declaring; and the doubt was, what judgment the avowant shall have: for if he shall have judgment to have a return of the cattle, it doth not appear what cattle were replevied; because the plaintiff hath not shewn them by any declaration; **[34]** and it seems the defendant shall suggest what cattle he took, and shall have return of them. *Vide* Mich. 3 H. 8, Rot. 649, C. B. and Pasc. 7 H. 7, Rot. 130, C. B. The defendant upon a *non-pros.* makes averment what cattle were taken, and thereupon a *return' habend'* awarded, *si vic' constare poterit allegationem præd' fore veram. Vide* Rastal's Entries Replevin tit. Frank-tenement in the Old Book, fol. 515 D. *Replevin de* 8 *cows*, the defendant said that there were more replevied, and upon this it was awarded *quod si vic' constare poterit*, that the allegation of the defendant be true, he shall make return of the others, Hob. Rep. 16. Replevin was brought without naming a place, the count abated, but the defendant to have a return avowed in a place certain.

BARRINGTON *versus* VENABLES.

Privilege. 1 Keb. 137, 474.

Debt upon an obligation of 100l. After imparlance, the defendant pleaded to the jurisdiction, that none of the Privy Chamber ought to be sued in any other Court at the suit of any person, without special licence of the Lord Chamberlain of the household for the time being; and that he is one of the Privy Chamber. The plaintiff demurs, and judgment was, that he should answer over, for such plea cannot be pleaded after imparlance; and the plea it self is ill; and the Court seemed to be offended with the said plea.

THE KING *versus* READ.

Perjury. 1 Lev. 9. 1 Sid. 49, 66, 217. 1 Keb. 127, 138, 163, 182, 191, 198, 213, 214, 230.

In an information of perjury, and verdict for the King; the perjury was committed in giving evidence upon a trial in this Court betwixt Dun and Dawson. And Allen moved in arrest of judgment because the information was, *Memorand' quod Thomas Fanshaw miles dat Curiæ hic intelligi & informari quod termino St. Hillarii* 1659, *in Rotulis continetur sic* (viz.) *that Dun brought his action;* and recites the whole record of it and the trial; and that the said Read *falsum præstitit sacramentum* at this trial; and he moved that it is not **[35]** positive that the defendant took a false oath; but that *continetur sic*, that he took a false oath; where he ought to have said after the recital so, *et ulterius dat Cur' hic intelligi*, that the defendant took a false oath at that trial. And after consideration the Court gave judgment against the defendant, because the late precedents are so. And now after verdict it shall be taken a distinct sentence betwixt the recital and the *et quod.* And by Wyndham, the record recited being in this Court, the Judges shall take notice how far the record recited extends, and what that is that is positively rehearsed: and judgment was given accordingly.

STILES *versus* TRISPE.

Award. 1 Sid. 54. 1 Keb. 130, 138.

There being a trial betwixt the parties the last Assizes in the country, the parties assented to a reference, and a rule was there made of the said reference; and the

referees there made an award, the which the defendant refused to obey, upon which the plaintiff moved to have the said rule at the Assizes made a rule of this Court, according to the tenor of the said rule at the Assizes; and it was granted: and then he moved for an attachment against the defendant for not obeying the said award of the referees; but it was denied; for suppose the defendant will deny that any such award was made, this Court will not try such issue by affidavits, and therefore they said that it was seldom that any advantage accrued to the parties by such reference.

DACY *versus* LINCH.

Words. 1 Danv. Ab. 99, p. 34, 152, p. 16. 1 Sid. 52. 1 Keb. 140, 181, 184.

Dacy is a witch, and deserves better to be hanged than Old Arthur, who was hanged for a witch. On not guilty pleaded, and verdict for the plaintiff, Serjeant Bear moved in arrest of judgment, because witch is only a word of scolding, if it be not coupled with a demonstration that he bewitched some creature. Mich. 8 Car, Cro. Car. 282, *George* against *Harvy*. Mich. 15 Jac. Rot. 636, Hutt. 13, *Stone and Roberts*. But it was adjudged for the plaintiff; for by Mallet, by these shall be intended such a witch that deserves to be hanged.

[36] STEVENS *versus* BRITTREDGE. EJECTMENT.

Trin. 12 Car. Rot. 922.

Discontinuance. 2 Danv. Ab. 573, p. 10, 576, p. 12. 1 Lev. 36. 1 Sid. 83. 1 Keb. 76, 141, 227, 321.

On a special verdict, Sir Francis Wortley seised of the lands in question, covenants in consideration of marriage with Hester to stand seised to the use of himself for life, the remainder to Hester for life, remainder to the heirs males which he shall beget upon the body of Hester, remainder to Sir Francis in tail, remainder to Francis Wortley son and heir apparent of the covenantor in fee, who is lessor of the plaintiff. Sir Francis and Hester after marriage in a fine with warranty to the use of Sarah Wortley daughter of the said Sir Francis and Hester, and wife of the defendant, and the heirs of the body of the said Sarah; Sir Francis and Hester die; Francis lessor of the plaintiff enters, and the defendant in right of Sarah enters upon him, and the sole question was, if Francis Wortley, lessor of the plaintiff, be barred by the said fine and warranty.

Allen for the plaintiff. These things are here considerable in the case. 1st, What estate Sir Francis and Hester had, and if the estate be executed. 2ly, What operation the fine hath. *As to the first*, Here is not any consolidate estate-tail in them, so that they can be said to be seised in their demesne as of fee-tail; but they have distinct estates; (viz.) to Sir Francis Wortley for life, the remainder to Hester for life, the remainder to the heirs males which he shall engender upon the body of Hester.

Object. This limitation of the remainder to the heirs males of both their bodies, swallows up the estates for life.

Answ. Here is not any execution, because all the estates are but one limitation in one conveyance, 2 Co. 60 b. *Wiscot's case*, 39 H. 6, 2 b. If lands be given to A. for life, the remainder to him and B. in fee, there is not any merger, because it is but one conveyance. Then an estate to the wife for life, the remainder to the husband and wife in fee, is an estate for life in the wife, and the fee is in both. 2dly, If a particular estate be limited to two persons, and a remainder is limited adequate to them to drown; as to two for their lives, the remainder to the heirs of them, the estates for life shall be consolidated; as *Lewis Bowle's case* is. But **[37]** when there is a particular estate for life or two, and the remainder is not answerable to them; as to three for life, remainder to two in fee, there they shall remain distinct estates; as A. tenant for life, remainder to B. for life, the remainder to A. and B. in fee, there shall be no merger of estates; so here the baron hath an estate for life, and the wife another estate for life, remainder to them both. 3dly, There is not any rule or case where

the estates may stand, that there shall be a merger; for they shall be so taken that the intention of the parties shall stand.

As to the second. This fine doth not make any discontinuance, admitting that the estates are several. 1. To make a discontinuance there ought to be a seisin of the estate, which is to be discontinued, Littleton, sect. 658. Tenant for life, remainder in tail, he in remainder disseises tenant for life, and makes a feoffment; this is not a good discontinuance, because he ought to have the freehold and inheritance at the same time; Coke upon Littleton 347 b. And here is not any seisin by the husband in his demesne as of fee. In the case of *King and Edwards*, Cro. Car. 320, where Jones holds it a discontinuance; it is not like to this case, because there the husband and wife have not such divided estates; for the husband there cannot grant his estate distinctly. Here though the estate in remainder vest in both, yet it vests as a remainder, and not to execute the present estate. 2dly, This fine takes its plenary operation without prejudice to any, for by it an intire fee passes, which is the principal reason of *Bredon's case;* and it is not like where there is an interposing estate, as tenant in tail enfeoffs the donor, it is not a discontinuance: but if there be an interposing estate, then such feoffment is a discontinuance, *Garrard and Blizard's case*, Pasch. 29 Eliz. B. R. *Trevillian's case.* (Cro. Eliz. 56.) Tenant for life, remainder in tail, join in a feoffment, this is not a discontinuance, and here the reversion of Sir Francis doth not impede.

As to the third. Admitting the other points, the warranty operates nothing, because the estate not being devested, the estate to which the warranty is annexed, is determined.

Winington for the defendant. 1. If this fine be a discontinuance of the remainder. 2. If it devest the remainder.

[38] *As to the first*, It is a discontinuance. 1. This estate is an estate-tail in them both, Lit. sect. 28. 2. Where an estate for life is limited to the ancestor, the remainder to the heirs of his body, there it is an estate by limitation, and not by purchase. Here Sir Francis and Hester were tenants in tail executed. I agree, that if there be tenant for life, the remainder in tail, the remainder to the heirs of tenant for life, they are distinct estates, as in *Lewis Bowle's case.* But this estate-tail cannot be at any time more executed in the husband and wife than now it is. *Vide* 1 Co. 98 b. 3 E. 3, 31. Here the estate-tail cannot be granted without the estate for life. It seemed to the Court that the estate is executed, and doth not differ from *Bredon's case.* But it was adjourned. *Vid.* Cro. Eliz. 135, *Toft* versus *Tomkins.*

READ *versus* GRAPLER. ACTION SUR LE CASE, SUR ASSUMPSIT.

Costs.

The declaration upon the Nisi Prius roll varied from the plea roll, and the plaintiff at the Nisi Prius was nonsuit. And now Jones moved that the Nisi Prius roll being not warranted by the plea roll, the Judge had not any authority to try the issue, and prayed that the *postea* might not be entered, according to Cro. Car. 203, *Aquila Week's case*, Cro. Jac. 669, *Young and Englefield.* And upon consideration of the cases a *distringas de novo* was awarded, and the nonsuit not material. But then the defendant insisted to have costs, and they directed to search precedents. And it seems he shall have costs at the discretion of the Court.

ELLISON *versus* ELLISON.

Amendment. 1 Sid. 70. 1 Keb. 145, 168, 196, 202, 229.

In debt upon an obligation against an executor: the defendant pleads it is not the deed of the testator; and found for the plaintiff, and judgment *quod defendens capiatur*, where it ought to be *in misericordia*, because it is a denial of the deed of his testator. And the defendant brought a writ of error. And Foster moved to have it amended; and on this the Court directed precedents to be searched. And now Serjeant Maynard came and prayed that it might be amended, **[39]** because it is error only in the entry,

and not in the pronouncing the judgment. Mich. 33 & 34 Eliz. C. B. Rot. 230, ejectment by *John Wyld* versus *Thomas Wheeler*, the judgment was *quod prædict' Thomas recuperet*, where it ought to have been John, and it was amended. Trin. 19 Jac. *Mason* against *Thompson*, ejectment of ten acres of land, five acres of pasture, and in the judgment the ten acres of land was omitted, and yet amended. Mich. 4 Car. B. R. *Everard* versus *Bosvile*, debt upon 2 E. 6, for tithes, and upon a nonsuit in the judgment *quod defendens eat sine die* was omitted, and yet amended. Mich. 12 Jac. C. B. Rot. 1106, *Nelson* versus husband and wife for words, there judgment was, that the husband only shall be *in misericordia*, and nothing said of the wife, yet it was amended. Serjeant Wild *contra*, Every judgment entered upon the roll is presumed to be pronounced by the Court, and therefore it is the act of the Court, and not amendable. As to the case of the ejectment, John for Thomas, it was only a perfect slip of the clerk, and not any precedent that such judgment as this hath been amended. But in the Common Pleas it may be amended, for there are dockets of every judgment, and if the entry of the judgment be defective in the roll, they frequently amend it by the docket. It was adjourned, and after resolved, that it cannot be amended in another term, and ruled accordingly.

WEEDEN *versus* BALDWIN.

Hill. 1659. Rot. 478. Hartford.

Devise. 2 Danv. Ab. 541, p. 8, 542, p. 10. 1 Lev. 18. 1 Sid. 55. 1 Keb. 9, 95, 51, 148.

Ejectment upon a demise of Henry Baldwin. On not guilty pleaded, a special verdict was found to this effect, viz. that before the writ one Thomas Baldwin and Katharine his wife, were seized of the land in Shoreditch in the county of Middlesex, to them and the heirs of Thomas, held of the King by knight service *in capite*. And also the said Thomas was seized in fee of the lands in question held in socage; and Thomas being so seised devised by his testament in writing the lands in question to Katharine for life, remainder to Henry, the lessor of the plaintiff, and his heirs, and dies, Katharine enters and dies, Richard Baldwin as heir to Thomas enters, Henry enters and demiseth to the plaintiff. Powis for the plaintiff. The question is here **[40]** if this devise by Thomas of the lands in question was good; viz. if he may devise all his lands held in socage. And 1st, It is without doubt a good devise for two parts; and it seems to me a good devise for the whole. 1. Because the husband here hath not the lands held *in capite* at the time of his death, for he hath only an estate in fee in them expectant upon the death of his wife; and therefore a gift to husband and wife, and the heirs of the husband, the husband cannot dispose of the fee, reserving to himself an estate for life, 2 Co. 60 b. *Wiscot's case*. And if the husband dies first, the wife is sole tenant to the lord, and not the heir of the husband, and upon the death of the husband no heriot shall be paid, Pasch. 19 R. 2, Fitz. Herriot 5. Nor the heir shall not sue an ouster le main, although the land was held *in capite*, because it is a naked remainder, Pasch. 7 Eliz. Dyer 237 a. *Macwilliam's case*. 2. And here it is no more than the feme tenant for life, the remainder to the husband in fee; this remainder doth not restrain the devise, because this remainder is not held of the King, because tenant for life is tenant to the King. 9 Co. 126, *Floyer's case*, 2 Co. 92 b. *Bingham's case*, 9 Co. 129 b. *Quick's case*, 134 b. *Ascough's case*.

Object. The words of 34 H. 8. c. 5. the third clause there, are, *Any one having a sole estate or interest in possession, reversion or remainder held in capite*, and this estate of the husband is a remainder.

Answ. Remainder in this clause is intended such which draws to him ward and marriage by the common law, and is in the nature of a reversion, as is to be seen, 10 Co. 81 a. The case in point.

Trin. 28 H. 8. Dyer 11 a. *Bakenham's case*, This very case is put by Shelly Justice.

Jones *contra*. Here the baron hath only the inheritance, and the wife only for life. 2. The King shall have the wardship at the common law in such case: for if there be tenant for life, the remainder in tail, and he in the remainder in tail dies without heir within age, he shall be in ward. 33 H. 6 a. b. 27 E. 3, 80 a.

Twisden Justice. When there are two jointenants, and to the heirs of one of them, it often has been a question, if he that hath the fee may devise it; and there are opinions both ways.

Wyndham. In such case he cannot devise. But it was adjourned.

[41] Wyndham Justice for the plaintiff. The devise is good for the whole socage land; and in this case we shall consider, 1st, How this stood at common law. 2. How upon the statute of 33 & 34 H. 8. 3. And how upon the proviso where land is given to two and to the heirs of one of them.

As to the first. H. seised *in capite* expectant on an estate for life, dies during the estate for life, no wardship can be, M. 24 E. 3, 33 b. pl. 28. Fitz. Gard. 48, because there is a tenant which may do the service.

As to the second. The statute hath two clauses, and there is not any such person in this case that is intended by the statute; for remainder by the statute is intended such as is in nature of a reversion, the tenant of which shall be in ward at the common law. 10 Co. 81, *Leonard Lovie's case.*

As to the third. The proviso is for the wardship of the body, but not of the land, and this proviso altering the common law, shall not be amplified. *Amy Townsend's case.*

Twisden and Mallet to the same intent; but Foster Chief Justice *contra;* because this statute of 34 H. 8 is an enacting law, not only in the proviso, but through the whole statute. 2. Though the baron here is so seized, yet his heir may bring a real action, and say, that his father was seized in his demesne as of fee the day he died, as *Wiscot's case.* 3. The statute was for the benefit of lords, and also the people reciprocally, and here it is a benefit. 4. A judgment or recognizance acknowledged by the husband shall charge this land in the hands of his son. But because the other three justices were against him, judgment was given for the plaintiff.

WHEELER *versus* HONOUR. EJECTMENT.

Copyhold. 1 Sid. 58. 1 Keb. 154, 166.

Upon evidence in a trial at Bar, the case was, The defendant was a copyholder of the manor of Latham, in the county of Middlesex, and upon his admittance the lord, which was Sir Thomas Reynolds, lessor of the plaintiff, demanded of him two years purchase for a fine, and assessed it in open Court, and acquainted him with it, and appointed him to pay it half a year after. He at the time of the assessment said, that he would pay only three years **[42]** quit-rent, because the tenants of the manor are by the custom there only to pay so much, and not a fine uncertain. And now the said lord, for not paying the said fine, entered for the forfeiture; and this was the title of the plaintiff. And it seemed to the Court, that if there were a real doubt, whether the custom be such that the fine should be certain or uncertain; if the tenant deny to pay an uncertain fine, this is not any forfeiture, although it be found afterwards that the fine ought to be certain; and so it was adjudged betwixt Parker and Cook. But then such doubt ought to be real, and not covinous. But the counsel of the plaintiff directed to have this point found specially, if occasion be. 2. If a fine be incertain, and the place and time appointed for payment of it is assessed, it seems that there ought to be a demand, because it is in point of forfeiture: but Cro. Jac. 617, *Gardner against Norman is contrary. Ideo quære,* and the jury here found for the defendant, That the fine ought to be three years quit-rent.

DELABARRE AND DELAVAL *versus* YARDLY.

Amendment. 1 Keb. 125, 155.

In an action on the case part is found for the plaintiff, and part for the defendant; and as to that that is found for the defendant, the judgment is entered *quod querens & plegii sui sint in misericordia;* and Baldwin moved that the judgment should be amended, and *plegii sui* struck out, because they ought not to be amerced; and the Court gave day to consider of it.

COOK *against* NEWCOMB.

Assumpsit. 1 Keb. 158.

Assumpsit. The plaintiff declares, that in consideration of so much money the defendant promised to deliver so many livers within a fortnight, and that the defendant hath not delivered them. The defendant pleads, that within the said fortnight, *scilicet* such a day, he delivered 25 of the livers, and then the plaintiff discharged him to deliver more till farther order of the plaintiff. That the plaintiff had not given any farther order. The plaintiff demurs; and adjudged for the defendant, that it is a good plea, because a promise before breach may be discharged by parol: but the plaintiff prayed liberty to discontinue his action; and it was granted to him, *nisi, &c.*

[43] GEORGE FOSTER *versus* GRACE FOSTER. EJECTMENT.

Durham, Trin. 1659, Rot. 751.

Uses. 1 Lev. 55. 1 Sid. 82. 1 Keb. 160, 225, 274, 319.

The plaintiff declares, that Nicholas Foster, 12 Jan. 1658, at the parish of Haughton in the Spring, demised to him 2 messuages, 10 acres of land, 40 acres of meadow, 40 acres of pasture and 100 acres of moor in Haughton aforesaid; to hold from the 30th of Decemb. last for five years, and that the defendant did eject him. Upon not guilty the jury found a special verdict, that before the said trespass and ejectment Margery Foster was seised of the said messuages, lands and tenements in fee, and the 8th of Feb. 1652, by her deed of the same date betwixt her of the one part, and Mathew Foster, her son, of the other part, did demise, grant, bargain, sell and set over to the said Mathew Foster, his heirs and assigns, all her part and proportion of that capital messuage or farm, which formerly appertained to her father Robert Brough deceased, and then in her tenure or occupation, with all houses, edifices, buildings, lands, meadows, pastures, feedings, commons, common of pasture and arable lands whatsoever, as were appertaining or belonging to her part of that farm-hold or tenements with the appurtenances, which the said Margery Foster then possessed, then being the tenements in the declaration mentioned. The tenor of which said indenture followeth in these words following, viz. articles of covenant concluded, condescended and agreed upon, 8 Feb. 1652, between Margery Foster, late wife of William Foster of Helton in the Hole in the county of Durham, yeoman deceased, on the one part, and Mathew Foster, her son, of Helton in the Hole aforesaid, yeoman, on the other part, as followeth: *Imprimis*, The said Margery Foster for divers good causes her thereunto moving, and especially for and in consideration of the sum of 20l. of lawful money of England, to be paid by him the said Mathew Foster, unto the assigns of the said Margery at 50s. every half year for four years next ensuing after the decease of her the said Margery, hath demised, granted, bargained, sold and set over unto the aforesaid Mathew Foster, his heirs and assigns, all her part and proportion of that capital messuage or farm, which formerly belonged to her father Robert Brough aforesaid deceased, and now in her tenure or occupation, with **[44]** all such houses, edifices, buildings, lands, meadows, pastures, feedings, commons and common of pasture, and arable lands whatsoever, as appertaining or belonging to her part of that farmhold or tenement with the appurtenances, which the said Margery Foster now possesseth; to have and to hold the aforesaid moiety or part of all the aforesaid premisses with the appurtenances whatsoever, unto the aforesaid Mathew Foster, his heirs, executors and assigns for ever, she the said Margery quietly and peaceably enjoying the premisses aforesaid for and during her natural life. *Item* the said Margery is to have Mathew Foster's barn with free egress and regress without let or molestation during her natural life for her full third part of all the houses due to her. In witness whereof the parties above named have hereunto set their hands and seals the day and year first above written. And the jury farther finds, that after (viz.) 5 Novemb. 1658, the aforesaid Margery Foster by her deed of feoffment executed

by livery and seisin, as well for and in consideration of the natural love and affection which she the said Margery Foster did bear to Nicholas Foster, her said son, as for the full sum of 20l. did grant, bargain, sell, alien, enfeoff and confirm unto the said Nicholas Foster the tenements aforesaid with the appurtenances; the tenor of which deed followeth in these words, This indenture made the fifth of November 1658, between Margery Foster of Helton, &c. of the one part, and Nicholas Foster of the same, yeoman, son of the said Margery of the other part witnesseth, that the said Margery Foster, as well for and in consideration of the natural love and affection, which she beareth to her said son, as for the full and just sum of 20l. to her in hand paid, or sufficiently secured by her said son, the receipt whereof she doth hereby acknowledge, and thereof doth acquit, exonerate and discharge him her said son, his executors and administrators, as for divers good and sufficient causes her thereunto moving, hath given, granted, bargained, sold, aliened, enfeoffed and confirmed, and by these presents for her and her heirs, doth give, grant, bargain, sell, alien, enfeoff and confirm unto him the said Nicholas Foster all that her capital messuage, farmhold and tenement situate, lying and being in Helton in the Hole aforesaid, which descended unto her from Robert Brough deceased late of Helton in the Hole aforesaid, late father of the said Margery Foster, together with all and all manner of houses, edifices, buildings, barns, byars, laithes, stables, yards, garths, tofts, crofts, folds, gardens, orchards, lands, meadows, feedings, pastures, commons, **[45]** common of pasture, woods, underwoods, ways, paths, passages, profits, commodities, emoluments and appurtenances to the said granted premisses, or any of them, belonging or in any wise appertaining, or to or with the same, or any of them, now or at any time heretofore held, occupied, used or enjoyed, or accepted, reputed, taken or known as part, parcel or member of or belonging to the same; and all reversion and reversions, remainder and remainders thereof, or any part or parcel thereof; to have and to hold the said capital messuage, farmhold, tenement and premisses with their and every of their appurtenances, to the said Nicholas Foster, his heirs and assigns for ever; to be holden of the chief lord or lords of the fee thereof, by and under the rents, duties and services heretofore due, and of right accustomed. And the said Margery Foster for her self, her heirs, executors, administrators and assigns doth covenant, promise, grant and agree to and with the said Nicholas Foster, her said son, his heirs and assigns, that she the said Margery Foster, her heirs and assigns shall and will from henceforth for ever hereafter stand and be seised of and in the said granted premisses, and of every part and parcel thereof, to the use before mentioned and expressed, and to no other use, intent and purpose whatsoever. In witness whereof the parties abovesaid to these present indentures have interchangeably put their hands and seals the day and year first above written, 1658. And the jurors farther say, that the estate to Mathew Foster was as well for natural love and affection, as for 20l. there mentioned to be paid; and the said Mathew Foster died, having issue Thomas Foster, and the lands in the declaration, and the lands in the deed of 1652 are the same lands, and that Margery is yet alive; and that Nicholas Foster 12 January 1658 entered into the lands in question, &c. and became seised *prout, &c.* and demised to the plaintiff; and the defendant by the command of Thomas Foster entered upon him and ejected him. And if Grace Foster be guilty *petunt advisamentum Curiæ.* And if she be guilty, then they assess damages, 2d. and costs 40s. and if not guilty, then not guilty; upon which record the case is shortly such; Margery Foster seised in fee 8 Feb. 1652, makes a deed to Margery Foster in this manner: articles of covenants concluded, condescended and agreed upon between Margery Foster of the one part, and Mathew Foster, her son, of the other part. *Imprimis,* The said Margery Foster for divers good causes, and especially for 20l. to be paid by the said Mathew to the assigns of Margery at 50s. every half-year for four years next after the death of **[46]** Margery, hath demised, granted, bargained, sold and set over unto the said Mathew Foster, his heirs and assigns, all that, &c. *habendum* to him, his heirs, executors and assigns for ever, the said Margery quietly and peaceably enjoying the premisses aforesaid, for and during her natural life. *Item,* The said Margery is to have Mathew Foster's barn with free egress and regress without let or molestation during her life, for her full third part of all the houses due to her. And this deed had not any execution besides sealing and delivery, and then the said Margery 12 Jan. 1658 made a feoffment to Nicholas and his heirs, to the

use of him and his heirs; Mathew dies leaving issue Thomas, who commands the defendant to enter.

The only question was, if any estate pass to Mathew by the deed of 8 Feb. 1652 by way of raising an use.

Turner for the plaintiff. That no use arises, because 1. At the common law no freehold passes without the ceremonies of livery and seisin, or attornment, Plowd. 25 a. Nor by the statute of 27 H. 8, cap. 16, because there it is only by bargain and sale. And Coke upon Littleton 271 b. Uses are raised either by transmutation of possession, as by fine, feoffment, common recovery, &c. or out of the estate of the owner of the land by bargain and sale, or by covenant on a lawful consideration. And to raise an use there are four things requisite, Mich. 18 Jac. Winch. 59, *Buckley* versus *Simonds*. 1. Sufficient consideration. 2dly, A deed testifying it; and therefore *Callard and Callard's case* was that no use could rise by parol. 3dly, The covenantor ought to be seised at the time. 4thly, The uses ought to agree with the rules of common law. Here is a good consideration to raise an use according to *Pledal's case* Plowd. 307 a. But the express consideration is 20l. and this excludes the implied consideration of being her son, *expressum facit cessare tacitum*, 7 Co. 40 b. *Bedel's case*, 11 Co. 24 b. *Harpur's case*, 4 Co. 80 b. Express covenant takes away a covenant in law, 9 E. 4, 28. If an Ordinary refuse a clerk, who is a felon, generally it is good; but if he shew cause of this denial which is not sufficient, as because he wants tonsure or *ornamentum clericale*, he shall be fined and compelled to receive such clerk, 5 Co. 97 a. The law never inquires for an assignee in law, when there is an assignee in deed.

Object. The jury have found, that this conveyance was upon both considerations.

Answ. This cannot be aided by averment, Dyer 147 a, and it is contrariant; for the deed is found *in hæc verba*, and **[47]** therefore the jury cannot find a thing which appears contrary to the deed and record, and which is admitted by both parties. 2 Co. 4 b. *Goddard's case*. 8 E. 2, Fitz. Entry 78. F. N. B. 205 k.

True it is, there may be two considerations upon the raising an use. 1 Co. 176 a. *Beaumont and Viller's case*. But this is with this difference, when the uses are directed to several persons, and when to one and the same person, as it appears by that case and *Bedal's case* before.

Object. Construction of a deed ought to be such *ut res magis valeat*.

Answ. A freehold shall not pass contrary to the rules of law. 8 Co. 94, *Foxe's case*.

But admit such averment may be, yet it stands not with the rules of law, and that such estate may be so limited, viz. to reserve an estate to her for life, to pass a freehold *in futuro*. 1 Co. 130 a. *Chudleigh's case*, Trin. 15 Car. *Peirce* versus *Pitfield*, and Dyer 55 a.

Allen *contra*. The sole question is, if by the first deed any use be raised to Mathew the son. And here are two inquiries. 1st, Abstractive, if the 20l. had not been mentioned if any use would arise. 2dly, If the addition of the 20l. vitiate the operation of the deed for raising an use. As to the first, that an use would have risen, if the 20l. had not been mentioned; at the common law an use was only an equitable right to land, and therefore any contract either by deed or word would create an use; then the Statute of Uses doth not alter the manner of raising of uses; and therefore in London an use is raised by parol, Dyer 229 a. *Chibborn's case*, and Popham 47, *Callard* versus *Callard*, and the case of Dyer 296 b. is not truly reported, for the words were only *in futuro*, and for that cause only the use was not raised, Cro. Eliz. 345, per Coke, Mich. 10 & 11 Eliz. *Page* versus *Moulton*. Promise to make an assurance to his son will not raise an use, and the judgment in *Callard's case* was reversed upon the mistake that an use might be raised by parol. But now it is to inquire what contract will raise an use at this day. And in this consider, 1st, Negatively, where it appears that an estate at common law shall be conveyed by intendment of the parties, there it shall not pass by way of use, as *Foxe's case* is, 2 Roll's Abridg. 786. Trin. 37 Eliz. Rot. 149, B. R. *Tebb* versus *Poplewel*. A woman makes a deed to one, who shall be her husband, the consideration was *causa matrimonii prælocuti*, by the words *dedi*, **[48]** *concessi & conformavi* to the man and his heirs, and no livery: but there was a warranty in the deed. And by Clench and Fenner an use doth not rise to the baron; but by Popham *contra*. The reason of the two justices, because it is only a feoffment *causa*

matrimonii prælocuti; in this case no judgment is entered. But by Popham, If I say, after the death of such an one my son shall have my land, an use shall rise. And in *Vivion's case*, Dyer, 302 b. Plowden would aver that the release there made was *pro fraterno amore*, and so to make an use arise. But this case was compounded, and the daughters at law had a small consideration, and the land was enjoyed against the opinion of Plowden. 2dly, When the deed binds to make farther assurance, there no use arises immediately. Dyer 162. *Wingfield's case*, Plowd. 302 b. 307 b. *Bainton's case*, Dyer 96 a. 235. 3dly, When the deed doth not contain a present declaration of the use but *in futuro*, 21 H. 8, 19. Dyer 55 a. *Burrow's case*, 1 Co. 129. 154. *Lord Paget's case*, Use was void to a stranger, and the case of *Buckley and Symonds* is upon the same reason, viz. because the tenor of the deed was only by covenants and words *de futuro* and obligatory, and not declaratory. But in the affirmative, when a covenant and grant is compleat and refers to a future act, there an use arises although the deed be in form of a conveyance at common law, and the word covenant is not necessary, as *Bedel's case* is: the word grant raises an use by way of covenant; because covenant is not obligatory, nor hath the effect of a covenant, and with this agrees *Tebb and Poplewel's case;* and *Callard's case* was not reversed, because the words were only give and grant, but because it was only by parol, Trin. 1649, *Wats* versus *Dix*. The case as to this point was, that Wats granted, bargained, sold in consideration that the bargainee had been at great charges for him for meat and drink, apparel and lodging, and for natural affection, and there was not any money paid, but the deed was inrolled.

Trin. 1657, C. B. Intrat. Rot. 655, *Saunders* versus *Savil*. Henry Savil seised of a rent in fee 14 June 18 Car. by indenture gives, grants and assigns to Henry and Mary his wife, and John Savil for and in consideration of good will; *habendum* to the said Henry and Mary for their lives, the remainder to John Savil and the heirs of his body. And by Hale and Atkins, Although the conveyance was a conveyance at common law, yet a use did arise thereby; Mich. 1657, *Sympson* versus *Keyles*, in ejectment, on not guilty **[49]** pleaded, a special verdict was, that John Pullen the father seised of land 1 Septemb. 1640, by deed gave to his son in these words, viz. *The father in consideration of tender affection hath absolutely given*, and livery was indorsed, but not made; and adjudged an use did arise to the son. And a difference taken where the father by feoffment gives to a stranger to the use of himself, remainder over, there no use arises; but when the conveyance is to the party himself, there the use will arise.

Object. Cro. Jac. 127, *Osburn's case.*

Answ. There it was good by confirmation, and that was only on evidence.

Object. Hill. 11 Car. B. R. Rot. 439, *Pitfield* against *Pierce* in ejectment: on not guilty pleaded, a special verdict found, that Thomas seised in fee makes a deed, which the jury found to be in consideration of marriage, and it was in these words: *Know all men that I have given and granted, and do give and grant to John my son the lands in question after my death, habendum to him and to the heirs of his body.* John dies and hath issue Elizabeth, John the father enfeoffs Thomas the second son. And if any estate passed to John, the son, was the question; and adjudged that no estate passed.

But it was answered. This was a plain case, that the lessor of the plaintiff cannot have title; for when tenant for life makes a feoffment, this is a forfeiture. And the reason of this case is within the second rule before laid down, because there is not any present execution, but after death. But in our case here, 1st, There is a deed well executed, for she grants the enjoying it; and *Callard's case* is the same case in point. 2dly, This case is not capable of farther execution, because there cannot be livery. 3dly, Here is allotment of dower. 4thly, When a deed hath two intendments, it shall be construed to establish, and not to destroy an estate. As to the 2d, the addition of 20l. doth not alter the case; the words of the statute are, that *the deed ought to be enrolled, when land is conveyed by reason only of any bargain and sale*, and here it is not a deed that vests the freehold by bargain and sale only. And if there are two considerations, and both express, then it would be without question, Plowd. 4, *Manxel's case.* 2. If no consideration had been expressed, it might be averred, as *Mildmay's case* is. And although one be expressed, yet the other may be averred.

[50] *Object.* As to *Bedel's case,*

I answer. That case is not agreed, but by the council, 11 Co. 24 b. True it is, another consideration shall not be presumed, but it may be averred. And as to *Beaumont's case,* Dyer, 146, where the difference is, when it is to another person, and when to the same person, that is all one when money is given by a third person. But here needs no averment, because it is for divers good causes and considerations, as well as money; and the Court here may take notice of the consideration of him as son; and it was adjourned. And after in Hill. 14 Car. 2, upon solemn argument at the Bench it was adjudged for the plaintiff. *Vid.* as to this point a good case in Ley's Rep. 57, *Buckley's case,* Trin. 15 Jac. in the Court of Wards.

COLLINS AND WALKER.

Repleader. 1 Keb. 164.

Trespass for beating and imprisoning his wife, &c. The defendant justifies by warrant of the sheriff. The plaintiff replies *de injuria sua propria absque tali causa,* and issue upon it; and verdict for the plaintiff. And it was moved for a repleader, because *de injuria sua propria* is not a plea to matter of record, but the plaintiff ought to have traversed the warrant. But judgment was given for the plaintiff, because it is good enough after verdict; and so it was resolved betwixt *Osburn and Desmond,* and *Peter* against *Stafford,* Hob. Rep. 244. *Vid.* 2 Leon. 81, *Moor* against *Sir John Savage.*

MAY *versus* SPENCER.

Scire facias.

Scire facias against the bail upon a writ of error according to the statute of 3 Jac. The defendant prays oyer of the condition of the recognizance, and upon that he pleads that the plaintiff prosecuted the writ of error with effect, and that thereupon the aforesaid judgment was reversed. *Et hoc paratus est verificare,* where it ought to have been *prout patet per recordum.* And for this defect the plea was ruled ill, and judgment given for the plaintiff.

[51] HODGES *versus* HODGES.

Amendment. 1 Keb. 203, 281, 292, 299, 310, 313. 3 Bulstr. 61, *Haver* versus *Gibbons.* Noy Rep, 121, *Thimblethorp's case.* Hetley 59, *Wolfe's case.* Marsh. Rep. 17, pl. 40 & 46, pl. 72, *ibid.*

Error of a judgment in the Common Pleas; the error assigned was, that there were not any pledges: and Powis for the defendant in the writ of error, insisted that this is amendable, or at least aided by 18 Eliz. cap. 13, because in the Common Bench the pledges are always indorsed upon the original, and when there is not an original there are not any pledges; but then the Court advised to pray *a certiorari* upon alledging diminution; and upon return that there was not any original, the Court debated it largely. And to Wyndham Justice it seemed that it is aided by the statute of 18 Eliz.

But Foster and Twisden *contra.* But upon examination, and no diminution alledged, that there was an original, an amendment was awarded. *Vid.* Dyer 288, pl. 53. F. N. B. 31, fol. 195. H. 8 Co. 61 b. *Beecher's case.*

ORTON *versus* FULLER.

Words. 1 Danv. Abr. 106, p. 20. 1 Lev. 65. 1 Keb. 293, 303.

Action on the case for words, viz. Orton says, *I am a perjured knave, but he is perjured knave as well as I; for he and Field swore one for another:* after verdict it was moved in arrest of judgment, because the defendant fires perjury upon the plaintiff only by relation, viz. *As well as I,* &c. But adjudged for the plaintiff.

[52] Term. Mich. 14 Car. 2, B. R.

Buxton *versus* Bateman. Derby.

Case. 1 Lev. 71. 1 Sid. 88, 201. 1 Keb. 345, 370, 386, 420, 433, 457.

Action upon the case: the plaintiff declares that he is seised of an ancient messuage, and of lands within the parish of S. and that he and all those whose estate he hath in them, have time out of mind used to sit in a seat in such an aisle in the church in the same parish, and that the defendant had disturbed him, to his damages, &c. The defendant pleads not guilty, and found for the plaintiff. And Allen moved in arrest of judgment, because the plaintiff hath not averred that he and all they, in whom he prescribes, have used to repair the said seat, which he ought to have done according to the cases, Co. 3 Inst. 202. *Corven* versus *Pym*, Cro. Jac. 366. *Frances and Ley*, 604, *ibid. Dawny and Dee*, Hob. 69. *Boothby* versus *Bayly*, 2 Bulstr. 150. *May* versus *Gilbert;* and the ordering of seats in the church being of ecclesiastical conusance, the temporal law will not meddle with it, without special reason.

Twisden Justice. I have conferred with most of the Judges in this case, and they are of opinion that the declaration is good enough without such allegation of repairing, this being in an action of the case; but if it had been in a prohibition, there perhaps it had not been good. But when it is as to such house belonging, it is parcel of his franktenement, and then he doth not sit there by the licence of the Ordinary. Wyndham and Mallet of the same opinion, but Foster for the defendant. But upon perusal of the record it was not *tanquam messuagio prædict. pertinent.* but only that he and all those whose estate he hath in the said messuage, have used to sit in the said seat, &c. And upon this Wyndham and the other Judges said, that they would advise; and upon that it was adjourned.

[53] Sir Henry Harbert *versus* Justinian Paget, Officer of the Court of King's Bench.

Case. 1 Danv. Abr. 179, p. 1. 1 Lev. 64. 1 Sid. 77. 1 Keb. 288, 346.

Action upon the case: the plaintiff counts that the defendant had the custody of the records of this Court, and ought to keep them safely; and that William Walker brought an action upon the case against the plaintiff for words, and recites the whole record, and that he recovered against the plaintiff, and had judgment upon it, and damages 106l. And that this judgment was entered, that the plaintiff here *capiatur:* and on this the plaintiff brought a writ of error in the Exchequer Chamber, and that pending this writ, the defendant Paget *tam negligenter custodivit* the records, that this error was amended, and made, that the defendant there *sit in misericordia*, by which the plaintiff is made liable to pay the 106l. The defendant pleads not guilty. And now this issue was tried at Bar, and upon evidence it was proved, that all the clerks of the office have liberty to go into the Treasury and to view the records, and so have the Clerk of the Nisi Prius for Middlesex, and his clerks, and all the philizers of this Court, although they are not clerks of the office. And also that the records have been frequently amended after error brought; and in 4 Car. in C. B. in the *Lord Savil's case*, it was resolved, that a record may be amended before a *recordatur* entered upon the roll; and upon all this evidence the jury found for the defendant.

Wheatly *versus* Thomas.

Attainder. 1 Lev. 73. 1 Keb. 349, 436, 549, 615, 745.

In ejectment. On not guilty, a special verdict found that George Lord Cobham being seised in fee of the lands in question 13 Jan. 1557, made his will and devised them to Anne for life, remainder to William for life, remainder to the first son of William, remainder to George for life, remainder to his first son, &c. And having two daughters Eliz. and Katharine limits them to Elizabeth for life, remainder to

Katharine for life, remainder to the heirs males of his brother Thomas, remainder to the heirs of the body of William, his eldest son; George dies 4 & 5 Ph. & Mar. Anne dies, George dies without issue; William hath issue, Henry and George; George hath issue William; William hath issue Pembroke; William enters, Henry enters, Henry and George are **[54]** attainted 1 Jac. In 3 Jac. an Act is made reciting the attainder, and confirms it; and then follows a proviso in these words, Provided, and be it enacted, that the manor of Cooling (the lands in question) shall be and remain and be held and enjoyed to Duke Brook, and the heirs males of his body, remainder to Charles, remainder to William Brook, and the heirs males of his body, remainder to such estates-tail as are mentioned in the will of George the devisor; Sir William the son of George 7 Jac. was restored; Henry dies 13 Jac. Sir William survives and hath daughters Pembroke, Hill, Margaret and Frances, Sir William the father of Henry dies, 39 El. Frances one of the daughters of Sir William demises to the plaintiff.

Baldwin for the plaintiff. The point is upon the Act 3 Jac. which takes notice of the attainder of Henry and George, by which Frances hath good title as heir of the body of William, eldest son of George. 1st, This clause is relative to the will of George, just as if it had been particularly recited, and so is the construction of relative clauses in grants, 9 Co. 30. a. 20 E. 3. Bro. Patents 31 and 91, so in Acts of Parliament, Plow. 130, *Buckley* versus *Thomas*.

1. *Obj.* The words of this proviso are imperfect, (viz.) *and for default of such issue shall be for such estates in tail*, and doth not mention the estates.

Answ. In an Act of Parliament words ought to be taken according to common parlance, as in *arbitrement, &c. and so held and enjoyed* are sufficient.

2. *Obj.* At the time of this Act Henry was attainted of treason, and alive, and so no person *in esse* to take as heir of the body of William at that time.

Answ. By this Act there are five estates-tail to be spent before the will of George is to take place, (viz.) of Duke, Charles, William, Calisthenes, John; and then comes the will of George by this Act, and there is no estate in that will to Henry in particular; and it is sufficient if the estate take effect when the particular estates are determined. 1 Co. 63, *Archers case.* And though in strict and legal sense William had not an heir at that time, yet Henry dying before the particular estate spent, the daughters shall take, and the daughters are heirs, as appears by the record; for Henry died 17 Jac. Suppose these four daughters should bring a *formedon* by the aid of that Act of 7 Jac. they shall mention Henry and George in the writ, because that Act purges the attainder.

[55] 2. The intent of an Act of Parliament ought to be observed in its exposition, and that was here, that as long as there was any issue of George in being, the land should not revert to the Crown, for they had a care that none of the remainders should be barred; and heirs here shall not be taken as in a conveyance, but in an equitable sense, as 8 Assises pl. 5, per Thorpe, 8 Co. *The Prince's case.*

3. This Act is *quasi* an Act of Restitution, which is *materia favorabilis*, Co. 3 Inst. 241. I agree if this Act had limited immediately estates according to the will of George, it had been a doubt whether good; but here it is after five estates-tail spent.

Jones for the defendant. This Act of 7 Jac. hath no operation in this case, because there is a proviso in it, that it shall not extend to the lands forfeit for treason.

2. Henry at the time of his attainder had two estates in him, (viz.) one in possession, and another in remainder; I agree that the relative words make the thing pass as well as if they had been *verbatim* expressed; but here Henry cannot take as heir to William, which he must do, if he takes at all, (viz.) by purchase; and when a man takes by purchase, all the estate ought to be described, Hob. 31 and 34. *Ashenhurst's case;* so in *Foster and Ramsey's case*, a devise to the heir of his brother, who was an alien; he could not take.

Object. He is capable of taking when the remainder falls.

Answ. There is no intent that there should be any contingent remainder. *Et adjournatur.*

WYNNE *versus* LLOYD.

Error to reverse a common recovery in Wales. *Antea* 16.

Error. *Postea* 70, 96, 134. 3 Danv. Ab. 49, p. 7. 1 Lev. 72, 130, 146. 1 Keb. 351, 388, 459, 717, 748, 809, 914. 1 Sid. 213.

Upon the *scire facias ad audiendum errores*, the sheriff returned several ter-tenants, who pleaded several pleas, the one that he is but tenant for years of the demise of one Owen, another that there are other ter-tenants of the land, (viz.) A. B. &c. not named in the writ, judgment of the writ. A third, that the plaintiff had entered into part pending the writ: to these pleas the plaintiff demurred.

Allen for the plaintiff. That these pleas are none of them good, because should these be allowed, the plaintiff might be infinitely delayed.

[56] Williams for the defendants, that these pleas are good, because the ground of a *scire facias* to the ter-tenants, is, that they may shew something to maintain their possession, and they may either plead in bar or abatement, and they may demand oyer of the record, Dyer 321 a. and they may have a release to plead, they may plead jointenancy, Hill. 42 Eliz. Cro. Eliz. 739. *Holland* versus *Dansey*. See in the same book 129 *Charnoch* versus *Worsley*, Cro. Jac. 332. *Bartholomew* versus *Belfield*. Then as to the plea of entry of the plaintiff pendant the writ, it is a good plea in abatement. 1. Because the nature of a writ of error is not to bar the right of the land, but to the action; and it lies not but when the plaintiff is prejudiced, and here the plaintiff is not prejudiced so long as he continues in possession, be his possession right or wrong; so for this reason the bail shall not reverse a judgment given against the principal, because it is but a consequential prejudice. 2dly, The end of the writ of error is to have restitution, which he needs not, when he hath already entered; but here is a difference between possession by act in law, and when by the act of the party. Bridgman 56, *Lloyd* versus *Bethil*. 2dly, As to the plea that he is but tenant for years, it is a good plea, for it is no more than an aid prier of him of whose lease he holds. Owen 157, *Carew* versus *Warren*. So the parol shall demur upon such a *scire fac.* for nonage, Cro. Jac. 392, *Herbert* versus *Binion*.

Object. It is in the discretion of the Court to grant a *scire fac.* in such case to the ter-tenants.

The Court hath now awarded one, and the tenants now may have those advantages as are incident thereunto; and there are many pleas which the ter-tenants may now plead, which after the reversal of the judgment they cannot plead, as a release of errors.

The Court was of opinion that the pleas are but frivolous, and awarded that they plead in chief. *Vid. postea.*

HURST'S CASE.

Mandamus. *Postea* 94. 1 Lev. 75. 2 Sid. 94, 152. 1 Keb. 349, 354, 387, 558, 675.

One Edward Hurst an attorney of the Town-Court of Canterbury being turned out by the commissioners within the late Act for Corporations, moved now for a *mandamus*, and though it was suggested that it is a place concerning the administration of justice, and a precedent shewn Mich. 1651, in the case of an attorney in Southwark, yet **[57]** Foster and Wyndham denied it, but Twisden and Mallet allowed it; so the Court being divided in opinion no writ could be had. *Post.* 94.

SOUTHCOT *versus* RIDER.

Account. 1 Danv. Abr. 229, p. 27, 234, p. 2. 1 Keb. 354, 395.

Account against the defendant as his receiver; the defendant pleaded that the 20l. in demand was delivered to him by the plaintiff to pay over to such persons as

Sir George Monk, &c. should think fit, and that they did award that they should deliver it over to one Hatchall, &c. *absq; hoc*, that he was his receiver *aliter vel alio modo;* and verdict for the plaintiff, and judgment *quod computet;* and before the auditors he pleaded a special plea; (viz.) the Act of Oblivion; and upon that the plaintiff demurred.

Jones for the plaintiff. It is not a good plea, because it ought to have been pleaded in bar to the action, and not before auditors, for otherwise such suits will be endless.

Polexfen for the defendant. Many things may be pleaded in bar and in abatement too, 41 E. 4, 31. 9 E. 4, 15, Bro. Accompt 43 and 48. Latch. 59, *Hopton* versus *Offal*, and payment to the plaintiff or a stranger is a plea in discharge, and yet may be pleaded in bar, Rast. Entr. 16. 19 H. 6, 5, and this is a proper plea in discharge, for otherwise it would be infinite. The Court seemed that the plea was well enough, but the defendant pleads ill as to the time, and when the plaintiff charges him as receiver from such a time to such a time, he must answer that precisely; and for that cause judgment was given for the plaintiff.

HOLE EXECUTOR OF &C. *against* BRADFORD, EXECUTOR OF B.

[See *Phillips* v. *Homfray*, 1883-86, 24 Ch. D. 445; 11 App. Cas. 466.]

Executor. 1 Sid. 88. 1 Keb. 344, 356.

Debt upon the Statute of Ministers for fifths against an executor. The defendant pleads *nil debet*, and verdict for the plaintiff. Stroud moved for the defendant, that this action shall not charge the executor, it not being a duty in the testator. But, by the Court, the executor is chargeable, because it was a duty in the testator; but escape lies not against the executor, because the action is founded *ex delicto;* but it lies upon the statute of 2 Ed. 6. **[58]** for tithes; and judgment was given for the plaintiff by the whole Court.

BAKER *versus* BERISFORD. COVENANT.

Trin. 1657, Rot. 1902.

Custom. 2 Danv. Abr. 440, p. 9. 3 Danv. Abr. 387, p. 6. 1 Lev. 154. 1 Sid. 76. 2 Sid. 1, 9. 1 Keb. 285, 356, 480, 509, 515, 838, 893.

The plaintiff declares, that Abraham Baker was seised in fee of copyhold land in Westham in the county of Essex, and alledgeth a custom in the said manor of Westham, that the wife shall be endowed of the moiety of all such copyhold lands as her husband was seised of, and that Abraham died having a wife named Mary, who had a moiety of the said land assigned her for her dower, and that John his son had the other moiety, and that Mary and John joined in a lease for years to the defendant, rendering 100l. per annum (viz.) 50l. to Mary, and 50l. to John, and that John dies, and the plaintiff as his widow demands 25l. And on *nil debet*, and verdict for the plaintiff,

Jones moved in arrest of judgment, that the breach is not according to the custom, because the wife is but to have a moiety, but here she claims a moiety of a moiety, and a custom ought to be pursued strictly; but by the Court it is directly within the custom, and adjudged for the plaintiff.

BILLING'S CASE.

Charge. 1 Keb. 303.

Billing was committed to the Marshalsea for divers misdemeanors, and he being in prison for the said offences was charged with actions, and judgments obtained against them; and the Court was moved he might be discharged of those actions; and resolved by the Court, when a man is in prison for criminal matters he is not chargeable with a civil action without leave of the Court; but if he happen to be

charged, *fieri non debuit, sed factum valet*, but they ought to have moved the Court first; but now once charged he cannot be discharged.

[59] DOVE *versus* DARKIN. EJECTMENT.

Error. 1 Lev. 80. 1 Sid. 93. 1 Keb. 368, 375, 413. P. 31 H. 6, 15 a. plac. 4.

Judgment was given against the defendant, and he brings a writ of error, and assigns for error, that the plaintiff was dead at the time of the judgment given. The plaintiff's entry is, that the aforesaid plaintiff by A. B. his attorney *venit & dicit*, that he is in life, and issue thereupon, and found for the plaintiff in the writ of error that he was dead; and Serjeant Maynard moved that the judgment might be reversed.

Allen *contra*, because there ought to have been a *scire fac.* against the executors of the party dead.

Wild. There is neither executor nor administrator.

Wyndham Justice. It is well enough, and a precedent comes near it, Rastal's Entries, tit. Brief in Mort. pl. 1, fol. 108. And it was adjourned. *Post.*

WISEMAN *versus* COTTON. HILL. 13 CAR. 2, ROT. 476.

Custom. *Postea* 76. 2 Danv. Abr. 441, p. 2. 1 Lev. 79. 1 Sid. 17, 135. Hard. 325. 1 Keb. 288, 372, 492, 505.

The plaintiff counts, that whereas there was a discourse concerning the manor of Farningham, and the plaintiff affirmed that it was devisable by the custom of Kent, in consideration that the plaintiff would give the defendant 5s. the defendant assumed to give the plaintiff 40s. if it were not devisable, and avers that it is not devisable. The defendant pleads that it is devisable by custom; and upon that a special verdict, that by Act of Parliament 2 E. 6 the lands of Sir Henry Isles amongst others should be from henceforth to all intents, constructions and purposes as lands at the common law: they find that lands in gavelkind are devisable; and if the Act of Parliament takes away the other collateral qualities, as well as the partibility, was the sole question.

Jones for the plaintiff. By this Act all qualities of gavelkind are taken away.

Winington for the defendant. Devisable or not, is not an essential quality of gavelkind. Lambert's Perambulation 584, 585. Spelman's Glossary, Gavelkind 412. 1 Inst. 140. Lambert 25 and 26. As for other particular customs they ought to be [60] specially alledged, as dower of a moiety, 2 E. 4, 18 b. 5 E. 4, 8, but gavelkind ought not; but the Court takes notice thereof, Cro. Car. 561, *Launder* versus *Brook*, and Davies 50. *Adjournatur.* But the Court inclined that the Act had not destroyed this quality. *Post.*

MOULD *versus* WALLIS. COVENANT.

Covenant. 1 Lev. 81. 1 Sid. 142. 1 Keb. 376, 469, 512.

The plaintiff declares upon an indenture of apprenticeship. The defendant pleads, that at the time of the entering into the said indenture he was an infant. The plaintiff replies, that by the custom of the City of London, if one under age binds himself an apprentice, that it shall be good against him. The defendant demurs.

Jones for the defendant. It is a departure. 1 Inst. 304 a. If H. intitle himself in his former plea by the common law, in his second plea he shall not enable himself by a custom, but should have pleaded it at first; so is Keilw. 75 b. *The Abbot of Bokefast's case.*

Howel for the plaintiff. The case in 21 H. 7, pl. 29, is otherwise, where in assize the defendant pleads feoffment of a stranger: the plaintiff replies, that the feoffor was an infant; the defendant rejoins, that there was a custom that he might make a feoffment at fifteen; and resolved no departure: 'tis true, 37 H. 6, 5, there was a departure, because he began with a general custom, and concluded with a particular

one; and this seems to be good by Cro. Car. 652, *Walker* versus *Nicholson;* but no judgment is there given.

Wyndham Justice. It is not any departure from the title, but only a plea to the disability.

Twisden Justice. Hutt. 63, *Jennings* versus *Pitman*, seems to make it a departure, Cro. Car. 179, *Guilbert* versus *Fletcher*. The action here is founded upon the covenant, and he doth not come in the replication and maintain his action, but answers to the disability, and so no departure.

Jones. The book of 21 H. 7, 17, is contrary to Yelv. 14. *Adjournatur*. *Vide* Godb. Rep. 122, the same case pl. 143. Moor 135, pl. 280, *Stanton's case*, *ante*, *Granger* versus *Hembrough*.

[61] LAWSON *versus* WITHERINGTON.

Condition. 2 Danv. Ab. 68, p. 8. 1 Lev. 85. 1 Keb. 380, 415.

Debt upon an obligation conditioned to pay 100l. upon the tenth day of January, upon three months warning. The defendant pleads that the plaintiff had not given three months warning. The plaintiff demurs.

Weston for the plaintiff. I conceive three months warning shall be taken upon any tenth day of January after three months warning given by the plaintiff, and if it shall be so taken, then the defendant's plea is but in abatement of the writ, and so he pleading in bar, it is naught. Cro. Eliz. 202, *Isham and Paget* versus *Hitchcock*.

Twisden Justice. Pleading in bar when it is in abatement, is not good.

Wyndham Justice. Although it had been to pay on the tenth of January after the date of the obligation, upon three months warning by the obligee, though the obligee omit the warning, yet the money shall not be lost; and so it hath been resolved in the time of Roll Chief Justice, and the other shall be bound to pay it at any three months warning. *Adjournatur*.

SAUNDERS *versus* EDWARDS.

Case. 1 Danv. Ab. 212, p. 5. 1 Sid. 95. 1 Keb. 389.

In an action on the case, the plaintiff counts that he is a clerk of the Inrolment Office, and that the defendant *crimen felonicæ ei imposuit*, by which he had like to have lost his office. The defendant pleads, that as to the imposition of felony, otherwise than by speaking of scandalous words, not guilty; and as to the speaking of the words, *non infra duos annos*. The plaintiff demurs.

Wild for the plaintiff. This is not within the Statute of Limitations, no more than slander of title.

Jones for the defendant. The imposition of felony is actionable by it self, and then the other words are within the statute.

Wild. *Crimen felonicæ imponere* cannot be by words alone, but by some act, as carrying him before a justice of peace, &c.

Twisden Justice. If the words are actionable at first, then the damages after do not give cause of action; and the first plea is a full bar, and the other fruitless, and of that opinion was the whole Court; and so judgment for the defendant, *nisi*, *&c.*

[62] JAMES NORFOLK *versus* AYLMER.

Sheriff's bond. 1 Lev. 209. 1 Keb. 391.

Debt upon an obligation, conditioned that whereas Smith was committed to the serjeant at arms by the House of Commons, if the said Smith shall be a true prisoner, and pay all fees due, &c. that then, &c. The defendant pleads the statute of 23 H. 6. The plaintiff demurs.

Powys for the plaintiff. A serjeant at arms is not within that statute, for it begins with keepers of gaols, and a serjeant at arms is above such a one, according to the rule given 2 Co. 46, and the office of serjeant at arms is properly to attend the

house, and not to be a keeper of prisoners. It is true, that Cro. Eliz. 66, *Bracebridge's case* is, that the marshal of the King's Bench is without question within that statute. Serjeant at arms within the marches of Wales is out of this statute. Cro. Car. 309, *Johns* versus *Stratford*.

Levinz for the defendant. This obligation is void by 23 H. 6. for it is within the words of the statute, which are keepers of prisons, or other the officers aforesaid. Cro. Eliz. 108, *Trussel* versus *Aston*. And as to the objection that a serjeant at arms is above a sheriff, I deny it, and here this statute ought to be taken according to equity, as sometimes penal statutes are, Trin. 9 H. 6, 19, pl. 13. Debt by the mayor of the staple, Plow. 35. Debt against the keeper of Ludgate, Dyer 321. Debt against the marshal. 2dly, This condition is void at the common law. 1st, It restrains trade and livelihood, 2 H. 5, 5, and Owen 143. 2dly, That he shall pay all fees due, &c. until he shall be discharged by the House of Commons, which may never be, because they may be dissolved. &c. 3dly, It is an obligation to pay fees before they are due, which is extortion. Co. 2 Inst. 210. Hut. Rep. 52. *Et adjournatur.*

DAVIES *versus* JONES.

Words. 1 Keb. 393.

For words of a broker, speaking of his profession, *He is a cheating knave, he hath cheated me with brass money.* After verdict Pemberton moved in arrest of judgment, and cited Hutt. 13, *Gitting* versus *Redseam's case;* but resolved by the Court, that to call a tradesman a cheat, an action will lie if he speaks of his profession; but to speak it generally it will not; and adjudged for the plaintiff.

[63] LITTLEBOY *versus* WRIGHT. ERROR, MARSHALSEA.

Jurisdiction. 2 Danv. Abr. 300, p. 4. 1 Lev. 69. 1 Sid. 85, 95. 1 Keb. 328.

Action upon the case for words (viz.) *You are a whore, &c. per quod she hath lost her marriage*, and verdict for the plaintiff and judgment; and now Serjeant Maynard assigns for error, that it doth not appear that the cause of action, (viz.) *that the loss of marriage* was within the jurisdiction of the Court, and the other words are not actionable, and for this cause judgment was reversed. *Vide* Cro. Car. 570, *Ireland* versus *Blackwel, contra.*

[64] TERM. HILL. 14 CAR. 2, B. R.

Sir Robert Foster, Chief Justice; Sir John Mallet, Sir Thomas Twisden, Sir Wadham Wyndham, Justices.

PALMER *versus* RICHARD.

Discontinuance.

Replevin. The defendant makes conusance to A. that one Knight was seised in fee of the place in which, &c. and granted a rent-charge to A. and so makes conusance for ten years rent. The plaintiff replies in bar, that Knight was not seised in fee, and the defendant demurs. And Serjeant Wild moved for the plaintiff to amend his plea, because it doth not appear by the whole record that Knight is dead; and then, though Knight be not seised in fee, yet if he be alive the grant shall be good during his life.

Twisden. If Knight were alive at the time of the distress, the defendant ought to justify; for if tenant for life grant a rent, if the grantee distrain, and after tenant for life dies, he ought not to make avowry nor conusance, but to justify, because the taking was lawful. In this case the record being entered, Read for the plaintiff came too late to have it amended; but then Wild moved to have leave to discontinue, and it was granted.

[65] ELIOT *versus* BLAKE.

Covenant. 1 Lev. 88. 1 Keb. 424, 426.

In covenant, the plaintiff declares upon an indenture dated 7 Sept. 1657, whereby the defendant covenants, that he one T. W. would deliver to the plaintiff so many maunds of salt-peter at such a rate before the 20th of October ensuing, the plaintiff paying so much a maund, and to the performance thereof the defendant binds himself in 500l. The defendant demands oyer of the deed, and by the same it appears, that between the same covenant and the obligation, there is a proviso, that if the defendant should between that and the said 20th of October be disabled by the sea, &c. to deliver the said salt-peter, then the deed should be void. The defendant pleads, that he within the time aforesaid had prepared one thousand maunds of salt-peter, and that the boat wherein it was put was cast away, and so he was disabled. The plaintiff replies, that the defendant had sufficient salt-peter over and above what was cast away; and issue thereupon, and found for the plaintiff, and damages 300l. And Allen for the defendant moved in arrest of judgment, that there is a variance between the deed and the declaration, for in the declaration the proviso is omitted.

Jones for the plaintiff. 1st, The action is brought upon the covenant, and not upon the penalty, and the reciting of the penalty is but surplusage. 2dly, The declaration is sufficient without recital of the proviso, according to *Ughtred's case*, and the defendant ought to plead the proviso; and of this opinion was the whole Court; and judgment was thereupon given for the plaintiff.

THE KING *versus* GISLIFER.

Apprentice. 1 Lev. 84. In a case between the parish of Henton in Kent and Steers, 1654, B. R. the question was, whether the defendant was compellable to take an apprentice, by 43 Eliz. And Rolls Chief Justice said, that if by any means he could, he'd construe the stat. to compel the party, because it was so advantageous a thing to the common-wealth. But the business was referred to the Justices of Assise, who ordered that Steers should take an apprentice, and for disobeying this order, an attachment was granted.

The churchwardens and overseers of a parish in the county of Derby place a child, which was the bastard child of one Mary Newton with the defendant, according to the statute of 43 Eliz. c. 2. and do appoint the defendant to receive the said child; the defendant appeals to the sessions, and there the justices make an order, that the defendant shall take the said child as his apprentice; and now the defendant brought his *certiorari* and removed the said order into this Court.

[66] Allen moved to quash the said order; and some exceptions he took to the form of it, (viz.) 1st, It doth not appear that this child was a poor child. 2dly, Nor in what trade he shall be an apprentice. But to these exceptions the Court answered; 1st, That it shall come on the other part that she is not a child within the statute. And 2dly, Husbandry is intended by that statute, and so shall be construed to be meant in the order until the contrary do appear. But the main question upon the order was, whether the defendant within this statute may be compelled to take an apprentice. And Allen moved that he could not. 1st, By this statute the churchwardens and overseers may bind out such an apprentice as well out of the parish as within it, and then it shall be inconvenient that strangers shall be compelled in this case. 2dly, The words of the Act are, *that it shall be binding to the apprentice, as if he or she had been bound themselves by indenture;* so that the intent of the Act was, that the apprentice chiefly should be bound, and not be chargeable again to the parish, and not the party who may be but tenant at will. 3dly, This Act extends over all England into corporations, London, &c. And if any one shall be compelled to take an apprentice, an alderman or any other person of quality may be charged to take such an apprentice.

Bigland *contra*. That it hath been the received opinion so amongst the Judges from time to time. And at length per Foster, Mallet and Wyndham the order is

good; but Twisden *contra*. And Wyndham said the Judges of Serjeants Inn in Chancery-lane were divided in this case. And Twisden said that the Judges in Fleet-street were of his opinion; and thereupon it was ordered, that the order should be confirmed; and that the law might come in debate, an information should be exhibited against the defendant for not performing thereof.

BRAHAM *versus* ASPINAL, C. B. ERROR.

Visne.

In debt upon an obligation, conditioned to pay money at the house of one Yarrow in Woodstreet Magna, London. The defendant pleads, that he paid the money at the said house in Woodstreet, but names no parish, and upon that a *venire fac.* issues to the parish of St. Michael Woodstreet, and found for the plaintiff, and judgment; and the defendant brings a writ of error, and after the record certified, **[67]** alledges diminution in the *venire fac.* and upon the return thereof it appears to be as before, and the now plaintiff assigns this for error, for that the parish of St. Michael is not named in any part of the record.

Twisden. The words of the statute of 21 Jac. cap. 13. are by reason the *visne* is sued out of more places or of fewer places than it ought to be, so as one place be right named, are to be intended when some of the places are named in the record: and therefore if an action is laid in D. and a *venire fac.* issues *de corpore comitatus;* there although the *venire fac.* be awarded to more places, yet it is not good, because the body of the county was not named before in the record; and it was adjourned: but afterwards it was ruled good being after verdict, because it shall be intended St. Michael is in Great Woodstreet; and judgment was affirmed.

THE KING *versus* HARDY.

Indictment. 1 Keb. 423, 428, 435.

Indictment of a forcible entry, for entering into a copyhold, and that the defendant *ejecit & disseisivit* the party: and Powis moved to quash it, because it ought not to be *disseisivit* upon 21 Jac. cap. 15, and so is Coke 4 Inst. 176 in the margent; and for this cause the indictment was quashed.

STONEHOUSE *versus* BODVIL.

Assumpsit. 1 Danv. Abr. 27, p. 10. 1 Keb. 439.

The plaintiff declares upon an *indebitatus assumpsit* for physick, wares and commodities provided and delivered for the daughter of the defendant at his request; after *non assumpsit*, and verdict for the plaintiff, Williams moved in arrest of judgment, because it is a collateral promise, and so no debt, and consequently the plaintiff ought to have declared specially: but the whole Court resolved it well enough. For that, 1st. It is for wares provided and delivered (*for*) not (*to*) the daughter of the defendant, and so after a verdict it shall be intended delivered to the defendant for the daughter. 2dly. An action of debt will lie for this; as if the father desire one to find physick for his daughter, debt lies against the father, and so *indebitatus assumpsit;* and judgment was given for the plaintiff.

[68] SIR EDWARD BATHURST *versus* COX. MICH. 14 CAR. 2, ROT. 783.

Contempt. 2 Danv. Ab. 292, p. 8. 1 Keb. 451, 465.

Debt for 40s. imposed as a fine upon the defendant at a court leet of the plaintiff's, for a contempt there committed; the contempt was, *that he put on his hat in the court*, and upon the steward's admonishing him of such his doing, he answered, *I do not value what you can do.* And adjudged for the plaintiff.

VERNON *versus* ALSOP.

Condition. 2 Danv. Abr. 24 b. p. 4. 1 Lev. 77. 1 Sid. 105. 1 Keb. 356, 415, 451.

The plaintiff declares upon a bond of 14l. The defendant demands oyer of the condition, which is, that if the defendant pay 2s. a week till 14l. be paid, and upon default of payment the obligation shall be void. The defendant pleads, that the 17th of October such a year he made default of payment; judgment *si actio.* The plaintiff demurs, and adjudged for the plaintiff, because the condition is senseless, and then the obligation is in force and single.

If H. be convicted upon verdict upon an information or indictment, his fine ought to be set in open Court, and not privately in the Judge's chamber.

DR. WIDDRINGTON'S CASE.

Mandamus. *Antea* 31. 1 Lev. 23. 1 Sid. 71. 1 Keb. 2, 50, 61, 68, 79, 131, 150, 234, 458.

Doctor Widdrington having formerly brought his *mandamus* to be restored to his fellowship in Christ-College Cambridge, and upon that the master, Dr. Cudworth, and the fellows made a return which seemed to the Court sufficient, and thereupon he could not obtain a writ of restitution; but he finding that the return was very false, brought his action upon the case, and thereupon a reference was procured to certain commissioners, (viz.) The Bishop of London, the Lord Chamberlain, and some of the Judges; and upon hearing the whole business Dr. Widdrington was cleared, and awarded to be restored: and now he moved by Allen, that in regard the return was scandalous, and might hereafter tend **[69]** to his disparagement, and since the other side were willing that all things before past might be buried in oblivion, the said return might be taken off the file, which he said might be, since all parties concerned were consenting thereunto. But the Court did somewhat doubt of that, they not knowing any precedent for the withdrawing any record of the Court: but they made a rule, that the record should be dashed through in the nature of a cancellation; and with that Allen was content.

TOWNSEND'S CASE.

Mandamus. 1 Lev. 91. 1 Sid. 107. 1 Keb. 458, 470, 659.

Townsend having served as an apprentice for seven years, in Oxford, with a tailor, his master refused to make him free; and Serjeant Holloway moved to have a *mandamus* to be directed to the mayor and others to make him free; and though at first it was doubted whether such a writ would lie any more than for one who had seven years studied the law to be called to the Bar, yet it was at last agreed, because it differed from the case of the barrister; for in the last case there is no person to whom the writ should be directed; but here the mayor & corporation are to be commanded to do it; and if this writ would not lie, it would be a great discouragement to trade; and a precedent was shewn, Pasch. 18 Car. in Norwich, of a *mandamus* granted by Bramstone. *Vide postea.*

MANSER *versus* SHELLEY.

Revocation. 1 Salk. 87.

The plaintiff obtained a judgment in debt, and received the money, and made a letter of attorney to another that he might acknowledge satisfaction; and afterwards, and before satisfaction acknowledged, revokes his warrant: and Allen moved that

the attorney might proceed, and that the Court might save him harmless; and the Court gave rule, that no proceeding should be upon the judgment without motion first made in Court for it. *Vide* Latch fol. 8.

[70] WYNNE *versus* LLOYD.

Error. *Antea* 16, 55. *Postea* 96, 134. 3 Danv. Abr. 49, p. 7. 1 Lev. 72, 130, 146. 1 Keb. 351, 388, 459, 717, 748, 809, 914. 1 Sid. 213.

The dilatory pleas being now over-ruled, the plaintiff in the writ of error assigned errors, which were now argued.

Finch Solicitor General for the plaintiff. Here is a recovery against the vouchee, who appears by attorney, and there is no warrant of attorney; and 1st, All recoveries are erroneous if the party does not appear either in person or by attorney, and here is no good warrant, because the commission to take a warrant of attorney issues before the summons *ad warrantizandum*, which is, 1st, Contrary to the nature of a warrant of attorney to be given before plea pleaded; and a general warrant of attorney is not good. 2dly, It is contrary to the words of the commission, which says, that a writ of summons now dependeth. Cro. Jac. fol. 11, *Arundel* versus *Arundel*.

2. The caption of the warrant of attorney is naught, because before the commission. 3. This shall not be supplied by an intendment, that there was another *dedimus*, and that this cannot be right, because, 1. The writ of error commands to send up the record *cum omnibus ea tangentibus*.

2. 'Tis a *dedimus* between the same parties.

Object. Cro. Eliz. *Johnson and Pavie's case* was objected.

Answ. There is nothing there could falsify that intendment; but here are strong presumptions to the contrary; so is Cro. Jac. 392, *Herbert and Binion's case*.

Williams *contra*. Here is a good record in a common recovery, and the errors alledged are only in the way, and proceedings thereunto. 1. These errors are repugnant to the record of the recovery it self, and not assignable, no more than that there was no such person as the Judge before whom the recovery was had. Mich. 38 and 39 Eliz. Cro. Eliz. 531, *Hobert's case*. Yelv. 33, *Arundel* versus *Arundel*. Then as to the errors themselves, here are all the necessary parts of a recovery. As to the first, of a *dedimus* being before the warrant of attorney, these things are to be considered. 1. The nature of a *dedimus*, that it is not any part of the recovery. 2. Admit it to be a part, yet it is no substantial part, and so helped by the statute. 3. The common practice. 4. The judgments in these cases. 5. The course in North-Wales. 6. The warrant here upon the roll. *As* [71] *to the first*, At common law a fine or recovery could not have been levied by *dedimus*, for the statute of Carlisle 15 E. 2 gave first the *dedimus;* but that statute is only directory, and at the discretion of the Court, and 5 Co. 38 a. *Tey's case*, and 40, *Dormer's case*, where the parts of a fine are reckoned up, a *dedimus potestatem* is no part thereof; and this objection had been pertinent to have stopped the judgment, but now *factum valet*, as *Tey's case* was. *As to the second*, It is helped by the statute of 27 Eliz. cap. 9, as a *venire fac.* wanting, or as *Norris's case* cited in *Gage's case*, 5 Co. 45 b. *As to the third*, It is the constant practice. *As to the fourth*, Recoveries have always been construed favourably for the upholding of them, and therefore a common recovery may be of an advowson, 5 Co. 40, *Dormer's case;* and yet a writ of entry will not lie thereof, 4 E. 3, 162. So it shall bind an infant, Cro. Car. 224, *Newport's case*, and variance in a fine hurts not, Cro. Jac. 77, *Earl of Bedford's case*. And a like error in a fine alledged, and allowed well enough, Cro. Eliz. 275, *Argenton and Westover*. *As to the fifth*, It is the constant course in North-Wales to take fines before *dedimus*. *As to the sixth*, Here is a good warrant upon the record.

Twisden Justice. There is a great difference between a fine and a recovery; for a *dedimus potestatem* is not part of a fine, but a warrant of attorney is part of the recovery; and it was adjourned. *Post*.

WILLIAM BAILY *versus* THOMAS BIRTLES AND KATHERINE UX. EJUS, EXECUTRIX OF RICHARD BAILY.

[See *Phillips* v. *Homfray*, 1883–86, 24 Ch. D. 459; 11 App. Cas. 466.]

Case. 1 Keb. 273, 395.

In an action upon the case, the plaintiff declares, that het he 26th of Oct. 12 Car. 2 was possessed of a cow of the value of 4l. 10s. and being so possessed 23 Nov. in the twelfth year he did deliver the said cow to the said Richard in his lifetime, to keep the same in his pasture safely for the use of the said William, to the said William to be redelivered when Richard should be requested; which cow the said Richard afterwards, (viz.) the said 23d of November did sell and deliver to one William Wodard for 4l. 3s. 4d. and the said monies did convert and dispose to his own use; and that the said Richard in his life-time, nor the defendant after his death *dum sola*, nor the defendants after marriage did not pay the **[72]** 4l. 3s. 4d. The defendants plead that their testator was not guilty; the jury find him guilty *ad damnum* 4l. 3s. 4d. and 53s. 4d. for costs; and in arrest of judgment it was moved by Bigland, because this is a tort for which the executor is not liable to answer, but *moritur cum persona*.

Raymond for the plaintiff. I agree that things which imply a wrong in themselves, as *actio personalis moritur cum persona*, as the wrongful taking of the profits of the land, Cro. Eliz. 206, *Tooley* versus *Wyndham:* so of an escape or any misfeasance: but for non-feasance the executors shall be chargeable; as for not payment of money levied upon a *fieri facias*, as Cro. Car. 539, *Dickenson* versus *Gilford*, this very difference agreed; for non-feasance shall never be *vi & armis*, nor *contra pacem*, 9 Co. 50 b. *Count de Salop's case;* for this reason an action lies against the executor upon 2 E. 6, for tithes: so this term, *antea* fol. 57, Hole against the executors of Bradford for fifths due to the widow of a sequestered person. But notwithstanding this the Court said it was a tort, and that the executor ought not to be charged with it. *Mes vide* Savile Rep. 40, *difference prise*, 3 Leon. 241, *Sir Brian Tuck's case.*

[73] TERM. PASCH. 15 CAR. 2, B. R.

Needham an attorney of this Court prayed for the filing of a *scire facias*, which was sued forth five terms ago against the bail, and two *nichils* returned upon the same, and he had neglected the filing of it; but the Court would not grant it.

FITCH *versus* VINOR.

Case. *Antea* 38. *Read* versus *Grapler.*

In an action upon the case, the plaintiff at the Nisi Prius was nonsuit, because the Nisi Prius roll is, that the plaintiff was in such a benefice in the year 1662, whereas the plea roll is 1626, & so the plaintiff is destitute of his proof; and now Wild Serjeant moved to set aside the nonsuit according to *Week's case*, Cro. Car. 203, and it was adjourned.

TURNOR *versus* FELGATE.

Intr. Trin. 1656. Rot. 130.

Execution. 3 Danv. Ab. 325, p. 2. 2 Sid. 125. 1 Sid. 107. 1 Lev. 95. 1 Keb. 453, 478, 482, 488, 822.

The case was thus, Felgate recovered against Mole, and Turnor was his bail; Felgate obtained execution against Turnor, and his goods were levied; and thereupon Turnor moved the Court, for that there was some miscarriage in the proceedings against him in obtaining that execution, because there was no *ca. sa.* sued out against Mole, that the matter might be referred to Mr. Hern the Secondary; and upon his examination he found the process unduly sued forth, and so the execution was super-

seded against Turnor, and a vacate made of it; and then Turnor brings trespass against Felgate for taking his goods, and upon debate upon a special verdict the plaintiff had judgment, and recovered damages for his goods taken; and now Turnor [74] brings a *scire facias* to have restitution for his goods taken upon the aforesaid erroneous execution, and for which he had already recovered damages in an action of trespass; and upon motion made by Felgate the *scire facias* was superseded as being a very unreasonable thing for Turnor to have double satisfaction.

THE KING *versus* WRIGHT.

Perjury. 1 Sid. 148. 1 Keb. 531.

Information of perjury set forth, that Sir John Lee brought trespass in C. B. for cutting of trees against Garward, and that the defendant there pleaded not guilty; and upon the trial there the defendant swore that the said William Garward *ultimo Junii* 12 Car. 2, did cut sixty trees of the value of 80l. *ubi revera* he did not cut sixty trees of the value of 80l. and verdict against the defendant.

Allen moved in arrest of judgment. 1. In recital of the action brought in C. B. and the issue joined, it is said that it was awarded, *quod venire faceret hic duodecim*, which is in B. R. and so the trial was *coram non judice*, and then no perjury can be committed. Yelv. 111. *Pain's case*, 3 Inst. 166.

2. It is said, that in that action *jurata ponitur in respectum coram domino Rege*, so an action is begun in C. B. and tried in B. R. and it is not after a verdict, for there is no mention of a verdict to be in that action of trespass, and so not helped by any statute; and for this cause it was staid until, &c. But afterwards the exceptions were over-ruled, and judgment against Wright to stand on the pillory, and be fined 20l.

THE EARL OF STAMFORD *versus* GORDAL.

Bail. 1 Danv. Abr. 681, p. 3. 1 Lev. 39. 1 Mod. 16.

Foster moved that the defendant might put in good bail to the plaintiff's action; for although the action is but for words, yet the same being spoke against an earl, the Court may compel special bail; and it was granted, *nisi*.

Note; Justice Twisden declared, that there is a rule made among the Judges, when any one prays a *certiorari* at a Judge's chamber, to remove an indictment out of London or Middlesex, he ought to give notice of his desire to the other side three days before, otherwise the *certiorari* is not to be granted; and there it was questioned whether an inmate be a nusance at common law.

[75] WHITEHEAD *versus* BROWN. ERROR IN THE PALACE COURT.

Court. 3 Danv. Abr. 301, p. 10. 1 Lev. 96. 1 Keb. 481, 512, 522.

In an *assumpsit* the plaintiff declares, that the defendant was indebted to the plaintiff within the jurisdiction for nursing a child; and for error it was alledged, that it is not set forth that the nursing was within the jurisdiction.

Twisden. The jury within the particular jurisdiction cannot take notice of that which was done out of it.

Wyndham. There is a difference between a debt arising upon a collateral act, and an *indebitatus assumpsit*; for in the later it is a debt every where, as it is a duty vested in the plaintiff.

Foster Chief Justice. In debt for money due upon the sale of an house, the plaintiff must shew that the house is within the jurisdiction; but when it is indifferent to the Court, where the debt may arise, it shall be presumed to be within the jurisdiction of the Court.

Twisden. Particular jurisdictions are not to be supported by implication and intendment; and it was adjourned.

HARVY *versus* MARTIN.

Words. 1 Keb. 485.

The plaintiff declares, that he is, and hath been, and was such a day the master of a bark. And the defendant said to him, *Thou art a cheating knave and a cheating rogue, and thou hast cheated my son-in-law, John Bradley, of a cable-rope, which belonged to the bark.* On not guilty, and verdict for the plaintiff, Jones moved in arrest of judgment, because the words are not applied to the plaintiff's profession as he is master of a bark, as Hill. 1656. *Geighton* versus *Kiffen*, of a reeder, *You cheated Mr. Rawley of a pannel of reed*, is not actionable. Wyndham seemed for the plaintiff. Twisden. I remember the case of the reeder. *Et adjournatur.*

[76] WISEMAN *versus* COTTON. SEE BEFORE, 59.

Custom. 2 Danv. Ab. 441, p. 2. 1 Lev. 79. 1 Sid. 17, 135. Hard. 325. 1 Keb, 288, 372, 492, 505.

Allen for the plaintiff. The Act of 2 E. 6 hath taken away the custom of devising, and the custom of gavelkind is altered to all purposes, and that appears, 1st, From the words of the Act. 2. From the meaning thereof. 3. From the construction that hath been made thereupon. *As to the first,* the words are, *that the lands be clearly changed, and be no wise departible, and shall be from henceforth to all intents, constructions and purposes as lands at the common law, and as if they had been of the nature of gavelkind. As to the 2d,* the meaning, every Act of Parliament ought to be interpreted according to the words, if there be not a particular reason to the contrary.

Here it is objected, that the words shall only refer to the partibleness.

Answ. In construction of an Act of Parliament that is most reasonable which makes all the words thereof operative. 2. If that had been the meaning thereof, there was no reason why the words should be so general, (viz.) *to all constructions and purposes.* 3. The meaning was, that their estates should be altogether according to the common law, they being gentlemen, it being prejudicial, that their lands should be according to the custom in gavelkind; as to devise is inconvenient in the opinion of gentlemen of that country. And by the custom of gavelkind upon a writ of right four eslisors ought to choose the grand assize, and not the knights. And the grand assize ought to consist of gavelkind men. *As to the 3d,* the construction and consequence of law upon this Act, 1. The custom of devising is of the same nature of being endowed of the moiety, of being tenant by the curtesy without issue, and other customs. Now consider the form of pleading these customs. The book of customs of Kent, Vet. Magna Charta 147 b. begins thus: *These are the customs which the men of Kent do claim in their gavelkind tenure.* So that gavelkind is the mother custom, Pasch. 4 E. 1, C. B. Rot. 2, *Margerie quæ fuit uxor Johannis Daggenham petit medietatem* of such land. The defendant pleads, *quod mulier amittet dotem si, &c.* The plaintiff replies, *quod bene & verum est que la est tiel custom, mes el ne unque fuit covert secundum legem de gavelkind.* The defendant rejoins, *quod fornicata est.* The jury finds that it is not necessary by such custom, **[77]** and that the law of gavelkind ceases when gavelkind ceases. 2. These customs are taken notice of to be incident to gavelkind, and there needs no prescription for them, but only in gavelkind, Fitzh. Aid 114, 129. Rastal, Dower in Demand 6. There, for the moiety of dower in gavelkind, the custom is only laid in gavelkind; but it is other of dower of a moiety in a city, for there the custom is more particularly alledged. *Ibid.* pl. 7, in Norwich. So in process 1 & 2, and voucher 10.

Object. To be indowed of a moiety is not incident to gavelkind; for in North-Wales, where is gavelkind land, the feme is not dowable of a moiety.

Answ. There it is otherwise.

Object. It ought to be otherwise alledged.

Answ. The gavelkind is thus pleaded, and so are the cases put upon it; and the case 5 E. 4, 8 b. pl. 23, is mistaken; for where it is said there, *that they ought to prescribe,* it should be, *that they ought not to prescribe,* for otherwise it is not sense; *quod Curia concessit.*

Wild Serjeant for the defendant. Where an Act is dubious we ought to consider, what was the mischief which it intended to prevent. Now the mischief here was the division of families. 1 Inst. 140 b.

Wyndham Justice. If it had been the intent of the Parliament to take away all gavelkind customs, they would have mentioned more than only the partibleness.

Twisden *accordant*, and he denied the opinion of Lambert, *that if the King purchase gavelkind land, that it shall go to all his sons;* for Lambert had it out of Plowden 247 a. from Southcote's opinion; and he from 35 H. 6, 28 a.

Mallet and Foster of the same opinion. And judgment was given for the defendant.

NURSE *versus* BARNS.

Damages.

The plaintiff declares, that the defendant in consideration of 10l. promised to let him enjoy certain iron mills for six months; and it appeared that the iron mills were worth but 20l. per annum, and yet damages were given to 500l. by reason of the loss of stock laid in; and *per Curiam* the jury may well find such damages, for they are not bound to give only the 10l. but also all the special damages.

[78] PAR *versus* EVANS.

Court. 1 Keb. 489, 500, 515, 542, 552.

A prohibition was prayed to the Court of Admiralty, for that the plaintiff here did sue upon a recognizance there, taken by way of stipulation, by one that was but surety in the nature of bail; and that Court not being a Court of Record, they cannot take any recognizance. Noy 24. But after long debate resolved, in favour of trade, such a stipulation is good, and shall bind the sureties. *Vid.* Godbolt 260. *Greenway* versus *Barker*, pl. 359.

[79] TERM. MICH. 15 CAR. 2, B. R.

Sir Robert Hide, Chief Justice. Sir Thomas Twisden, Sir Wadham Wyndham, Sir John Keeling, Justices.

Memorandum, this last vacation Sir Robert Foster Chief Justice of this Court died, and the first day of this term Sir Robert Hide was sworn Chief Justice.

MURCH *versus* LANDS.

Trial. 1 Keb. 561, 667.

At a trial at the Nisi Prius the plaintiff changed the *venire fac.* and panel, and had a jury which the defendant knew not of, and he moved by Jones for a new trial. And Twisden Justice upon that cited a case upon a trial at Essex Assises, in which the jury was changed. And resolved by all the clerks of that Court in the time of Hosden Secondary, that the defendant cannot be aided, if the first *venire fac.* was not filed, because the defendant may have resort to the sheriff and have view of the panel to be prepared for his challenges. But if the first *venire fac.* was filed, then the defendant shall have a new trial; and after this the defendant took care to file the *venire facias:* and upon this case put by Twisden the Court inclined against a new trial; but it was adjourned to inquire of the clerks for the course in this Court.

[80] KITCHIN AND KNIGHT *versus* BUCKLEY.

Intr. Trin. 15 Car. 2, B. R. Rot. 1256.

Covenant. 2 Danv. Ab. 239, p. 1. 1 Lev. 109. 1 Sid. 157. 1 Keb. 565, 572. *Vide* Bendl. 89. Kel. 114 a.

The case was, that two tenants in common bring covenant against lessee for years for not repairing the thing demised, and whether they ought to sever or join was the

question after verdict for the plaintiff; and the Court inclined they ought to join, because it was a personal action; but it was objected, that it favoured of the realty. And where Littleton speaks of actions personal, it is to be intended that the action is grounded upon the contract or possession of the plaintiffs; and it was adjourned.

Afterwards Jones argued for the plaintiff, and cited Littleton, sect. 311, 312. In all actions real tenants in common shall not join; but in personal, where damages only ought to be recovered, there they shall join, as in debt for rent; and that to Kelw. 114 a. I oppose Pasch. 18 H. 6, 6 & 7, that tenants in common may join in a forger of *faux faits;* they shall join in detinue for deeds, 1 Inst. 197 b. And they shall join in a *warrantia chartæ*, 1 Inst. 97, and Hill. 28 E. 3, 90 b. pl. 12, which is intented there by Coke. They shall join in waste in the *tenuit*, Moor 40, pl. 127. Baldwin *pro defendente.* In all actions personal, where the possession is concerned, there they shall join, Littleton, sect. 315. In mixt actions they may either join or sever, as in a *parco fracto*, Moor 452, pl. 617. So in account, Godb. 90, pl. 101. So if two tenants in common make a lease for years rendering rent, and then one of them dies, the executor and the survivor shall join in debt, or they may sever at their pleasure. But if the lease be for life, they ought to sever. Godbolt 283, pl. 504, and Dyer 326, pl. 1, *Huntley's case.* Debt by one tenant in common against lessee for years, and a demurrer upon it, and Moor 40, pl. 127. In actions that favour of the realty they shall not join, as in a *cessavit*, nor in an assise, Lit. sect. 314, nor in an avowry, 317. And this action favours of the realty; and so it was ruled in Mich. 1657, B. R. *Baker and Berisford*, Bro. Joinder in Action, 35.

Hide Chief Justice. Although the thing of which, (viz.) the house, is in the realty, yet the action is not so.

[81] Twisden Justice for the plaintiff, and also Wyndham; and as to *Berisford's case* it is not law.

Kelyng Justice. The case of Littleton is upon the personal contract; but it is a question if the tenements be conveyed over, and this contract destroyed, if the tenants in common may join. And in all cases by Litt. the parties are jointenants of the profits; but here it is a covenant, and this concerns the profits, and so of necessity they ought to join; and judgment was given for the plaintiff.

Pain was convicted of perjury upon an information at common law for giving evidence, and was sentenced to stand on the pillory two days, at Westminster and Aldersgate-street; and to be imprisoned a month without bail or mainprise, and fined 100l.

LONG *versus* EMOT.

Ejectment. *Postea, Nedham* versus *Benet, fi. fa. al Chester hors de B. R.*

Ejectment was brought in this Court, of lands in the county of Lancaster; and upon trial the Judge at Lancaster Assises caused the *postea* to be marked, and to be moved in Court, if it lies, the defendant being in custody; and it was adjourned. *Vid.* Mich. 2 R. 3, 18, pl. 45. Hill. 27 H. 6, 6 a. pl. 35.

Forgery.

Farr was indicted at common law for forgery of a warrant of attorney, and he demurred upon the indictment, and adjudged against him, and his sentence was, that he shall be set upon the pillory the first day of the next term with a paper, and then at the Exchange, and pay 100 marks, and imprisonment during the pleasure of the Court.

HAWES & UXOR *versus* WHEELER.

Words. 1 Lev. 116. 1 Keb. 578.

The plaintiff brings an action in London for these words, *Thou art a whore and my husband's whore*, and the defendant removes this by *habeas corpus* into this Court, and Simpson moved for a *procedendo;* and it was granted by three justices, Hide Chief Justice dissenting.

[82] Some part of this term I attended in C. B. during which time Bridgman Chief Justice argued this case that follows.

BATE *versus* AMHERST AND NORTON. SUSSEX, C. B.

[See *Smithwick* v. *Hayden*, 1887, 19 L. R. Ir. 497.]

Devise. 2 Danv. Abr. 515, B. p. 6. Eq. Ab. 212, p. 5.

Ejectment for lands of the demise of Peter Underwood. Upon not guilty pleaded, the jury found a special verdict to the effect following: Stephen Norton seised in fee of the lands in question the 20th of February 1651, made his will in writing, and by it gave divers legacies, (viz.) 300l. *to, &c. Item. I give to my brother Anthony Norton*, 30l. *per annum. Item, I give all my land in Kent and Sussex to one of my cousin Nicholas Amherst's daughters that shall marry with a Norton within fifteen years. And I make Nicholas Amherst my executor.* Nicholas Amherst had three daughters, Elizabeth, Anne and Mary; Stephen Norton the defendant marries Elizabeth; the lessor of the plaintiff marries the heir at law. And the sole question was, if the heir at law or the devisee shall have the land.

Bridgman Chief Justice. Here are two things to be considered, 1. Here being a devise to one of the daughters of Nicholas Amherst, who marries with a Norton; if this devise be not void for the uncertainty; if it had been to one of the daughters without more saying, it had been without question void, for two may marry with a Norton. But as to this point all agreed, that the devise is good notwithstanding the uncertainty. As to the second point, admitting the devise is good in respect of the person; yet if it be good altogether, because here is an immediate devise to one of the daughters who marries with a Norton. 2. Being limited to Nicholas Amherst to gather rents, &c. and then to Nicholas for fifteen years, and then to the devisee that shall marry with a Norton. As to the first, although the words are not, *who shall first marry with a Norton*, yet it is all one with them, for these reasons: first the law supplies these words in a deed, 6 Co. 36 b. *The Bishop of Bath's case.* 2. In the King's grants, if two constructions be made, and one makes the grant void, then the other shall stand; so here. 3. It is agreeable with the reason of the law, because a thing which once vests shall not after be devested. 4. *Non præsumitur pluralitas*, that more than one shall marry with a Norton, and the words in the will fix in a single person. And there is a difference when there is incertainty in the **[83]** event, and when in the person, as in all cases of contingencies: and as to *Taylor and Sayer's case*, Cro. Eliz. 742, that is not law. As to the second point, if it had been immediately devised to the daughters, then if a devise to such of the daughters as should marry a Norton be good. 2. Nicholas his interest for fifteen years be determinable upon the marriage of one of the daughters with a Norton. As to the first construction, without question there may be a contingent executory devise without an estate precedent limited to that, because it leaves an estate in the devisor and his heirs till the contingency happen; and where it is to a stranger till such a thing happen, there is difference betwixt them, the reason of law holds in both. If I covenant to stand seised to the use of such a son as J. S. shall name, it is a good conveyance, if he nominate, 1 Co. 176 b. *Mildmay's case*, 8 Co. 95 a. *Manning's case.* And here it is to be considered if Amherst had an estate for fifteen years, here he leaves nothing to the heir, because Nicholas had the profits till marriage, and then to the daughter; and then it is a devise made to one for years, the remainder in contingency, which is void. 1 Co. 130 a. Popham 3, the case of *The Earl of Bedford.* But here is a contingent certain, as 2 Bulstr. 127, *Robert's case*, and *Jay and Brown's case* in C. B. The question is if good by immediate devise, Dyer 304, pl. 50. A devise to an infant *in ventre sa mere* is not good. So a devise to a college which is not yet erected, Hob. 32, *Cunden and Clerk.* In an executory devise it is not void, but shall descend to the heir in the mean time. 1. Although in a conveyance a freehold cannot commence *in futuro*, yet in an use or a devise it may. As a devise or feoffment to the use of A. after my death, remainder over, is a good conveyance, because it rises out of my estate. Mich. 13 Car. 1, B. R. *Long* against *Smith.* In case of a devise, Cro. Eliz.

919, *Hainsworth* versus *Pretty*, and 878, *Pain's case*. Devise to J. S. for fifteen years, remainder to the right heirs of J. D. is not good; but for fifteen years, remainder to the first son of J. D. is good; because the devisor takes notice that he hath not a son, and intends a future act, and the law aids him which was *inops consilii;* so here the devisor intends futurely.

As to the other point, that if it were an immediate devise, it is a devise to an infant *in ventre sa mere* for 15 years, if it be with a remainder over it is good by way of executory devise. An estate *in futuro* and a contingent precedent makes an executory devise; these executory devises were grounded upon the common law, as *Goodcheap's case*, 49 E. 3, 16 a. cited **[84]** in *The Lord Stafford's case*, 8 Co. 76 b. 7 Co. 9 a. 11 H. 6, 13 a. Bro. Devise 32. And the words of the statute of 32 H. 8 are not that H. devises to any person or persons, but at his will and pleasure; and see Cro. Jac. 394, *Blandford* versus *Blandford;* and so he concluded for the defendant, and judgment was given accordingly.

In the case of one Ferrars, against whom an information was exhibited for forgery: it was resolved by all the justices, that although the jury be charged and sworn in the case of a plea of the Crown, yet a juror may be drawn or the jury dismissed, contrary to common tradition, which hath been held by many learned in the law.

HERBERT *versus* TUCKAL. EJECTMENT.

[See *Haines* v. *Guthrie*, 1884, 13 Q. B. D. 822.]

Evidence. 2 Danv. Abr. 516, p. 5. Eq. Ab. 172, p. 4. 1 Sid. 162.

Upon evidence in a trial at Bar the question was, if one was of full age at the time of his will made by him. And upon evidence it appears, that he was born the 14th of February 1608, and he made his will when he was of the age of 21 years within two days; and to prove his nonage the defendant produced an almanack, in which his father had writ the nativity of the devisor, and it was allowed to be strong evidence.

THE KING *versus* BURGESS, &C.

Restitution. 1 Sid. 149. 1 Keb. 334, 343, 538, 600, 614.

On an indictment of forcible entry removed here in B. R. The defendant pleads to it in bar of restitution the statute of 31 Eliz. cap. 11. That J. S. is tenant for life of the tenements, and that he was in possession for the space of three years and more before the indictment, and that the defendants as servants entered as to them best seemed fit; and upon this plea the King demurs.

Winnington for the King. 1st, Here being particular estates set forth in the plea, it is not shewn how they commenced, which ought to have been. 2. It appears, that the parties indicted have not any estate, but that they are only servants to him who hath the estate. 3. They entered as servants, and it is not well pleaded where the command was made.

Jones for the defendant. As to the 3d, the constant pleading over-rules this; for to say, *that he entered as servant*, without saying *by his command*, is well enough. As to the 2d, **[85]** they are within the statute, because their possession is the possession of their master, and so the statute intends. As to the 1st, this plea is not like to a plea where a man is to derive an estate.

Hide Chief Justice. As to the 1st. although it had been only said, *that he was in possession for three years*, it had been good enough. As to the 3d, the command is not traversable. As to the 2d, there is not any accessary in this case, and the possession of the servant is the possession of the master.

Twisden Justice. To the 2d, a servant is within the statute.

Wyndham Justice accordingly, as to the 2d, for the reason aforesaid. As to the 1st, it is good according to the words of the statute. As to the 3d, it is only formal.

Kelyng Justice. To the 2d, here the person enters with force, and then the party ousted shall be restored, and the statute of 31 Eliz. cap. 11 shall be taken strictly.

Hide Chief Justice. Restitution doth not lie without conviction.

Twisden and Kelyng Justices. Restitution is of duty, but re-restitution is of grace. But after resolved, that the plea was not good, because it is not said that the defendants were in possession three years before the inquisition found, according to Dyer.

GUILBERT AND MARTIN. COVENANT.

Visne. 1 Lev. 114. 1 Sid. 157. 1 Keb. 575, 601.

The action is laid in the county of Hampshire for not repairing of an house in Barkshire; and upon *non infregit conventionem*, a verdict was found for the plaintiff: and it was moved in arrest of judgment. And Guidot for the plaintiff said, where the foundation is in one county, and the breach in another, the plaintiff hath election in which county he pleaseth to bring his action; and here is not any mis-trial, because the covenant is transitory, as in an escape.

Sawyer for the defendant; and he cited Bro. Visne 19. 22 H. 6, 13, pl. 16. 16 H. 7, 1.

Twisden Justice. The deed is now agreed to be where the plaintiff hath alledged it, and therefore good for the plaintiff.

Wyndham Justice for the plaintiff. If the issue had been special the trial ought to have been in Berkshire; but here is matter general alledged by the defendant, and he doth not [86] join in a particular issue, and he may give in evidence any collateral thing.

Kelyng for the defendant. The thing in itself is local.

Hide Chief Justice. It is not a general issue, but upon a particular breach, viz. the repair of the house.

Twisden Justice. The general issue here was *non est factum*. And because two justices were against two, the case was adjourned.

LEE *versus* RAYNES.

Assumpsit. 1 Keb. 566, 578.

The plaintiff declares, as executor of Vavisor, of a promise made thirteen years before: the defendant pleads *non assumpsit infra sex annos*. The plaintiff replies, that he assumed within six years. The defendant rejoins, as before; and issue was joined upon it, and found for the plaintiff. And it was moved in arrest of judgment, because the plaintiff in his replication hath departed from his count. Cro. Car. 228, *Tyler* against *Wats*.

Hide Chief Justice, Twisden and Wyndham Justices for the plaintiff. Because if the defendant had demurred upon the replication, it had been for the defendant; but here he hath joined issue, and therefore good.

Kelyng Justice for the defendant. Because the plaintiff ought to have given an account of the time betwixt the time laid in the count and the replication; but after judgment was given for the plaintiff.

TERRY *versus* HOOPER & UX'.

Words. 1 Danv. Abr. 122, p. 6, 168, p. 2. 1 Lev. 115. 1 Keb. 602, 644.

The plaintiff declares, that he is a lime-burner, and gets his living by buying and selling thereof; and the defendant said of the plaintiff *in arte sua, John Terry is a runaway, and he is a base cheating rogue, and John Terry shall never think to bring John Webb where he is himself, and rather than so I will spend* 20*l.* On not guilty pleaded and found for the plaintiff, it was moved in arrest of judgment, because he doth not say, that the defendant spoke of the trade of lime-burning, but *de arte sua* generally, and he may have another trade.

Jones for the plaintiff. In ancient time it was the constant course in declarations to lay a *colloquium* of the plaintiff; [87] and it was a grand doubt if it was good without

it, until Cro. Jac. 673, *Smith and Ward's case.* And there resolved *de quer'* supplies the *colloquium*, Cro. Car. 515. Words of an attorney in his profession. And 2. Lime-burner is such a profession of which he may be scandalized.

Wyndham Justice. Lime-burning is such a trade of which a man may be scandalized, and so in any lawful occupation whatsoever, for it is his livelihood. 2. The flourishes in a declaration are of no effect, but only to aggravate damages. 3. The saying here *de arte sua* are applicable to his profession; and a man may speak occasionally to the prejudice of the plaintiff without having discourse of his profession. As if two are speaking together of one another, and a third person comes in and affirms a scandal of him; this is commonly the worst scandal; and therefore judgment for the plaintiff.

Twisden to the same intent.

Kelyng Justice for the defendant: that *de arte sua* cannot be applied to his profession of lime-burning.

Hide Chief Justice for the defendant. Buying and selling is not incident to the art of lime-burning; and he cited a case in C. B. 1655, accordingly, and because the Court was divided no judgment was given.

PALMER *versus* FLESHEES.

Case. 3 Danv. Ab. 421, p. 7. 1 Lev. 122. 1 Sid. 167, 227. 1 Keb. 533, 625, 704, 836.

The plaintiff declares for stopping his lights. Special verdict finds that H. seised of a piece of ground, and building a messuage upon part of it, he grants the other part of the said ground to A. who builds upon it, and obstructs the lights of the first messuage; and if he could, was the single question upon the special verdict. And by Twisden and Wyndham Justices, that he may; but by Kelyng, that he may not. *Vid.* Cro. Eliz. 118. *Bury and Pope*, 1 Leon. 168, pl. 234.

[88] TERM. HILL. 15 & 16 CAR. 2, B. R.

Sir Robert Hide, Chief Justice; Sir Thomas Twisden, Sir Wadham Wyndham, Sir John Kelyng, Justices.

SHARROCK *versus* BOURCHIER. PROHIBITION.

Prohibition.

The plaintiff suggests that in the county of Lincoln there is a prebend called Langford Prebend, within the county of Oxford; and the prebendaries of that prebend and their farmers have had, time whereof, &c. the granting of the office of commissary within the said Prebend of Langford, and that Dr. Pocklington prebendary there made a lease to Copley of this prebend for three lives; and that the lessee grants to the plaintiff the commissaryship; and the defendant pretends that the disposal of this commissaryship belongs to the Dean and Chapter of Lincoln, who had libelled for it in the Court of Arches, and that the freehold of it would come in question.

Wyndham Justice. The prebendary cannot grant this power to make a commissary over to his lessee, no more than he may grant a thing which is annexed to his spiritual function.

Twisden Justice. Although it is not grantable, yet the freehold or power to grant is determinable at common law.

Kelyng Justice. It may be granted by the prebendary, for it seems to be a peculiar, and that this office runs with the prebend which is demised, and is not an assignment of the spiritual function, and therefore a prohibition lies.

Hide Chief Justice. The grant of the prebend *cum omnibus advantagiis* doth not pass this power to grant the commissaryship; but it is meerly ecclesiastical. And because the Court was divided, no prohibition was granted, but the rule was, that all things stay as before the motion till farther **[89]** consideration. But after Hide Chief Justice said, that the right of the office did come in question, and upon that a prohibition was granted.

YOUNG *versus* COLLET.

Audita querela. 1 Keb. 264, 556, 634, 640.

Audita querela. The plaintiff declares, that whereas John Collet in Hill. 1685, brought an action of trespass of assault and battery and false imprisonment against him to his damage of 500l. and had a verdict for 80l. damages, and 4 marks costs, and had judgment. And by an Act of Parliament held 25 April 12 Car. 2, it is enacted, *that all offences, &c.* viz. the Act of Oblivion. And in fact says, that this assault and imprisonment was by virtue of an ordinance for the regulating the excise, and in pursuance of it. The defendant pleads that it was not in pursuance of that ordinance; and found for the plaintiff.

Widdrington Serjeant moved in arrest of judgment, that an *audita querela* lies not in this case; for it is said by Stoner 27. E. 3, than an *audita querela* is a new kind of action, and that it commenced only 10 E. 3, and not before. And it doth not lie where there is any other remedy at law for the plaintiff, either by plea or otherwise. And here the plaintiff might have pleaded this ordinance, by virtue of which he justifies the imprisonment in evidence upon the trial, 1655, upon the Meal Act, and no *audita querela* lies where remedy may be had in another manner. 1 Inst. 290 b.

Wild Serjeant for the plaintiff. The Meal Act doth not appear to the Court, nor can the Court take notice of it; and this writ is grounded upon an Act of Parliament subsequent.

Kelyng Justice. The intention of the Act of Oblivion was to prevent new animosities, but for those things that were reduced to judgment, it was not intended that they should be undone, and therefore an *audita querela* doth not lie.

Twisden Justice. It seems that the defendant hath waived this exception; but if he had demurred upon the count it had been for him without question.

Wyndham. The Act of Oblivion is more comprehensive than any course before.

Hide Chief Justice. The Act of Oblivion only discharges acts of hostility, and not judgments obtained for such acts. And it was adjourned.

[90] CARPENTER *versus* MARSHAL.

Attornment. 1 Danv. Ab. 613 g. p. 1, 614, p. 11. 1 Lev. 28. 1 Sid. 189, 1 Keb. 643, 713. 1 Leon. 151. *The Lord Howard and the town of Waldens case.* Co. 7. Rep. 32.

Ejectione firmæ at the Bar, of a lease by Phillips, dated the 5th of April 1659. The defendant pleaded not guilty. The plaintiff made title, that the land in question is dutchy land lying out of the County Palatine, and there was a lease for years made of it to A. rendering rent, and shews a grant of the reversion the 7th of Jac. to Ferrers and Phillips under the Great Seal, County Palatine seal and dutchy seal, and that Phillips survived, and the rent was constantly paid to him during the lease, which ended in the year 1658, and in the year 1659, Phillips made the lease *ut supra*. The defendant shews a patent 8 Car. 1, to him, reciting that former patent to Ferrers and Phillips, and that it was void, because it passed only an interest in reversion, and no attornment had, and so grants the reversion to the defendant; and this being doubtful whether the former patent were good to pass the estate without attornment, and that upon Co. 4 Inst. 209, 210, it was found *specially;* the only question in this case being, whether attornment was necessary or not in this case.

Jones for the plaintiff. That the grant is good without attornment. 1. Some things are to be premised concerning the three seals here, the seal of the dutchy is pleaded, Rastal's Entries 524 and 636. But by the statute of 37 H. 8, cap. 16, lands lying out of the County Palatine shall pass under the dutchy seal. By the common law lands coming to the King in his natural capacity participate of the prerogative, Plow. 213 a. and b. And now it is to see if the statute of 1 H. 4, hath altered this; and it seems it hath not, the words are, that the lands *taliter & tali modo pertractentur, &c. sicut pertractari deberent si ad culmen dignitatis Regiæ assumpti minime fuissemus.*

The ends of this statute were, 1. To preserve inheritances. 2. To preserve the reputation: and yet to more purposes the lands partake of the prerogative where the ends are not crossed; as the King within age may grant them: so to have aid, Plow. 221 a. before issue joined, Cro. Eliz. 240. Double usurpation doth not put the King out of possession of a church he hath in the right of his dutchy. As to livery, 21 E. 4, 60 a. 26 H. 8, 9, the reason of that is, that it is a privilege adherent to his person, and cannot be separated, as livery, tender of a ring, demand of rent, &c.

[91] 2. If these lands do not pass without attornment, the King will be in a worse condition than a common person, for a common person may compel the tenant to attorn, but the King cannot; for a *quid juris clamat* doth not lie for the King, because a fine by the King is always by render, 6 Co. 68 a. If a fine be levied to an use, the *cestuy que use* shall have the rent without attornment, 4 Inst. 210. It is said that the tenant is compellable by English writ; but this only forces the person, and imprisons him, but does not pass the land it self. And as to that that is said, that it hath been used; there cannot be an usage time without memory &c. because it begins since 1 H. 4. For authorities in the case, there is Co. 4 Inst. 209, and so concluded for the plaintiff.

Weston for the defendant. Attornment is as necessary as livery, and no difference betwixt them; and so are the books 21 E. 4, 60. 26 H. 8, 9. The reasons of attornment are, 1. Notoriety. 2. Election of the tenant of his landlord, Moor 153. In *Bonnie's case;* by Beaumont attornment ought to be: and the statute of 2 & 3 Phil. & Mariæ, cap. 20, saith, that the lands there annexed shall pass by attornment, &c.

Kelyng Justice. No difference betwixt livery and attornment in this case.

Twisden. Coke, when he delivers the opinion in 1 Inst. well knew how these lands should pass out of the Crown, being Attorney General; and it is the constant course that no attornment shall be adjoined. But afterwards it was adjudged for the plaintiff, for they were guided by precedents; for Twisden and Wyndham said, that if it were *res integra* they could not find any reason why attornment should not be as well as livery upon a feoffment; but because the precedents are contrary, judgment was given for the plaintiff.

FORD *versus* WELDEN.

Ordinary. 1 Keb. 638, 647, 651, 669.

In a prohibition the plaintiff suggests, that the defendant libelled for defamation in the Court of Arches, and he is an inhabitant within the diocese of London, *contra formam statuti* 23 H. 8, cap. 9.

Powis for the defendant, that a prohibition shall not go; he cited Cro. Car. 339, *Gobbet's case*, where a prohibition in such case was denied, because there had been a composition betwixt the Bishop of London and the archbishop, for such **[92]** jurisdiction; and the archbishop doth not visit in the diocese of London for that cause.

Kelyng Justice. The diocese of London is not within the jurisdiction of the Arches, but the archbishop hath a peculiar jurisdiction there, consisting of 14 parishes, Co. 13 Rep. 4, and the mischief here was intended to be prevented by the statute; and so is Mich. 5 Car. 1. Cro. Car. 162. *Cadwalder* versus *Bryan*, Hob. 185. *Jones* versus *Jones*, and therefore a prohibition lies.

Wyndham. A prohibition doth not lie, because the Arches is within the diocese of London; and if there be any cause to remit the jurisdiction of the Bishop of London to the Arches, it ought to be determined by the civilians, according to the statute; and the composition mentioned in *Gobbet's case* amounts to a licence.

Twisden Justice. A prohibition lies. Although there was a composition before, yet now the statute takes it away, and the agreement betwixt the Ordinaries cannot prejudice the people for whom the statute was made; and as to *Gobbet's case*, the reason there is not good, for the Bishop of London cannot agree that the archbishop shall not visit; and 2dly, the composition intended ought to be pleaded.

Hide Chief Justice. A prohibition doth not lie; and he affirmed that such writ is *ex gratia*, and not *ex debito justitiæ;* but Kelyng and Twisden positively denied that; and because the Court was divided the matter rested as before.

TOWNSEND'S CASE.

Mandamus. *Antea* 69. 1 Lev. 91. 1 Sid. 107. 1 Keb. 458, 470, 659.

The Mayor and Commonalty of Oxford return to a *mandamus* to them directed, that if any person binds himself to be an apprentice it is by the course of their corporation to be inrolled, and that the said Townsend by indenture obliged himself to be an apprentice to one Colley, by which he covenanted that he would not contract matrimony during his apprenticeship, and that the said indenture was inrolled according to the said usage; and that the said Townsend within the first two years of his apprenticeship did marry, and after this he served rather as a journeyman than an apprentice. And to this return Holloway took exceptions; 1. Although he covenants that he will not marry, yet if he marry, this is only a breach of his covenant, but not any cause to bar him of his freedom. 2. The return that he **[93]** served rather as a journeyman than as an apprentice is uncertain and not positive; and for this cause the writ of restitution was awarded.

SANDS'S CASE.

Administration. 3 Danv. Abr. 407, p. 1. 1 Sid. 179, 403. 1 Keb. 667, 683. 3 Salk. 22.

The eldest son of Sir George Sands having a wife dies intestate, and administration is granted by the Prerogative Court to Sir George Sands as the next of kin; and now the wife libels in the Ecclesiastical Court to repeal these letters of administration, and to grant them to her; and Sir George upon this moves for a prohibition; and the Court granted it; and resolved by the statute of 21 H. 8, it is in the election of the Ordinary to grant administration to the wife, or to the next of blood. 2. The father is next of blood; and the case of my Lord Brook cited in *Ratcliff's case* is not law. 3. When the Ordinary hath once granted administration, he cannot repeal that, and grant it to another, because he hath executed his power. Cro. Car. 49, *Fotherbie's case.*

KEYS *versus* BRAYDON. ERROR IN IRELAND. EJECTMENT.

Error. 1 Keb. 705, 740, 755.

The plaintiff obtains a judgment against his own ejector, in a case where an infant was in possession; and the party concerned in the land brings a writ of error in the name of the feigned defendant. The plaintiff pleads in the writ of error the release of the defendant; and the Court held such release shall not be allowed. And the Court will not permit the party to proceed to try the issue if the release be good or not, because it is to bar the right of a third person.

And Hide Chief Justice said, that such release was offered in C. B. in a case between the Lord Leceister and the Lady Holborn, and the Court of C. B. refused to allow it.

[94] HURST'S CASE.

Mandamus. *Antea* 56. 1 Lev. 75. 1 Sid. 94, 152. 1 Keb. 349, 354, 387, 675.

A *mandamus* was granted in the case of Hurst to restore him to the place of an attorney in the Town-Court of Canterbury, and upon the return of the writ, restitution was granted, because an attorney is not such an office of which the commissioners for corporations have a power to intermeddle.

MORGAN *versus* MAN.

Award. 1 Lev. 127. 1 Sid. 180. 1 Keb. 678.

Debt on an obligation. The defendant demands oyer of the condition, which is to perform an award; and then pleads *nullum fecer' arbitrium.* The plaintiff replies,

and sets forth the award, and assigns breach for non-payment of the money. The defendant rejoins, that one Anne Collins the testatrix of the plaintiff recovered against him on a judgment in an action of battery and false imprisonment, and this judgment was one of the causes submitted, and the arbitrators had notice of it, and they did nothing concerning it. The plaintiff surrejoins, that the award was as well concerning that judgment as of other things betwixt them; *& hoc paratus est verificare.* The defendant demurs; and Jones for the defendant, here the plaintiff ought to have concluded to the country, and not to have said, *et hoc paratus est verificare,* for here is an affirmative and a negative, which make a good issue, which may be tried.

Wild Serjeant for the plaintiff. 1. This is aided upon a general demurrer, because only matter of form. 2dly. Here is a departure, because the defendant cannot rejoin concerning an award, when he hath pleaded before that there was no award; and upon debate it was resolved, this is a departure, and therefore adjudged for the plaintiff; but the saying, *et hoc paratus est verificare,* where he ought to have concluded to the country, is matter of substance; but for the departure judgment was given for the plaintiff.

[95] WILKS *versus* RUSSEL.

Prohibition.

It was moved for a prohibition to the Spiritual Court.

The plaintiff suggests, that the defendant sued him being executor, for tithes, and to have double damages, which doth not lie against an executor.

Kelyng Justice. If by the common law an executor shall not be charged, if the Spiritual Court will sue him; there a prohibition lies, because it exposes the executor to a *devastavit;* but the reason of Kelyng was disallowed, and a prohibition was denied. *Vide* Fitzherbert's Nat. Br. 51. Roll, 1 part, 919.

[96] TERM. PASCH. 16 CAR. 2, B. R.

The Judges being Sir Robert Hide Chief Justice. Sir Thomas Twisden, Sir Wadham Wyndham, Sir John Kelyng, Justices.

Theodorus Humfrys one of the clerks of Mr. Paget, *custos brevium* of this Court, complained of the said Paget for hindering him to take clerks fees due to him for transcribing records of Nisi Prius for the Western Circuit: and the Court ordered Paget to refund upon account, or else to be committed.

It is a rule of this Court, that if bail be put in before a Judge, the plaintiff hath twenty days to accept or disallow of it, and after that to file it under the pain of ten shillings.

WYNNE *versus* LLOYD.

Error. *Antea* 16, 55, 70, 96. *Postea* 134.

Jones for the defendant. A vouchee may appear in person, Fitz. Voucher 230, and he may come in by attorney *gratis* without a summons *ad warrantizandum,* Trin. 22 E. 3, 7 b. pl. 2. Fitzh. Voucher 197. Trin. 13 H. 7, 24, pl. 1. A caption before the time that it ought to be taken, is good enough. Hutt. 135. *Champernoon's case.* And afterwards judgment was affirmed by all the Judges, because it was resolved a good warrant of attorney. *Post.*

[97] BOWMAN *versus* MILBANKE.

[Disapproved *Smyth* v. *Smyth,* 1878, 8 Ch. D. 567.]

Devise. 2 Danv. Abr. 527, p. 16. Eq. Ab. 207, p. 1. 1 Lev. 130. 1 Sid. 191. 1 Keb. 719.

Upon a special verdict found, &c. (viz.) *I give all to my mother, all to my mother;* and resolved lands do not pass by these words, by the whole Court.

Brocket in ringing was taken up by the bell-rope, and by it he was killed ; and now the coroner took an inquisition upon his death, and found the bell to be a deodand. And Siderfin for the church-wardens moved, that the bell is not to be a deodand, because a bell is already given to God and to the church. And bells were invented about the year of our Lord 400 by Paulinus a bishop here; and by Hide Chief Justice, the case of Fitzh. Corone 389, of a mill-wheel, is not law. And it was adjourned. *Vide* Stamf. Placit. Corone, lib. 1, cap. 12, fol. 20 a. Fitz. Corone 405.

[98] TERM. TRIN. 16 CAR. 2, B. R.

CHARLETON *versus* FINNEY.

Pleading. 1 Sid. 215. 1 Keb. 759, 766. Dyer 121 a. pl. 14. 3 Leon. 90, 129. *Bunny* versus *Bunny*, 2 Roll. Rep. 63. *Gray* versus *Gray*.

In debt upon an obligation, the condition was, that if he paid all sums which should be expended about, &c. that then, &c. The defendant pleads that he paid all. The plaintiff replies that he had not paid all ; *& hoc paratus est verificare.* The defendant demurs generally, and alledged for the defendant, that the plaintiff ought to have concluded to the country in his replication, because there is an affirmative and an negative ; for otherwise there shall never be an end of pleading, but it shall be infinite ; and so is Cro. Car. 164, *Duncomb* versus *Smith*, and Yelv. 137, *Alexander* versus *Lane*. And of this opinion was all the Court. And Twisden put a difference when the plea is involved, and when it is direct.

Jurors.

Leech and five others being of the jury at Justice-Hall in the Old-Baily this last sessions, refused to find certain Quakers guilty according to their evidence, and upon this they were bound to appear here this first day of the term, and they appeared accordingly, and the Court directed an information to be drawn against them, and upon that they were fined. *Vide* the same case, 3 Leon. 147. *Vide postea* 138, *The King* against *Wagstaff*.

Note ; 1 H. 8. It was laid to Empson's charge, that he being Recorder of Coventry, and there sat with the mayor and other justices of the peace upon a special gaol-delivery within that city, on the Monday before the Feast of St. Thomas the Apostle, 16 H. 7. A prisoner that had been indicted of felony, for taking out of a house in that city certain goods to the value of 20s. was arraigned before them, and because the jury would not find the said prisoner guilty for want of sufficient evidence (as they after alledged) the said Sir Richard Empson supposing the same evidence **[99]** to be sufficient, caused them to be committed to ward, wherein they remained four days together, till they were contented to enter into bond in 40l. a-piece to appear before the King and Council 15 Hill. whereupon they keeping their day, and appearing before the said Sir Richard Empson and other of the King's Council according to their bonds, were adjudged to pay every of them 8l. for a fine, and accordingly made payment thereof, as they were then thought worthy so to do. But after at a sessions holden at Coventry 1 H. 8 an indictment was framed against him for this matter, and thereof was found guilty, as if therein he had committed some great and heinous offence against the King's peace, his Crown and dignity. Hollinshed, part 2, in the time of 1 H. 8, fol. 804, and fol. 1104, in the case of *Sir Nicholas Throckmorton*, 1 Mar.

Note ; Before Westm. 2, cap. 30, some justices are said to rule over the recognitors of assise, and made them give a precise verdict without finding the special matter. 2 Inst. 422.

[100] TERM. HILL. 16 & 17 CAR. 2, B. R.

ADAMS *versus* TOMLINSON.

Debt. 2 Danv. Ab. 499, p. 9. 1 Lev. 153. 1 Sid. 236. 1 Keb. 827.

Judgment was given for the plaintiff in B. R. upon which the defendant brought a writ of error in the Exchequer-Chamber, and after the writ of error brought, the plaintiff in the first action brings an action of debt upon the judgment, to which the defendant pleads *nul tiel record*. And resolved the plea is naught; for notwithstanding such a writ of error an action of debt lies upon the judgment, as Dyer 32 b. pl. 5 and 6, and 18 E. 4, 7. But Bendl. 20, pl. 31, takes this difference, that when the action of debt is brought before the writ of error, the action continues good. But if the writ of error is first brought, debt does not lie; but in *Limbny and Langham's case* the Judges held it was all one, and that a writ of error is not any *supersedeas* to an action of debt; and that notwithstanding the writ of error, the bail may bring in the principal in discharge of the mainpernors.

CLERK *versus* MOLINEUX.

Escape. 3 Danv. Ab. 117, p. 8. 1 Lev. 159. 1 Sid. 269. 1 Keb. 845.

In an action upon the case for an escape against the Sheriff of Nottingham. The defendant pleaded, that during the time the prisoner was in his custody he received a writ of privilege from the Marquess of Newcastle, reciting that he was a justice of peace of the said county, and *custos rotulorum*, and that the said prisoner was convened before the justices at the Quarter-Sessions, and that by the law of England the prisoner ought not to be molested *eundo & redeundo* during the time that he had causes there depending, and commanded the sheriff to dismiss him, which the defendant accordingly did. To this plea the plaintiff demurred; and it seemed an ill plea, because the justices can't cause an arrested person to be dismissed. *Vide* Browl. **[101]** l. 1, 15, *Wilsons* against *The Sheriffs of London*, where the Court held, that if a man was arrested in the face of the Court, the Court had power to discharge him, but not otherwise.

PATRICK'S CASE.

Mandamus. 1 Lev. 65. 1 Sid. 346. 1 Keb. 289, 294, 298, 551, 610, 665, 835. 1 Keb. 65, 164, 259. Hollingshead fol. 765, l. 2, *dit que le feme de E.* 4 *erect cest college.*

A writ of *mandamus* was directed out of the King's Bench to Richard Bryan, the senior fellow of Queen's College in Cambridge, to admit and pronounce Simon Patrick president of the said college, being *debito modo electus* president, or to shew cause to the contrary. After an *alias* and *pluries* Richard Bryan makes this return: viz. that King H., 6 30 *Martii* 26th of his reign, by letters patent under his Great Seal of England, gave licence to Margaret Queen of England, his consort, that she might found a college to consist of one president and four fellows (more or less, as the revenues of the said college should happen to fall out) in the University of Cambridge, and ascertains the place *ad studendum & orandum*. Which president and fellows for the time being, according to such statutes as the Bishop of Coventry, John Somerseth Chancellor of the Exchequer, and others whilst they lived, or the greater part of them should live, should make, should be governed, punished and deprived. That Andrew Ducket should be the first president, and names the other four fellows, clerks. That the said president and four fellows may afterwards admit more fellows. That the name of the college shall be *Reginale Collegium Sanctæ Margaretæ & Sancti Bernardi in Universitate Cambrigiæ*. That 15 April 26 H. 6, Margaret founded the college accordingly, and made the said Ducket president, and the other four fellows, and that they might choose others. The Bishop of Coventry, Somerseth and the others before appointed, make and ordain statutes and orders; amongst which they ordain, 1. That

the college be called Queen's College, and that in the same be one president, whom all others *in omnibus licitis & honestis* must obey. That there be nineteen fellows, whereof every one must take holy orders within two years after they become masters of art, unless the president and greater part of the fellows shall give them longer time. 2. That none of the fellows sow discord, and if any be found so doing, they injoin the first time admonition by the president or his deputy; the second time by the president and two fellows; the third time expulsion. And if **[102]** discord arise between the president and the fellows, or any of them, the president must call the fellows together three several times in three days space; and if they cannot compose the differences, then as well the president as the fellows are bound to stand to the award of the chancellor, and the greater part of the *præpositi* of the colleges, under pain of expulsion. That King James 9 *Martii* 3 *Jac.* confirmed all former charters and grants to the university and scholars of the same. And farther, that the chancellor of the said university for the time being (if within the town or suburbs) or in his absence, the vice-chancellor, *per cancellarium universitatis prædictæ in ea parte deputat' sive appunctuat'*, should be ordinary visitor (where no special visitor was nor should be otherwise appointed) of all colleges and halls in the said university. That no special visitor is appointed of this college. That Dr. Edward Martin late president died 7 April 14 Car. 2, and that ever since Edward Earl of Manchester hath been chancellor, and out of the town of Cambridge and suburbs thereof. That Dr. Dillingham is his vice-chancellor. That the town and University of Cambridge are within the diocese of the Bishop of Ely. That at the death of Dr. Martin, and ever since, Mathew Wren was and hath been Bishop of Ely. That Simon Patrick hath not made his appeal to the chancellor, vice-chancellor or bishop, and therefore he the said Richard Bryan cannot admit or pronounce the said Simon Patrick president.

Masters *pro* Patrick. I conceive the return to be insufficient, and the statutes of the college recited are not material, and the letters patent are not well applied. 1. It is said that the college is within the diocese of the Bishop of Ely; but it is not said, that it is within the jurisdiction of the bishop; and it may be within a peculiar of the diocese, in which the bishop hath nothing to do. 1. A college is a temporal corporation, Coke sur Litt. 250 a. Dyer 255 b. Finch. 92. 2. A college is temporal, viz. to pronounce him president. Dyer 209. Deprivation is a temporal act, *et contrariorum eadem est ratio.* And it is not requisite that the president be in orders. 44 Ass. 9.

Object. This college is founded *ad studendum & orandum*, which implies that it is spiritual.

Resp. Coke sur Lit. 342 a. An hospital, though founded *ad orandum*, is lay, for every one is bound to pray; and *ad studendum* doth not refer to divinity. And the fellows here are to enter into orders, but it doth not here appear that the fellows are in orders.

[103] *Object.* An impropriation cannot be to a lay corporation, but it may be to a college.

Resp. It may be to a nunnery, Plowd. and yet that is no spiritual corporation. And this Court is the proper place for redress and examination of this matter, because otherwise here would be a failer of justice. Co. Inst. 4, 71. And here can be no prejudice to any one by allowing a *mandamus;* for notwithstanding such a writ, the party grieved may try his right, viz. the party whom the seignior fellow hath already admitted president.

Authorities in the case are these; Fitz. Assise 150. 8 E. 3, 69. 9 H. 6, 32. Dyer 209. 6 H. 7, 14. In the case of a free chapel. So in case of the granting of letters of administration, *Luskin* versus *Carver*, Stile's Rep. And in case of the usher of a grammar school, *Crawford's case;* and so prays a *mandamus.*

Brampston *contra.* This college being founded for a spiritual end is a spiritual corporation, Linwood 111, & 155. The Orders of the Carthusians. 8 Ass. pl. 29 & 31. L. 5 E. 4, 127 and *Allen* and *Nashe's case.*

Jones *pro* Patrick. This return is insufficient, because it doth not contain an answer to the writ; for the return says that Mr. Patrick hath not appealed; but shews no cause he should appeal, 34 H. 6, 41, but in truth, the return is to the jurisdiction of the Court. I shall consider the return in two points, 1. As without reference to the letters patent; and 2. What influence the letters patent have upon the same.

As to the 1st, the King gives licence to the Queen to erect a college *ad studendum & orandum*, and no visitor is appointed; and whether there be any remedy in this Court to restrain a grievance, is the question. This Court hath jurisdiction to restrain and take cognizance of all misdemeanors extrajudicial. Co. 11, 98, *Bagg's case.* 1. If there be no remedy for this here, there is remedy no where.

Object. Mr. Patrick ought to appeal to the visitor.

Resp. It doth not appear by this return that there is any visitor. And 1. The foundation doth not appoint any visitor. And 2. The law doth not appoint the founder to be visitor; and if it did, Queen Margaret the foundress here was a foreigner and died without issue: and we shall not intend any visitor when 'tis not mentioned, because a return ought to be certain, and is not to be construed by intendment, for the party cannot reply to it.

[104] *Object.* The Ordinary of the diocese is visitor.

Resp. 1. There is no authority in our law for that, in case of a college. 2. The experience in the university is totally against it; for the bishop appoints visitors, but not the bishop of the diocese. 3. When the letters patent recited in the return were made, the law was not so taken, for 'tis added as a supplement, who shall visit. 4. The nature of this corporation doth not allow the bishop to be visitor; for I take it for a rule, that where the head of the corporation is constituted without the concurrence of the Ordinary, there the Ordinary hath no jurisdiction, be the corporation spiritual or temporal. 1. For a spiritual corporation, as an hospital. F. N. B. 42 b. 50 p. In case of a free chapel the Ordinary shall proceed *per pœnam corporalem & non pecuniariam.* The King's chaplain may be visited as a private person, but not in his politick capacity. 6 H. 7, 7. He cannot visit a chaplain, because he comes not in by his act. In case of a dean, *in temps* Ed. 6, Br. Præmunire 21. In case of an abbot, 9 H. 6, 32. If he comes in by election without the concurrence of the Ordinary. 2. For a temporal corporation, it is plain; and here this college is not a spiritual corporation, because neither the persons nor employment are spiritual. The president is not to be in orders; the employment *ad studendum & orandum;* all learning; *ad orandum.* So must all lay professions, hospitals, a private school, a workhouse is *ad operandum & orandum.* It is the duty of every one.

As to the 2d, let us consider what influences the letters patent have in this case; I conceive they alter not the use. 1. Here are no restrictive or negative words, as to the jurisdiction, as in Act of Parliament, or as in the grant of conusance of pleas, *Ieo quod nullus justiciarius se intromittat.* 2. It doth not appear that there was any visitor at the time of the return. The vice-chancellor ought to be thereunto appointed, and he doth not visit *quatenus* vice-chancellor.

Object. A presidentship of a college is not an office of a publick nature.

Resp. Bagg's case is, that this Court hath conusance of all wrongs, be they private or publick. 2. But then is of a publick nature more than the petty corporations in Cornwal, or any petty borough.

And for authorities, there was no president for *Bagg's case;* but the Judges finding the mischief, did out of the foundation of law frame that writ; and here the president cannot have an assise, and therefore ought to have this writ.

[105] Finch Solicitor General *contra.* I agree the power of this Court to be very great, and *Bagg's case* taken *cum grano salis* is good law. But in all cases where the foundation of a corporation is eleemosynary (be it lay or spiritual) the Ordinary is visitor thereof. Linwood cap. de Religiosis Domibus Verbo Ordinarius. *Locus pius non potest fundari eo modo quod non possit episcopus se intromittere.* And if the Ordinary is not, then the founder is visitor; and if neither, then the King, as fountain of authority; and if so, then the King grants this authority by his letters patent. A man cannot resort to this Court, but either it must be *per saltum* or *per gradus,* Hob. 23, *Dr. James's case,* and *Kenne's case.* Deprivation is not questionable here, and 13 Jac. *Huntley's case.* The consequence is great. Where the founder names a visitor and prohibits appeals from him, yet an appeal from the visitor is not restrained. Magdalen College in Oxford is so founded, *absque ullo appellationis remedio;* and resolved *inter* Dr. Pierce and Dr. Yarbury, such clause doth not restrain an appeal from the visitor; although it was there objected, that he might come into this Court, but resolved he ought to resort to the visitor, and the words are contrary to common right. See the clause of *omni appellatione remota,* Co. Inst. 4, 340.

Raymond *pro* Patrick. I shall waive the exceptions to the form of the return, which is at the best but argumentative; and out of which the consequence intended cannot without much incertainty be deduced, to wit, that the college is within the jurisdiction of the Bishop of Ely, therefore not within the jurisdiction of this Court of B. R. For a man in some cases may have redress in both jurisdictions F. N. B. 51 b. He may sue here and there for a pension; and that it is within the diocese of the bishop, therefore it must be within the jurisdiction, whereas it may be within some peculiar. Such a return by a sheriff hath been resolved naught, as Plowd. 14 a. *Manxel's case.* In *habere facias seisinam* the sheriff returns, that another is tenant of the land, and so he cannot give possession without trespass, it is no good return. But I shall waive these exceptions, and speak only to the main point intended in the return, which is this, that this college is within the jurisdiction of the Bishop of Ely, who is proper Ordinary, and that Mr. Patrick ought to apply himself to the bishop and not to this Court, which in short is, that the bishop of the diocese, where no special visitor is appointed, is *de communi jure* visitor of colleges in the universities. In examining of which point, as to our case, **[106]** I shall humbly crave leave to premise three things, which I conceive will be granted me on the other side, for they are very plain.

1. Upon the whole record, upon view of the writ and of the return thereof together, it doth most plainly appear to the Court, that the plaintiff Mr. Patrick is greatly injured, and that by the defendant Mr. Bryan, and so deserves no more favour than a tort-feasor; for the plaintiff by the writ suggests, *quod debito modo electus fuit præsidens ejusdem collegii, & in locum præsidentis collegii prædicti admitti se obtulerit;* and that notwithstanding, Richard Bryan the defendant being seignior fellow, *& cui pertinet præsidentem sic electum pronunciare, & personam sic electam admittere, & facere electum præsidentem jurari & coram communitate collegii in capella ejusdem ad mensam domini personaliter præsentari, prædictum* the plaintiff *in præsidentem admittere renuit.* The defendant returns, the foundation of the college, and some certain statutes (so many as he thinks make for his turn) the letters patent, and that the college is within the diocese of the Bishop of Ely, &c. and so he cannot admit him; but not one word that the plaintiff was not duly elected, nor that Mr. Bryan is not the person that hinders the plaintiff's admittance, both which by silence are agreed unto by Mr. Bryan; but that the plaintiff hath not taken a right course.

2. That the letters patent as to the matter in question are of no concernment: 1. Because they are not restrictive, so as none other shall visit but the chancellor or vice-chancellor. 2. Because the vice-chancellor must be *in ea parte deputat' sive appunctuat'*, which is not here alledged to be done: so that they make nothing in this case, and this being observed already, I shall speak no more to them.

3. That (contrary to what hath been by the way alledged, but not proved on the other side) every eleemosynary foundation is not visitable by the Ordinary; 'tis said, 8 Ass. pl. 31, that the Ordinary shall not visit but where he hath institution and induction; and with that agrees the opinion of Keble, Hill. 6 H. 7, 14, pl. 2. But admit that the Ordinary may visit where he hath not induction, yet his power shall not extend to all eleemosynary foundations; for Regist. Orig. 35 a. A prohibition is to an officer of the Court of Canterbury and his commissary for the holding plea concerning the grammar school of Fernedon, in a suit between the Abbot and Convent of Battel and William Pipod, Regist. 41 a. Another prohibition **[107]** to the Archdeacon of Taunton for holding plea concerning an hospital, and yet nothing can be more eleemosynary than schools and hospitals. And could the Ordinary by the common law have visited all foundations eleemosynary, the statute of 2 H. 5, cap. 1, had been to no purpose, which doth enable the Ordinary to correct the abuse of lay-hospitals erected for the purposes therein mentioned. So that I do conceive, as it is of hospitals, so of all other eleemosynary foundations, and without special visitors. 8 Ass. pl. 29 and Coke l. 10, 31 a. If the hospital be spiritual, the bishop shall visit; if lay, the patron: for so the writ in the Register before cited is, fol. 41. *Totum in temporalibus fundatum existit.* And the Statute de Circumspecte Agatis, 13 E. 1. *Episcopus teneat placitum in Curia Christianitatis de iis quæ mere sunt spiritualia.* And Linwood 53, expounding what are *merè spiritualia*, says, *quæ non habent mixturam temporalium.* And if there be no visitors specially appointed, then in common reason, and according to the rule of law, *ne deficeret justicia*, the King. So that now, whether

this college upon the whole record be of a lay or spiritual foundation, is the question: for if it be spiritual, then I must acknowledge the Bishop of Ely (admitting the Court shall intend its being within the compass of his diocese to be within his jurisdiction) in all things spiritual ought to visit; but if it prove a lay corporation, then I conceive the King is to visit, for no founder appears, *ne Curiæ Regis deficerent in justitia exhibenda*, Co. Inst. 4, 213. And I do conceive this college, as it is here described, to be of a temporal and lay foundation. In the proof whereof I shall make no difference between it and other colleges of the universities; for if any difference, it will be on my side, the foundations of other colleges being more spiritual than this.

1. From the end and purpose of its foundation, viz. *ad studendum & orandum.* 1. *Ad studendum*, which may be, and by experience we see hath always been humane learning principally, viz. logick, philosophy, mathematicks, &c. And the constant practice founded upon the opinions of learned men concomitant with practice. Camden in his Britannia 381, describing the University of Oxford, says, that the places of learning were in old time called *studia*, for that they were designed *pro bonarum literarum studiosis;* and in his description of Cambridge, having repeated all the colleges in that university, amongst which he names this of Queen's, speaking in commendation of this university, *I will*, says he, **[108]** *let pass little monasteries and religious houses.* So that he makes a plain distinction between the colleges in the university and religious houses. And Stow in reckoning up all the colleges of both universities and their foundations, fol. 450, &c. shewing some originally founded for grammar, others for logick, others for other sciences, reckons none of them barely for ecclesiastical matters. Linwood 155, K. cap. de Magistris, says, A college is only *habitaculum scholarium;* and 161, cap. de Hæreticis, Verb. *ipsius loci*, where treating of the jurisdiction of the Ordinary in punishing hereticks, puts this question: What if the place be *non habens ecclesiam parochialem, qui est locus religiosus, vel collegium, aliusve locus qui non subest ecclesiæ parochiali?* So that *collegium* (which I take to be in the university) is a place distinct from *locus religiosus.* And in truth, if we observe the foundation of all religious and ecclesiastical corporations and societies, not one was ever seen whose end was *ad studendum.* Their design was either to pray *pro animabus*, or to observe such and such canonical hours, according to such and such an order, their mattins, vespers, compline and other divine offices tending to divine worship, which was already by the Church prepared to their hands, and such as men of little or no learning might perform. They might contemplate upon what was already invented and studied, and agreed on to their hands, but not excogitate new matters in religion. They went on in a circle, and where they left off at night, they began the next morning. They were not injoined *ad studendum*, but *ad celebrandum divina.* True it is, some members of such foundations have been students, and have profited in arts, and have written learned tracts, but they were not injoined to do so; for 'tis not study, but *celebratio divinorum* makes an ecclesiastical corporation. For suppose a man should erect a society, and direct that it should be to study the school-men or the fathers, to enable them in the polemical parts of theology, or to paraphrase or make a comment upon the Bible, as the Schola Conimbricensis did upon Aristotle, this would not be a spiritual corporation; for that the spiritualty consists *in celebrando divina & fungendo divinis officiis*, and not *in studendo.* 2. *Ad orandum* is no more than what is implied, for with all studies that must be concomitant. A lawyer by the Lord Coke's rule of *quatuor orabis* may be as well an ecclesiastical person, if *ad orandum* should make him ecclesiastical. I may say of this word *ad orandum*, as Lindwood expounds the words **[109]** of *circumspecte agatis, de mortali peccato.* 1. Says he, *non intelligas de omni peccato mortali, sed de tali cujus punitio de sui naturâ spectat ad forum ecclesiasticum;* for if the Church should take conusance *de ratione cujuslibet peccati mortalis periret temporalis gladii jurisdictio*, for that every evil act would have something of mortal sin in it. So if the injunction of saying one's prayers would make a corporation spiritual, none almost of those, which are out of doubt lay hospitals, but in their creation would be spiritual. Nay in *Pit's and James's case*, Hob. 121, prayer for souls was injoined, and yet the hospital was lay. And denomination is from the greater part of the imployment, viz. If it be to celebrate *in ecclesiasticis*, 'tis that makes an ecclesiastical person. They were *divino mancip' servitio*, and did *Deo servire.* As to the objection, that the fellows are here injoined to be in orders, it hath been answered: 1. The president is not injoined. 2. They may be dispensed with amongst themselves.

2. From the use. 1. How they are used in the commonwealth. 2. What acts they do not compatible with a spiritual corporation. To the 1st, 8 Ass. pl. 29. A spiritual corporation is not chargeable with subsidies, nor taxed amongst the laity. Now a college in the university is so taxed in every Act for subsidy, as we may see 21 Jac. 3, Car. 1, and the last Act for subsidies, 15 Car. 2, only there is a proviso to dispense with their payment. 2. The university sends burgesses to the Parliament, which they could not do if they were a spiritual corporation, *et eadem est ratio partis & totius*, if the whole be lay, the essential parts cannot be spiritual.

3. From their constant application to the temporal power upon all occasions of grievances amongst them, and the balking the bishop of the diocese. Linwood fol. 155, cap. de Magistris. When books of Wickcliff were spread abroad, and others pretended to expound the Scriptures, a canon was made, that none should do so, but by licence from twelve of either of the universities, to be allowed by the Archbishop of Canterbury, not the Bishop of Ely, or of the diocese. 5 E. 2, M. 8, Riley 533. One Roger Baketon having a desire to take his degree in the university, was denied, and thereupon he brought his *mandamus* directed to the chancellor and masters of the university. *Teste Rege* 28 *die Martii al York.* Riley 534. In the same year the university thought themselves so far from being a spiritual corporation, **[110]** that they excluded certain scholars who were of the Order of the Predicants, and denied them any privilege of the university, and thereupon these scholars (waiving the bishop of the diocese) apply themselves to the King, and obtain a *mandamus* directed to the chancellor, *regentibus & non regentibus* of the university, commanding them to allow the complainants the privileges by them challenged. *Teste Rege*, 29 *Martii* 6 *E.* 1. Co. 2 Inst. 640. *Rex non intromittit se de his quæ spectant ad forum ecclesiasticum, prosequatur coram Ordinario jus suum.* Riley 601. Claus. 19 R. 2, M. 24. Robert Lichlade, a scholar in Oxford for maintaining Lolardy was complained of, and the university was remiss in punishing him; the bishop takes not upon him jurisdiction though in a cause of heresy, but the King directs his writ to the chancellor of the university to remove him: in which writ the words are very remarkable, that this Lichlade did *publicare, communicare & docere opiniones nefarias, ac conclusiones detestabiles in fidei Catholicæ læsionem, & universitatis prædictæ subversionem, nisi brachio Regiæ Majestatis* (not the visitation of the Ordinary) *citiùs resistatur;* and then commands that they shall examine *per inquisitionem vel alio modo legitimo si ipsum talem inveniri contigerit: per inquisitionem* according to the common law, and not by ecclesiastical process. 50 E. 3, pars 2, membrana 8. *John Wolverton's case.* A *mandamus* to restore a fellow in Cambridge, who was turned out of the university; and F. Corody 6, the very sending the writ shewed a right to the jurisdiction till the contrary be shewed. 21 E. 1, C. B. Rot. 318, March 181. *Habeas corpus* for a scholar imprisoned by the vice-chancellor, no application to the bishop which had been proper, if oppressed by false accusation for heresy, &c. All which precedents shew that the colleges were of temporal conusance, or at least not subject to the visitation of the Ordinary, 5 Mar. A commission issued to visit the University of Cambridge, amongst which visitors were some bishops, viz. Chester and Chicester, but the Bishop of Ely was none. The letters patent in the return do imply that the bishop had nothing to do with this matter.

I will not repeat the answers which have been made to the objections, as 1st, that an impropriation may be to a college, which 1st, hath not been resolved; for none have so been. All the impropriations they now have being heretofore impropriated to religious houses before the dissolution. 2. It was not resolved, whether an appropriation may not be to a lay **[111]** corporation, there being no judgment in *Alden and Tothil's case.* 2. That the act to be done is temporal, and no more than the writ *de admittendo clerico*, F. N. B. 38, and induction is a temporal thing. 8 Jac. Bulstr. l. 1, 179, *Holt's case.* And an action lies against the archdeacon for not inducting, F. N. B. 47 H. 3, 51 b. and then Coke *sur* Lit. 96 b. If there be remedy *in foro sæculari*, then none *in ecclesiastico.* As for *Dr. Lewes's case* it was not resolved judicially, and if it had, this point was not in question. As for *Dr. Widdrington's case*, I conceive though the conclusion of that case do not, yet the reason given by the Court upon granting the *mandamus* will make for me; for then the writ was opposed with the argument, that there were special visitors, the Court ruled, that a writ should go, because it appeared not to them till the return, that there were such. So that they took no notice that the bishop should visit; who is notorious.

As for precedents, Hob. 270, *tantum habent de lege, quantum habent de justitia*, and they are built upon reason and justice; now though I am not able to produce any other precedents, than what I have before mentioned; yet (as hath been by those who have argued on my side already observed) there is as much reason for this writ (if not much more) as to swear a town-clerk, churchwarden, constable, mayor or head of some corporation; nay for a scavenger, to command him to take upon him that office. Mich. 1652. The case of *The inhabitants of Clerkenwel*, and in *Bagg's case*, and 4 Inst. 71. In any case where there is oppression, which I conceive extends to this case, it appearing to the Court that my client hath right to this place, but held out by a dilatory return. Lastly, This writ will not conclude the right of either party; but duly elected or not elected will be tried in an assize, or other action, as in the case of *The Abbot of Fountain*, 9 H. 6, 32 b. And this very argument was prevalent with Bryan Chief Justice in 6 H. 7, 14, where the case was, a free-chapel was annexed by licence to Magdalen College in Oxford, the master avows for rent by the name of master of the college and *custos capellæ;* and it was objected, that whereas it was set forth, that the union was by the licence of the Ordinary, it did not appear whether the Ordinary had any jurisdiction or no; and no resolution as to that point: but ruled by Bryan that it was all one to the tenant, whether it was a free chapel or visitable; for the rent was due, and no prejudice could be to the tenant by determining either way. The prejudice was the thing considered **[112]** by the Court. So here no prejudice in granting, but much by not granting; and so I pray the writ to swear Mr. Patrick.

Baldwin *contra*. There are 4 things inquirable in this case. 1. Whether this college be a spiritual or a temporal foundation. 2. Whether by this return it appears, that there are any special visitors for this college. 3. Whether this Court may intermeddle with the government of the college. 4. Admitting it may, whether it may do it *per saltum*, or whether Mr. Patrick ought not first to have appealed to the bishop. 1. 'Tis a spiritual foundation, the fellows are called clerks, and (*ergo*) their study is theology, and the statutes of the college are, that they must enter into orders, and every college is of a spiritual foundation. 1. From the end, for the advancement of learning, 11 H. 4, 47, per Thirning. A grammar school is spiritual, Seld. Hist. de Dismes, 121. Hospitalers and Templers are religious, and yet no part of the clergy. Linwood de Religiosis 118. 2. Colleges are governed as other ecclesiastical corporations. 8 Ass. pl. 29, and 31. 3. A thing of an ecclesiastical nature may be annexed to a college. 6 H. 7, 13. 10 H. 7, 19. 11 H. 6, 26, and 27. Co. Lib. 5, 10, *Caudry's case*. 7 E. 3. Qu. Impedit, 19. Dyer, 255. *Allen Clerk's case*. 2. It appears there are no visitors. 3. This Court cannot intermeddle. 1. Because a college is a spiritual foundation, and hath a proper visitor. Spelman's Gloss. verb. Visitator, Trin. 13 Car. 1, *Allen* versus *Nash*. Ejectment of the demise of Huntley. The defendant gave in evidence a deprivation of the lessor by the High Commissioners; but resolved, that if he had been deprived by the Ordinary, the Court could not have intermeddled. 2. *Ab inconvenienti*. For if a *mandamus* should lie for putting in a fellow, it would lie for a fellow that is turned out; and so it would be a charge to the scholars, and it would be against the dignity of this Court to take notice of every trivial offence arising between the scholars in the universities. 3. This Court did never intermeddle in this kind. So Dyer 376. Error of a judgment in the Cinque-Ports.

Object. Dyer 209. *Covenye's case*.

Resp. That case makes for Bryan my client.

Object. *Hern's case*, who was a fellow, and had a *mandamus* to restore him, being turned out.

Resp. The visitor of that college was then the Archbishop of Canterbury, and that see was then vacant, and so there was no proper visitor in being. As to *Crayford's case*, Resp. **[113]** Hobart Rep. 17, *James's case*. The King is fountain of justice and distributes it accordingly. 4. Admitting that resort might be made to this Court, yet it ought not to have been *per saltum*. 5 E. 3. Fitz. Error. *Curia advisare vult*.

THE KING *against* THE CITY OF CANTERBURY.

Privilege. 1 Lev. 159.

An information was exhibited against John Percival, Thomas Godfry and Walter Wilford, Esq; for a riot and assault by them made upon one Baker, a messenger of the King, at the Three Kings Inn in Canterbury. To which the defendants pleaded not guilty, and a *venire facias* issued to the Sheriff of the City of Canterbury (which is a county of it self) and the sheriff returned a *venire feci duodecim, &c.* Then there went out a *distringas*, and upon that the sheriff returns, that the City of Canterbury is an ancient corporation, &c. known by such name; and that by letters patent bearing date the sixth of his reign, King James granted to the said city, &c. that they should not be compelled to go out of the said city upon any cause whatsoever, &c. the sufficiency of which return was very much questioned by the Court.

Hardres counsel for the sheriff, to make it good, argued, that the grant of exemption is good in point of creation, for which he cited 18 H. 8, 5. 42 Ass. pl. 5. 39 E. 3, 15. But the question (*he said*) would be, whether the words are sufficient in the King's case; and he conceived they were, because they are, that the citizens, &c. shall not be compelled to appear before the King, or any Judge in any jury, assise, recognition, &c. (excepting high treason), and the occasion of the granting this patent he hoped would make it apparent, that it was the King's intention they should be exempted; for 23 H. 6. Exemption was granted to the citizens, and yet they went out of the city to Assises, notwithstanding the first charter was confirmed 1 E. 4. But 4 Jac. a question arose upon a clause of this charter, when one Robert Lad was indicted for murder, and it was referred to the Lord Chief Justice Hobart and the Attorney General, and they certified that the charter was not sufficient, because the B. R. was not comprised in it, according to 8 H. 6, 21. 21 E. 3, 64. 11 Co. Rep. 64. *Dr. Foster's case coram Rege;* then comes this charter of 6 Jac. and if this does not aid in cases where the King is concerned, the patent will serve for nothing, for the **[114]** precedent charters have all the other clauses included in them. He confessed exemption did not extend to the King, unless he be named, and the words *licet tangat nos.* 42 Ass. pl. 5. 8 H. 6, 21. 39 E. 3, 15. But here the words are equivalent, and that is well enough. 8 H. 6, 19. Then as to the time of pleading this charter, it comes soon enough upon the return of the *distringas*, for it can't come upon the return of the *venire fac.* because no man is mentioned in it till it is returned. 18 H. 8, 5. Citizens shall not have advantage of a charter upon an appearance, but upon the return. 27 H. 6, 5. 34 H. 6, 25. 35 H. 6, 42. And if the return is naught an action will lie against the sheriff, because he did not obey the writ of allowance, which is also returned. 2 Inst. 130. 18 H. 8, 5. 22 E. 3, 20. Debt against a Grecian; the defendant prays to be tried *per medietatem linguæ* upon the *distringas*, and it was allowed, because it appeared upon the declaration he was an alien. And it differs from the case in Dyer 357, Stanf. 89, because there it did not appear in the declaration that the defendant was an alien, for which reason he prayed the return might be allowed. But at another day in Easter-term 17 Car. 2, the Court was of opinion that the return was naught. 1st, Because the sheriff having returned upon the *venire fac.* that there were *probi & legales homines*, and now upon the *distringas* returning, that they ought not to appear, &c. contradicts himself, and is estopped by his first return. 2. The sheriff ought not to claim this privilege, but every singular person that is desirous to have the benefit of it. 3. He ought to have averred that there are no inhabitants in the city besides men of the corporation; for which reasons the return was quashed, and the sheriff fined a hundred pounds, and an *alias distringas* was issued out.

[115] TERM. PASCH. 17 CAR. 2, B. R.

Sir Robert Hide Chief Justice. Sir Thomas Twisden, Sir Wadham Wyndham, Sir John Keeling, Justices.

WARD *versus* MARSH.

Words. 1 Danv. Abr. 95, p. 9. 1 Sid. 241. 1 Keb. 862.

In an action upon the case for speaking these words of the plaintiff, *You are a baud, and I will prove you a baud, and you took* 5*s. for a clean pair of sheets for two whores and two rogues.* And at another day, *She is a baud, and I will prove her baud, and will have her carted for a baud.* Upon not guilty pleaded, and found for the plaintiff for all, and intire damages given; it was moved in arrest of judgment, that the first words are not actionable; for it is one thing to call another baud, and another thing to say she keeps a baudy-house. But by Kelyng Justice, an action lies for calling one baud, because a baud is punishable in the Spiritual Court by ecclesiastical censures; but judgment was staid until, &c.

THE KING *against* MIDDLETON.

Error. 1 Keb. 867, 879.

Middleton was indicted at Guild-Hall in London, and the sessions there were adjourned to the sessions at Justice-Hall, and there he was tried, and judgment given against him for assault, battery and wounding of J. S. And now he brought his writ of error, and assigned for error, that all the adjournments of the sessions are in the preter-tense. But by the Court 'tis the usual course in indictments, and therefore **[116]** well enough, and all the precedents are so, and therefore judgment was affirmed.

WILLIAMSON *versus* BOLTON AND OTHERS.

Custom. 2 Danv. Ab. 312, p. 3. 1 Lev. 162. 1 Sid. 250. 1 Keb. 851, 868, 895.

In trespass and imprisonment, the defendant justifies that London is an ancient city, &c. and in it there is, and has been time out of mind, a Court of Orphans which hath governed them, and granted the custody of them; and that there is, and time out of mind has been such a custom, that if any takes away and eloigns an orphan, the Court may commit the eloignor to Newgate till he discovers where the eloignee is, and that one Amos Pain, a citizen, died 1 Jan. 14 Car. 2, leaving issue an infant named Mary of the age of thirteen years, who was committed by the said Court to the defendant Bolton, &c. and that the plaintiff took her away out of the defendant's custody and eloigned her, and that upon this the defendant was summoned to the said Court, and appeared, and there refused to discover where the infant was; upon which the Court adjudged that he should be imprisoned; and this is the same imprisonment. To this plea the plaintiff demurred. And Williams for the plaintiff argued, 1. That the custom of it self is naught. 2. That it is not well pleaded. As to the first, that the custody of orphans appertains to the mayor and aldermen, and that they may commit without summons. By *Bagg's case* there ought to be notice and summons to the party, 2 Inst. 46. 2. There is no lawful trial for the party to acquit himself, but only the discretion of the mayor and aldermen, confession of the party and examination of witnesses. 3. The duration of the imprisonment, because the party may be innocent; and the words, *till he be discharged by due course of law*, do not aid him, because there is no remedy by *habeas corpus* nor by appeal. 4. The extent of the custom is to all manner of persons, and so may extend to peers, and others not citizens; besides the party has an ordinary remedy, viz. Ravishment de Gard. F. N. 142 g.

Object. The custom is confirmed by Act of Parliament.

Resp. That is of no value, if the custom is unreasonable. 2 Inst. 142. Dyer

245 b. 22 Car. 1, B. R. *Estwick's case.* As to the second, the custom is not well pleaded. They ought to shew how this appears that he is guilty, *Specot's case.* 3. This case is out of the custom, because it appears that [117] Mary Pain was not married at the time of the commitment. 4. The custom is to have all her estate, though it be in any part of the realm, and out of the liberty of the city.

Wild Recorder *contra*, for the defendant. 1. This crime of eloignment of a child is in the nature of a theft, and he called it a plagiary. As to the 2d, It is in vain to plead summons for him that is present in Court. As to the 3d, There is a difference betwixt a plea and a return, for a plea shall be taken according to common intendment. As to the 4th, This is a Court of Record, and a Court of the City of London, and grounded upon the custom of London. Hutt. 30, *Andrew's case*, Hob. 247, *Luck's case.*

As to the 1st objection, Here is a conviction without trial.

Resp. The Court hath no other course by custom than examination, which shall be intended legal examination.

As to the 2d objection, Duration of imprisonment, that is grounded upon the reason of the common law, as in a *homine replegiando*, Reg. 79.

As to the 4th objection, (viz) The extent of this custom to peers.

Resp. 1. Person shall be intended such which shall be subject to imprisonment. 2. Peers are not exempt from contempts. 11 H. 4. 15.

As to the 5th objection, That there is an ordinary remedy, F. N. B. 142.

Resp. This is only for damages, but here it is for the person it self.

As to the 6th objection, He ought to have shewn how this appears.

Resp. This appears upon examination, and the offence appears, (viz.) the taking away the orphan.

As to the 7th objection, That the case is not made according to the custom, because it does not appear that Mary Pain was unmarried.

Resp. Consider the time in the plea, (viz.) 1 Jan. 14 Car. 2. Amos the father died leaving Mary within the age of fourteen, and the twenty-seventh of the same month the custody was committed to the defendant, and the twenty-ninth of the same month she was eloigned, and she shall not be intended to be married without making it appear; and the plaintiff ought to have shewn this; and the whole Court was for the defendant; and judgment was given accordingly for the defendant.

[118] AMCOTS *versus* AMCOTS.

Infant. 2 Danv. Abr. 773, p. 3. 1 Lev. 163. 1 Sid. 252. 1 Keb. 896, 900, 934.

Error upon a judgment in C. B. in a *formedon* in remainder. The plaintiff counts of a feoffment, 38 H. 8. by Alexander Amcots, and makes title to himself; the tenant being an infant, by guardian pleads, that John Amcots was seised in fee, and prays that the parol may demur; the guardian dies, the demandant counter-pleads the age, and traverses the seisin in fee and discent; and upon this was a special verdict; and judgment for the demandant; the tenant brings a writ of error, and assigns for error in the manner of the judgment, (viz.) that it is final where it ought not to be so.

Newdigate Serjeant for the plaintiff. In the writ of error the judgment ought not to be final, but only a *respondes ouster.*

Here are four things to be premised. 1. That it is all one in a special verdict as in a general verdict. 2. The nature of the plea is considerable. 3. The infant had no disadvantage. 4. There is a difference when there is a demurrer upon such plea, and when a special verdict, and when a demurrer is in the same term, and when in another term. 1. In respect of the nature of dilatories in general, 1 Inst. 134. In all pleas by the tenant, in disability, the law giveth liberty to pray in aid and voucher. 9 Co. 84. *Conye's case.* In a *cessavit* against an infant, the parol shall demur, 2 Inst. 291. Infancy is preferred before dower, Cro. Jac. 398.

Object. Here is a verdict.

Resp. It is the same as if verdict, and no difference in reason; for the plaintiff might have demurred, and a demurrer is more tedious than a verdict. 2. When it is an issue upon a collateral point, the judgment shall not be final, but a *respondes*

ouster. Appeal 18 E. 3, Fitz. Outlawry 47. Bro. Peremptory, 28 Assise, pl. 52. 6 Assise, pl. 1. 40 Assise, pl. 2. L. 5, E. 4, 90. Bro. Peremptory 44. Fitzh. Issue 14. Bro. Peremptory 69. 1 Inst. 135. Co. Entries 321.

Object. Delay.

Resp. We must distinguish between delays, for dilatories are allowed in real actions. If it be a delay that an infant shall not be prejudiced but with a contempt, it shall be one. Cro. Eliz. 467, *Holford* versus *Plat*, 8 H. 7, 8. It is error to deny a dilatory; this plea is not found to be false, (viz.) minority.

[119] Object. 24 E. 3, 76. Bro. Peremptory 22, by Wilby, 25 E. 3, 80, pl. 2.

Resp. The reason of that case is, if he had been of full age it should be peremptory; but here the plea is not false.

Object. If a demurrer in another term. Fitz. Voucher 17 and 119.

Resp. It is the same reason, for none shall be prejudiced by the act of Court; as adjournment, continuance, &c. Voucher is instead of a plea in bar; it is not a delay with contempt no more than 8 H. 7, 5. Plow. 364. Fitz. Assise, 43. The delay is by the demandant himself, for he imparled four terms.

Object. Latch 177, *Cademan's case.*

Resp. The conclusion was not good; the demandant himself prayed only that the tenant shall be ousted of his age, and therefore no other judgment shall be given in a plea after darrein continuance. Yel. 18, *Hawkin's case.*

Jones for the defendant. As to the prayer of the demandant, it is so in all pleas to the writ, *quod breve cassetur*. It is a general rule L. 5 E. 4, 90 b. in every action, if issue be joined and found, it is peremptory for the tenant or defendant; and no difference betwixt an infant and another, if the books and authorities do not contradict this. In the case of a counterplea of a voucher, this is not in nature of a plea in bar, because it is not peremptory after demurrer, before the Statute of Westm. 2, cap. 6, Excommunication, 3 H. 4, 3. 50 E. 3, 20. But these differences are to be observed, 1. In every dilatory plea, after issue against the tenant, it is peremptory. 2. Upon dilatory demurrer it is not peremptory in one case, (viz.) after the Darrein Continuance, L. 5 E. 4, 139. 2 E. 4, 10. Yelv. 112. Fitz. Issue 14 and Age 122, by inspection it is not peremptory, because by the Judges. The reason is. 1. Upon a verdict the delay is greater. 2. The matter of fact lies more in the intelligence of the plaintiff.

Twisden Justice. This is a ground, if a dilatory be pleaded and found against him, it is peremptory. *Adjournatur.*

[120] Pritchard's Case.

Parliament. 1 Lev. 165. 1 Sid. 245. 1 Keb. 871, 884, 887, 850, 525.

The House of Lords in Parliament made an order for the apprehending of Pritchard to commit him to prison. Before the order executed the Parliament was prorogued. The serjeant at arms five days after the prorogation of the Parliament arrested the said Pritchard, and had him in custody, and now he brings his *habeas corpus.*

Coleman for the defendant. 1. The return here is insufficient, because it is not shewn that he was committed by virtue of an order of the House of Lords. 2. Because the commitment is not lawful, for every prorogation is *quasi* a new Parliament. 3. He is committed for not payment of fees: and it doth not appear what.

Kelyng Justice. If a man be committed by Parliament which is prorogued, the Court may bail him. Here the return is not sufficient, because no day is mentioned when the warrant came to the serjeant at arms, and therefore the party ought to be discharged.

Wyndham Justice to the same intent, because it shall be presumed that the party was taken after the Parliament prorogued. Bro. Parliament 86. Every sessions is a new Parliament. 1 H. 7, 20, *Flowerdew's case.* Judgment given in Parliament may be executed by the Chancellor *quia transit in rem judicatam.*

Twisden Justice accordingly: Be the person taken before or after the Parliament prorogued he is to be discharged.

Hide Chief Justice of the same opinion. 22 E. 3, 23. A writ came to the Chief Justice of this Court to remove a record. By the Court he was discharged.

WHALEY *versus* ANDERSON.

Mich. 14 Car. 2, Rot. 399.

Treason. 1 Sid. 260. 1 Keb. 329, 874, 905, 909, 933.

In ejectment of a demise from Springate and Stapley. On not guilty pleaded, the jury found a special verdict, that William Marquess of New-castle being seised in fee the 19th of May 16 Car. 1, demised to More, Wolrich and Alestry for ninety-nine years, upon condition to pay 2500l. in the year **[121]** 1700, and 200l. per annum in the mean time; More dies, and then Wolrich and Alestry 12 Febr. 17 Car. 1, assign to Warren and Lanyon. Edward Whaley purchases the reversion. Warren and Lanyon 1 November 1656 assign to Sir Charles Harbord, and agree, that if Whaley pay half a year's interest and principal upon the 17th of Novemb. then the assignee shall be in trust for him. Edward Whaley doth not pay the principal in 1658 by indenture betwixt Springate, &c. for the use of his daughter upon marriage with John Whaley. Harbord assigns to Springate in trust by the direction of Edward Whaley to permit John Whaley to take the profits of 200l. per annum, the remainder to the wife for life, and the residue for the charges of the trustees, and after to Edward Whaley. The 2500l. was paid by Springate to Sir Charles Harbord; the marriage took effect; the last indenture was not in trust for Edward Whaley. The 25th of April 12 Car. 2, by the Act of Attainder Edward Whaley was attainted, and all manors, &c. of which he was seised were forfeit; and upon the whole matter, if for the plaintiff, &c. and the main question was, if this trust shall be forfeit to the King by the Act of Attainder.

Jones for the plaintiff. The King hath no title in law to these lands. 1. What right or interest Edward Whaley had by these indentures. 2. What may accrue by this forfeiture. As to the 1st, there are three indentures, and so many pretences. 1. A reversion upon payment of 2500l. 2. Edward Whaley had a contingent trust by the second indenture. 3. The residue of the profits was to him. 1. He cannot have a right by the redemption, because the King shall not be in a better plight than Whaley himself. As to the 2d, touching the interest upon the contingent, this is passed, and depends upon an act to be done, which was not done, (viz.) payment upon November following. The third upon the third indenture. If by this limitation of the residue of the profits, the King hath a title to the land? And he conceived not. 1st, The verdict finds that the trust was to John Whaley for 200l. a year, and to the trustees for their expences, and then to Edward Whaley. The jury doth not find that any residue remains, nor that the land is of any value, and then no surplus shall be intended. To the 2d, if the interest of the King shall swallow the whole land? And he conceived not. 1. I agree, that in case of forfeiture upon attainder the King is intitled to personal things intirely; as in the case of an obligation, a horse, &c. the attainder **[122]** of one jointenant shall forfeit all, but not of things in possession, which may be divided. 3 Inst. 55. Chattel real in possession; and Plow. 243 intimates so much, because he instances only in intire chattels.

Object. Dame Hale's case, lease for years forfeit by a jointenant.

Resp. The pleadings of this case shew the case to be of a lease assigned to baron and feme after marriage, and so no moieties betwixt them. 2. The reason of this case is the relation from the time of the forfeiture, which is there a disposition; but in case of jointenancy the one may grant only a moiety; but in our case there is no jointure, and they cannot take the profits together; but there is a priority of time between them, they may be tenants in common by perception of the profits. The words of the Act of Parliament are, *All lands &c. of which Edward Whaley had any estate, or any in trust for him, shall be vested in the King, &c.* But there is also a saving to all strangers; the King shall have the same estate in law as the party had in equity, and not more; and therefore if the trust had been for John for life, the remainder to Edward, the King shall have only the remainder, and not the possession.

Here Edward can never have the possession of the land. If Edward had brought his *subpœna*, he should never have the possession, for there are precedent estates; but the trustees shall deliver the surplus to Edward. It is like to the Statute of Uses, for this Statute of Attainder executes trusts. If the trust had been, that the trustees shall permit the *cestuy que trust* to perceive and take such annual sum, it shall be vested in the King.

Bigland for the defendant. Consider the case, 1. Without reference to the deed of settlement, and then the case is, 1. When Edward Whaley purchases the reversion he hath a right of redemption. 2. When the mortgagee and the reversioner join in an assignment; although the money was not paid at the day, yet the trust remains. Where an estate is once vested in the King, nothing shall devest it. 1 Inst. 118. Cro. Jac. 82. ——— versus *Wyndham*, Moor 196, 815, *Palmer's case.* If the trust had been, that Edward Whaley shall have all the profits, then the term it self shall be in the King, *Adam and Lambert's case;* the King shall have all because a mixt interest. Plow. 423. Here the King hath something, and if it do not appear what part he shall have, he shall have all.

Wyndham Justice. A lease upon condition to pay at a day to come, and then the lessor makes another lease by estoppel, **[123]** and then procures another to pay the money; the lease by estoppel shall take place.

Kelyng Justice for the plaintiff.

Twisden Justice. The question is, if the equity of the trust be forfeit, and it seems not; and it was adjourned; and after judgment was given for the plaintiff.

WILLAN *versus* GILL.

Prohibition.

George Allington makes his will, and Gilham and Denhurst his executors; Denhurst makes his will, and executors, and dies; Gilham dies intestate, his administrator sues the executor of Denhurst for a legacy due from Allington. Simpson moved for a prohibition.

Twisden Justice. Here by the spiritual law the plaintiff may sue the executor of Denhurst as executor *de son tort.*

Kelyng Justice. The executor of Denhurst may be sued as executor of his own wrong, but then he cannot be sued as executor of Denhurst, but as executor of Allington.

Twisden Justice. In our law it is so; but in the ecclesiastical law perhaps it is otherwise.

Wyndham Justice accords with Twisden, it is more proper for an appeal than a prohibition.

Twisden accords, and a prohibition denied by three against Kelyng.

BUCK *versus* ANGEL.

Assumpsit. 1 Danv. Abr. 74, p. 1. 1 Lev. 164. 1 Sid. 246. 1 Keb. 872.

The plaintiff counts, that whereas he had procured one Woodward at the request of the defendant to surrender a lease, the defendant would pay, &c. On *non assumpsit* pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, because it is not said that the defendant assumed and promised. And to Twisden Justice it seemed not to be a good declaration, and so it was ruled in the first case that he ever moved in this Court. But it seemed to Kelyng Justice to be only matter of form. But judgment was stayed until, &c.

[124] BURTON *versus* ROBINSON.

Inquiry. 1 Sid. 246. 1 Keb. 882.

Detinue for a deed, and verdict for the plaintiff, that the defendant detained the deed, and 20l. damages; and then issued out a *distringas* to deliver the deed or the

value, and after that a writ of inquiry issued for the value, and found a different value from the first verdict; and it was moved that the last damages found on the writ of inquiry shall stand. Rast. Entr. 214, 219, tit. Judgment in Detinue, c. 3. And *Chenye's case* here doth not oppose this, because here attaint doth not lie.

Kelyng Justice. There cannot be damages and a writ of inquiry also.

Twisden Justice. There ought to be both; and it was adjourned, and after adjudged for the plaintiff.

ERRINGTON *versus* HIRST.

Intr. Trin. 16 Car. 2, Rot. 505.

Debt. 1 Keb. 883.

Debt upon an obligation against an executor. The defendant pleads *non est factum;* and upon this the jury found a special verdict, viz. that the testator of the defendant sealed and delivered the obligation, and that the plaintiff was a commission officer, and detained the said testator in prison until he had entered into this obligation. And they found the Act of Oblivion that pardons all acts of hostility, and all appeals and personal actions by reason of them shall be discharged, and that all persons may plead the general issue, that the defendant nor testator are not excepted.

Turnor for the plaintiff. There are two points. 1. If this obligation be nulled by this Act; and it seems that it is not. 2. If the defendant may plead *non est factum?* And it seems he cannot.

To the 1st, It is not within the words of the Act, because there is no mention of an obligation given to another.

2. It is not within the meaning, because it is not a crime or offence. Plowd. 173, *Hill* versus *Grange*. Words ought to answer the sense of a statute; the Act was intended for the benefit of the plaintiff, who was a commission officer.

[125] *Object.* Or relating thereunto.

Resp. This obligation is collateral to the offence, and not relating; for relating ought to be preceding and not subsequent, and therefore it was adjudged, Dyer 14 b. *Tunc* is extended until, 164 and 286. 5 Co. *Clayton's case,* 2 Inst. 112. A statute ought to be expounded to prevent prejudice to a third person.

As to the 2nd, He cannot plead *non est factum,* but the special matter, and conclude *issint nient son fait.* 1 H. 7, 15. 5 Co. 119. *Whelpdale's case,* Hob. 72.

Linley for the defendant. As to the 1st, It is within the words of the Act in a legal sense. Personal actions include the causes of action. 1 Inst. 285. 8 Co. 153. Littleton sect. 512, it extends to obligations. There is another clause, viz. *that all differences betwixt the subjects, &c.* and all that had followed upon it. Here this act of hostility which occasioned the obligation. 2. This is within the intent, which was to take away all those things which might be the cause of future disturbance.

As to the 2d, If the Act had said that the obligation shall be discharged, then it ought to be pleaded; but here it is that the obligation shall be void, and that the defendant may plead the general issue.

Kelyng Justice. The Act enures between man and man, as a release; that the imprisonment is discharged is clear, then it seems the obligation shall be discharged.

As to the 2d, The general issue aids where the defendant cannot justify at common law; here may be a justification at common law.

Wyndham Justice. A contract seems not to be discharged by this Act, although many of them were forced by acts of hostility. A man takes a horse in those times, trespass doth not lie, but upon demand trover lies.

Twisden. Acts of hostility shall be intended matters of force.

As to the 2d point, The Act gives a latitude to the party. And it was adjourned.

[126] MERREL *versus* RUMSEY.

Intr. Hill. 14 Car. 2, Rot. 689.

Remainder. 1 Sid. 247. 1 Keb. 888.

Ejectment for land in in the county of Monmouth. Upon not guilty the jury found a special verdict, viz. that Edmund Williams seised in fee 20 Aug. 15 Car. 1, by indenture covenanted in consideration of marriage, and 600l. portion to levy a fine to the use of the conusees till a recovery had, and then the recoverors should be seised to the use of Edmund and Dorothy for their joint lives, the remainder to the heirs of the body of Dorothy by Edmund ingendered, remainder (Dorothy surviving Edmund) to Dorothy for life, remainder to the right heirs of Edmund; the marriage takes effect, a fine is levied, but no recovery was had; and there is a clause in the deed, that if there was not any recovery, that then the conusees should stand seised to the uses before mentioned. Edmund and Dorothy have issue two daughters, Rachael and Elizabeth; Edmund dies, his widow marries William Watson, the daughters are lessors of the plaintiff.

Winnington for the plaintiff. The design of this conveyance was, that if the husband died before his wife, that his issue should have it; here Dorothy hath no title, but the daughters.

1. When the freehold determines.

2. If it determines upon the death of

3. If the contingent remainder fail, if the other takes.

As to the 1st, This freehold upon which all the remainders depend, determines upon the death of the husband, because it is for their joint lives; although a joint estate to two shall be intended to the survivor, 5 Co. 9, *Brudnel's case;* but if a particular limitation be, it is otherwise.

To the 2d, Remainder to the heirs of the feme ingendered by the baron, these are words of purchase and not of limitation, and then contingent, so they cannot take, as 1 Inst. 22 b. Where the ancestor takes an estate for life, the remainder over to him and his heirs, it shall be by limitation and not by purchase. There is a difference where the freehold is absolute and intire determinable upon life, and not upon a determinable estate for life, where by possibility it may [127] continue and consolidate. An estate to A. for life, the remainder to B. for life, remainder to the right heirs of A. they are words of limitation. But not when a determinable freehold, as an estate during widowhood, remainder to his right heirs; here they are words of purchase. 10 Co. 85, *Lovie's case.* Lands given to A. for life, remainder to B. for life, remainder after the death of A. to B. and his heirs.

To the 3d, Then the contingent remainder is destroyed. 3 Co. 20, *Boraston's case.*

Powis for the defendant. Here is an estate-tail executed in the wife; it had been clear if the wife had died first.

2. If the estate be limited to A. for life, the remainder to the heirs of his body, it is an estate-tail executed, 1 Co. 204, and there is no difference in this case.

1. It is within the words of *Shellie's case,* 1 Co. 104, because an estate limited to one for life is a freehold indefinitely. 21 H. 6, 54 a. 33 H. 6, 5 b. 40 E. 3, 20 & 21. It behoveth not that the freehold continue; and *Lovie's case* cited on the contrary part is not to the purpose; the case in point is in Perkins sect. 337.

2. The wife hath a freehold for life. And it is like the case where land is given to baron and feme, and to the heirs of the body of the feme, and she dies. Dyer 99. Fitzh. Br. 81.

Kelyng Justice for the defendant. This estate is an estate-tail executed *sub modo,* (viz.) not as to division of the jointure; but it is to other purposes; and so all the other justices held, and judgment was given for the defendant.

HUNT *versus* SWAIN.

Assumpsit. 1 Danv. Abr. 57, p. 57. 1 Lev. 165. 1 Sid. 247. 1 Keb. 890, 900. 2 Keb. 62.

The plaintiff declares that the father of the defendant was obliged to the plaintiff in an obligation, and that the defendant is his son and heir; and that the plaintiff notified to the defendant, that he intended to sue him; and upon this the defendant, in consideration that the plaintiff would forbear the defendant, promised to pay the money due upon the obligation. The defendant pleads *non assumpsit*, and found for the plaintiff. And it was moved in arrest of judgment, that it is not said that the heir was obliged in the said obligation with his father.

[128] Wild Serjeant for the plaintiff. That it shall be so intended; and he cited the case of *Seignior St. Paul and his Wife* against *The Earl of Rivers.*(1)

Twisden Justice. By this way presumption shall aid any thing: but I confess that Rolls, when he was Chief Justice, was of the opinion, that it was good in this case after verdict; but I conceive the material thing is omitted.

Wyndham Justice. The defendant hath admitted himself to be bound, by the desire to give time to pay, and therefore it shall be presumed that he was bound, and so the plaintiff shall have judgment.

Kelyng Justice. The forbearance only will not maintain the action; for in the action against an executor he ought to shew that he is executor, but here it is laid that he is heir; as if I lay a man to be executor, although he hath no assets, it is good.

Hide Chief Justice. There is a grand difference between an heir and executor; and it was adjourned. *Vid.* Hob. 18. *Wollaston* versus *Web*, 1 Leon. 114. *Grey's case* cited in *Stone and Withypool's case*, 2 Cro. 602. *Bard* versus *Bard, contra* Yelv. 56. *Fish* versus *Richardson.*

ROGERS *versus* MASCAL.

Process. 1 Sid. 248, 259. 1 Keb. 890, 908. 2 Keb. 7, 17.

Trespass in assault and imprisonment. The defendant pleads that the 26th of Feb. in the Palace Court one levies a plaint against the plaintiff, and the defendant as serjeant of the said Court takes him by virtue of process upon this plaint. The plaintiff demurs.

Offley for the plaintiff. The justification is by several process out of the Palace Court, and doth not say it is by prescription or letters patent.

2. It is said that Cage levied a plaint in the nature of an action upon the case, and upon this a *capias* issued, and the **[129]** officer returned it. The immediate process here is attachment by the goods, where it ought to be a summons. 34 H. 6, 49 *a.*

3. *Capias* is not a process within an Inferior Court, because the statute which gives a *capias* doth not extend to it. F. N. B. 92 G. 100 D. The statute of 19 H. 7, cap. 9, gives a *capias* in B. R. and C. B. but not otherwise; and there is a difference

(1) Trin. 1656, B. R. *St. Paul and his Wife* against *The Earl of Rivers.* The plaintiffs declare, that whereas the father of the defendant obliged himself to the plaintiff's wife, *dum sola fuit*, in the sum of 400l. for the payment of 200l. which father is now dead, and the defendant is his son and heir, to whom the plaintiff repaired, and intimated that he intended to sue the defendant as son and heir for the said debt; the defendant upon consideration of forbearance assumed to pay, &c. And upon *non assumpsit* pleaded, and a verdict for the plaintiff, Serjeant Twisden moved in arrest of judgment, because it is not said, that the father obliged him and his heirs, and therefore it does not appear the defendant was liable to an action, and so the consideration is void. But adjudged that it should be intended, it being found by the jury, according to *Bidwel and Catton's case*, Hob. 216, and the plaintiff had judgment upon my own argument; but otherwise adjudged between *Barber and Fox*, Trin. 22 Car. 2, B. R.

where the jurisdiction is general, erroneous or void, process doth not expose the officer to false imprisonment. 10 Co. 76. But otherwise it is in an inferior jurisdiction. Cro. Car. 394, and 395, *Nicholas* versus *Walker*.

4. It doth not appear the Court had jurisdiction. It is said generally, that the plaint was in nature of an action upon the case, and it may be such an action as cannot be brought in an inferior jurisdiction. Mich. 17 Car. 1, *Bye* versus *Olive*, Rot. 545, or 548.

Pemberton for the defendant. As to the 2d, It is a Court of Record which ought to have such process. 2. Summons doth not lie in an action upon the case, but a *capias* lies in trespass in any case, and it is a general entry in all Courts; and the case of *Dye and Olive* is not to the purpose. To the 3d, Summons is not a process in an action upon the case, but a pone, F. N. B. 92 and 93.

Object. It is not said, *quod profert hic in Curia* the letters patent by virtue of which the Court is held.

Resp. The defendant is only a bailiff, and cannot have them, upon the reason in *Leyfield's case*, and Dyer 29. Sub-lessee ought to shew the lease, but sub-collector and under-sheriff not. 36 H. 6, 14. 22 H. 6, 42. An incumbent shall not shew the title of his patron. 36 H. 6, 14.

Object. It is not said of what sum or place the Court had jurisdiction.

Resp. It is a Court of Record, and so hath conusance of all sums; and so is the plea of conusance of pleas, the plaint is not levied of any sum but generally. As to the place, it is said to be within the jurisdiction, and cannot be traversed how many miles it extends, but only that it is not within the jurisdiction.

Object. A *capias* doth not lie within an inferior jurisdiction.

Resp. 1. Admit this process doth not lie in an Inferior Court, yet the Court having jurisdiction the officer is not to be punished. 10 Co. 76. 2. By the equitable interpretation of the statute of 19 H. 7, cap. 9, it will extend to other Courts. As the statute that gives debt against the warden of the Fleet **[130]** extends to the sheriff. This statute of 19 H. 7 doth not give the *capias* alone, but at the common law where originally there was not summons, but a pone, and then a *capias*. *Capias* is not the process by this statute, but the exigent. 35 H. 6, 6 a. pl. 9. *Capias infinitè* was before, and not the exigent. Experience shews that before the statute a *capias* issued in these Courts. Rast. Entr. 293 a. A memorandum made that the process given by this statute is an exigent.

Twisden Justice. This exception has been taken, but it is cured by appearance.

Wyndham Justice. It seems process in an action upon the case was a *capias infinitè*. But after it was adjudged for the defendant by all the Judges besides Hide Chief Justice, who was then dead.

Memorandum, The first day of this term died Sir Robert Hide Lord Chief Justice, who was a man expert in the pleas of the Crown, but especially in those which concerned a justice of peace.

[131] TERM. TRIN. 17 CAR. 2, B. R.

There being then only three Judges, viz. Sir Thomas Twisden, Sir Wadham Wyndham, Sir John Kelyng, Justices.

WORRAL *versus* BRAND AND OTHER TWO EXECUTORS.

Death. 1 Lev. 165. 1 Sid. 259. 1 Keb. 902, 906, 925. Escape against two sheriffs, and the one dies. Noy 72. Cro. Eliz. 625, *Bannion* versus *Watson*, &c.

Assumpsit against two executors. After issue joined, one of the executors dies, and then the plaintiff suggests upon the roll that the other was dead, and upon this there is a trial against the other.

And now Jones for the defendant moved in arrest of judgment, and the question was, if the death of the one abate the writ as to both; and it seemed to him that it did.

1. In all actions of trespass, which are grounded upon a tort, the death of one shall not abate the writ of the other; but if it be founded upon contract, as *nihil debet* or *ne unques receiver*, *&c.* there by the death of one the writ is abated against the other. In debt, 4 E. 3, 26 b. 50 E. 3, 7. In accompt, Fitzh. Br. 263, 344. Authorities in the case it self. Plowd. 186 b. *Woodward* versus *Darcy*, 37 H. 6, 16, are cases in point, 10 H. 4, 18. In detinue, 2 H. 4, 18 b.

Pemberton for the plaintiff. There is no reason for this difference put by Jones; in 50 E. 3, 7, there it was, that he was dead before the action brought, and the writ was false. 37 H. 6, 16. A writ of error was brought, and it was moved for the plaintiff, but it was never argued; there is cited the 14 E. 3, but there is no such case. As to Plowd. nothing was done, and no judgment there given; Cro. Car. 426, *Tiffen's case*, an action against two and one dies, and no suggestion before the *venire fac.* and yet good. 41 E. 3, 3. Account against two, and one dies, the other shall answer over. Bro. tit. Respondes Ouster pl. 4. No reason for one more than another, as in outlawry. Here **[132]** is no other action or better brief, and the abatement shall be a mischief to the plaintiff, but none to the defendant by the allowance; for the defendant may plead *plenement administer*, and the promise survives. And there is a difference where there are two plaintiffs and where two defendants. Resolved by the Court that the writ is abated; and they relied upon *Woodward and Darcy's case*, and 37 H. 6. But see Hern's Precedents 102, 139, to the contrary.

OPEY *versus* THOMASIUS.

Estate. 3 Danv. Abr. 195, p. 4, 198, p. 9. 1 Lev. 167. 1 Sid. 260. 1 Keb. 778, 910.

Upon a special verdict in an *ejectione firmæ* of land in Devon, the case was to this effect. Rous seised of lands in fee, by indenture makes a lease to Thomasius for 99 years, if three lives live so long. And then settles the reversion upon himself in tail, with a power to make leases for one, two or three lives, or for 21 years in possession; and then he leases for 21 years to commence after the first lease, and then conveys over the reversion by fine; the first lease determines; and the question was if the conusee may avoid this second lease, which, as was admitted, was not within the power, because it was not in possession.

Jones for the plaintiff. There are two points. 1. If the second lease be pursuant to the power in the first indenture. 2. Admitting that it is not, then if the conusee shall avoid this lease made by the tenant in tail.

As to the 1st, There be two parts of powers: 1. To make leases in possession. 2. Leases in reversion. It doth not come within the power to make leases in reversion, because they are tied up to special particulars for any number of years determinable, &c. 6 Co. 33. *Leper and Wroths case*, Cro. Eliz. 5.

Object. It is a lease in possession, because there shall not be two leases extended by one and the same power, and it is *quasi* a possession.

Resp. 1. Observe the intent of the deed. 2. In pleading, possession may be of a reversion, but not in a conveyance; for there it ought to be according to ordinary parlance, and the subject matter guides the thing. Cro. Jac. 318, *Hawkin's case.*

As to the 2d, Tenant in tail of a reversion makes a second lease after the expiration of the first, and then levies a fine to a stranger, if the conusee shall avoid the second **[133]** lease; and it seemed to him he should. 1. If this second lease be void or voidable; and he held it was void. 2. If the conusee may avoid it.

As to the 1st, It is void, Westm. 2, cap. 1. Tenant in tail shall not have power to alien to the prejudice of his issue, but otherwise it is voidable. Tenant in tail grants a rent-charge, it is void against the issue, tenant in tail makes a lease without reserving a rent, it is void. Plow. 436. 12 H. 8, 8. The reason of these cases is, because it an apparent prejudice to the issue; and the statute doth not measure the acts which the tenant in tail doth by his estate, but with the consequence of the prejudice that may come to the issue by them; and here is an apparent prejudice; for if he may make a lease *in futuro* he will deprive his issue of the liberty of alienation

according to the statute, and also to levy a fine. This upon the reason since the statutes of 32 H. 8. 4 H. 7. 6 Co. 41. 1 Inst. 223. This lease is a clog. 2. This lease being by way of future interest, the issue is in paramount this future interest, for it is not an estate until it is executed, for a surrender may be notwithstanding it. When tenant in tail makes a lease *in futuro* the statute preserves the issue. Cro. Jac. 445, *Griffins case.* A lease after death is void, although a rent be reserved. Dyer 279, per Manwood.

As to the 2d, The conusee shall have the same power, Plowd. 437, *Smith* versus *Stapleton.* Feoffee may enter upon lessee, 1 Inst. 46 b. and no difference betwixt conusee and feoffee.

Object. Dyer 51. Tenant in tail makes a feoffment, and makes a lease for years.

Resp. No resemblance, for when tenant in tail makes a feoffment the tail is discontinued, and then the joining with the feoffee is good.

Object. Cro. Jac. 692, *Croker* versus *Kelsey.*

Resp. The issue there had barred the intail and himself, and therefore the conusee shall not have more power than the tenant in tail himself.

Winnington for the defendant. This lease is pursuant to the power, which is to be regarded at the time of the creation; possession may be applied when it is to take effect in possession. Intent of the parties, I confess, *Hawkin's case* in Cro. Jac. 318, to be against this opinion, but the record of that case doth not warrant it. And Yelv. 222, reports the same case wholly different from Crook; but admit that the power is not pursued, yet 1. This lease is only voidable. 2. Not voidable by the conusee.

[134] As to the 1st, Tenant in tail makes a lease *in futuro*, rendering rent, this lease is only voidable. Plow. 434, is a case in point. 1 Inst. 46.

Object. Dyer 279.

Resp. Catlin there denies the opinion of Manwood. It had been good although no rent had been reserved, till avoided. Hutt. 102.

To the 2d, The conusee cannot avoid this lease. Westm. 2, de Donis. The issue hath power to elect *post prolem suscitatam*, tenant in tail hath power by the common law. The conusee doth not come in in privity of the estate-tail. Dyer 51 b. 7 Co. 9, *Count de Bedford's case.* Tenant in tail makes a lease *in futuro*, and then levies a fine, the lessee enters, the conusee enters upon him, and the fine is reversed. Dyer 263.

Kelyng Justice. The first point concerning the power is the principal point; tenant in tail makes a lease *in futuro*, it is not void, but voidable only, and the conusee shall here have advantage of election as well as the issue.

Wyndham Justice. If the lease be *in esse* at the time of the settlement. A lease made by the power to commence after the lease in being is determined, is good. Dyer 357. There is a difference when the land is in possession, and when it is in lease. Tenant in tail makes a lease without rent, it is not void, but voidable, because there may be covenants in it, and there is also fealty, &c.

Twisden Justice. Powers are to be expounded according to the intent of the parties. Tenant in tail makes a lease, it is only voidable, the conusee shall not avoid it, because the estate-tail is barred, and he cannot come in in privity; and matter of election is transferable. *Latch, Arnold and Warner's case.* And it was adjourned.

WINNE *versus* LLOYD. SEE BEFORE.

Error. *Antea* 16, 55, 70, 96.

A writ of error was brought to reverse a common recovery in Wales, and judgment in the common recovery is affirmed; and now Williams moved for costs for the defendant in the writ of error, according to 3 H. 7, cap. 10, he cited Co. Inst. 162. Cro. Eliz. *Grove's case*, and Cro. Eliz. *Penruddock's case;* and although there is not any delay here according to the words of the statute, yet this is to be intended where execution may be; but here is no **[135]** execution to be had. But the Court denied to give costs, because there is not any delay of execution; and at the common law there was no costs in a writ of error.

LOW *versus* BEARDMORE.

Case. 2 Danv. Abr. 210, p. 11. 1 Lev. 169. 1 Sid. 261. 1 Keb. 881, 915.

An action upon the case against the defendant for falsely and maliciously indicting the plaintiff for a rescous. And on not guilty found for the plaintiff,

Powis for the defendant moved in arrest of judgment, that such action upon the case doth not lie for indicting one for a bare trespass, and this indictment was but a trespass.

And as to the *objection*, that the plaintiff declared, that the defendant *scienter* indicted him,

Resp. It is the common declaration which is *falso & malitiose.*

Wyndham Justice. The case of *Langly and Clark* was debated for an action for an indictment for taking his wife with an intent to ravish her; and it seemed there for the defendant.

Twisden Justice. In *Chamberlain and Prescot's case* (1), it was resolved in this Court, that the action lies for such indictment; but the judgment was after reversed in the Exchequer Chamber; but it seemed a hard case if the action should not lie.

Kelyng for the defendant. Such actions would deter men from prosecuting, and he seemed to be for the defendant; but it was adjourned. *Vid. postea Henly* versus *Burstal* 180.

JEMOT *versus* COOLY.

[See *Doe. d. Biass* v. *Horsley*, 1834, 1 Ad. & E. 769.]

Estate. 3 Danv. Abr. 163, p. 4. 1 Lev. 170. 1 Vent. 193. 1 Saund. 112. 1 Sid. 223, 262, 344. 1 Keb. 784, 915. 2 Keb. 20, 184, 270, 295. 3 Keb. 6. *Postea* 158.

Ejectment of the demise of Sir Ralph Bovey of lands in Amersham in the county of Bucks; on not guilty pleaded, the jury found a special verdict, viz. that Francis Drake 20 July 1651 for 6000l. granted a rent-charge to the lessor of the plaintiff of 420l. a year, and in the deed was **[136]** this clause; and the said Drake doth grant that if the said rent shall be in arrear at any of the days of payment above twenty days, that then it shall be lawful to and for the said Bovey to enter into the said lands, and the same to retain until he be satisfied the said arrears. The rent is behind at one of the days, and the lessor enters and demises to the plaintiff.

Jones for the plaintiff. The sole question is, if the lessor of the plaintiff hath any interest in the land it self by these words. Here it is not any question, if the interest be an inheritance, freehold or chattel, because Sir Ralph Bovey is alive; but that this estate is an interest. Littleton sect. 327. There it is not a condition, because then he ought to avoid the whole estate by his entry. 1 Inst. 217. This interest is a chattel created by the agreement of the parties. Littleton doth not put it by deed indented, but it ought to be so intended; for a feoffment in fee rendering rent cannot be without deed, because not good by way of reservation. 1 Inst. 143. It hath been held that a rent upon a feoffment may be by deed poll. Doct. & Stud. 74. 11 H. 7, 22. 14 H. 7, 36. This interest is a chattel, because it is a penalty annexed to the rent. Cro. Jac. 510, *Havergil* versus *Hare.*

Object. It is a fee, because heirs is in, and then it doth not pass without livery.

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(1) Mich 1659, *Chamberlain* versus *Prescot.* The plaintiff brought a special action upon the case for maliciously indicting him upon 8 Eliz. cap. 2, for procuring the defendant to be arrested in another man's name, who disowned the suit; and the plaintiff declares that he being a freeman of London, and a merchant, and reciting the statute, the defendant caused him falsely and maliciously to be indicted upon that statute. And upon not guilty pleaded, and a verdict for the plaintiff, Allen moved in arrest of judgment that this action would not lie, it being only a trespass in its nature; and if it should be allowed, it would discourage prosecutors: but notwithstanding the plaintiff had his judgment.

Resp. These words do not design what estate, but who shall have the remedy.

Authorities in the point, Hill. 13 Jac. C. B. Rot. 868, *Brown* versus *Hagger*, cited in *Price and Vaughan's case.* If tenant by *elegit* make a lease to try a title, it is good, although he hath an incertain interest, 1657, B. R. *Harrison's case*, the case of a tenant-right.

Thursby for the defendant. It cannot be a chattel-interest because incertain. Lit. sect. 380, Bracton, Britton, &c. do not mention any such incertain interest. 37 H. 6, 26. *Quas tenuit dum sola fuit, quamdiu se bene gesserit.* 4 Co. 30. *Durante viduitate.* Bro. Leases 67. Pet. Bro. sect. 462, & 463, *ibid.* & 468. But it doth not appear that livery was made. 14 H. 8, 10, & 14. 8 Co. 96, *Cordel's case*, it cannot be raised by grant. 1 Inst. 42, and the reason is because suppose the land will not answer the debt, then it shall be a perpetual chattel, yet 258, *Green* versus *Edwards*, at some times it may be created, 1. By Parliament, as tenancy by *elegit.* 2. Things in a grant may be so, as a rent. 11 Ass. pl. 8. Common 17 Ass. pl. 7. In the case of the King. 8 H. 4, 17. *Quamdiu in propriis* **[137]** *manibus*, because no other ceremony is requisite, but here it is in the case of land. 3. In case of a will it may be so granted. Cro. Eliz. 315. *Cordel's case*, 3 H. 7, 13. 4 Co. 82. 4. In a feoffment upon condition to hold till the feoffee be satisfied, &c. Litt. sect. 327. 44 Ass. pl. 3. Plowd. 524. Fitzh. Barr 280, & Done 210, but this is only as a pledge, and not an estate. In case of a replevin, a condition may be so. 1 Inst. 146. *Fortior est obligatio hominis quam legis.* It is not an estate for years, nor a freehold. Not a freehold, 1. Because it commences in *futuro.* 2. It is without livery, and therefore it is only an estate at will, and it is not found that it is not determined. Tenant at will cannot make a lease to try his title against his lessor, *Blundel and Baugh's case;* and here the defendant enters by command of the lessor.

Twisden Justice. The case cited of Brown and Hagger is material.

Wyndham Justice. The lessor hath only an estate at will.

Kelyng Justice. The case of Littleton cannot be maintained by reason, but only by the authority of the author, and it was adjourned. *Vid. postea.*

MARKE *versus* JOHNSON.

Office. 1 Keb. 898, 919.

In an ejectment. On not guilty pleaded, the jury found a special verdict, which was in effect, that a lease is made by the King for years, provided that upon non-payment of the rent the lease shall be void. And the question was, if the rent is arrear, the King may grant this term *de novo*, without finding by office that the rent was unpaid at the day.

Kelyng Justice. The statute of 21 Jac. cap. 25 makes an alteration of the common law; for now a lease shall not be void, as before; but now an office ought to be found, that the rent is not paid, and here is no office found: but upon this special verdict there is a special conclusion, and therefore good enough. But it was adjourned.

THATCHER *versus* ULLOCKE.

Pleading. 1 Keb. 920.

In trespass *quare clausum fregit.* The defendant pleads, that H. 8 was seised in fee, and so the lands descended to the King that now is, and that he as servant, &c. The plaintiff replies, that H. 8 granted to the plaintiff, and doth **[138]** not traverse the dying seized of King Charles the First, and it might come to the King otherwise. Dyer 170.

Twisden Justice. A traverse needs not, and if it came to the King again, this ought to be shewn in the rejoinder; the last seisin shall be traversed, if it might be gained by disseisin. Adjourned.

THE KING *versus* WAGSTAFFE AND OTHERS.

Juror. Hard. 401. 1 Sid. 272. 1 Keb. 934, 938.—fo. 99. See before *Leeche's case.*

Wagstaffe and others, citizens of London, being sworn upon a petty jury at the sessions at the Old-Baily, to try Gosse and divers others, indicted upon the late Statute of Conformity, refused to find the parties indicted guilty, contrary to their evidence, which in the opinion of the Judge was full and pregnant; and upon this the Court fined them 100 marks a-piece, and ordered them to be imprisoned till they paid the said fine. And now they bring a *habeas corpus*, and upon the return of this, all this whole matter appeared, and upon mature consideration they were remanded.

And by Justice Kelyng (who was in the same Court, and gave the rule at the same sessions for the same fine and imprisonment) it is clear that the law is so; yet see Hollinshead Chron. par. 1, lib. 2, cap. 4, fo. 155, and part 2, 1405, and 1126, *Throckmorton's case*, and *Leeche's case* before.

And by Twisden Justice. The Judge is intrusted with the liberties of the people, and his saying is the law, and a man could not have a bill of exceptions at the common law, till Westm. 2. And now this doth not lie in matters of the Crown. And so it was adjudged, that the return was sufficient, and the prisoners were remanded.

[139] TERM. MICH. 17 CAR. 2, B. R.

This term was adjourned to Oxford by reason of the plague in London; and in this term no special verdict was argued, nor judgment given upon any demurrer, or special verdict by order and proclamation. And only two returns of the term kept, that is to say, *octabis & Martini.* And this term Justice Kelyng, who was Puisne Judge, was made now Lord Chief Justice, and Sir William Moreton Knight, the King's Puisne Serjeant, was made a Judge in the place of Justice Kelyng.

[140] TERM. PASCH. 1653, C. B.

Intr. Hill. 1651. Rot. 1732.

THOMAS CORBET PLAINTIFF, FRANCIS STONE DEFENDANT.

Hartford. Remainder.

In ejectione firmæ. The plaintiff declares upon a demise of Robert Slingsby Esquire, of one messuage, 200 acres of land, 60 acres of pasture, 40 acres of meadow, 20 acres of wood in Barkeway, dated the 11th of August 1651. *Habendum* for seven years from the 10th of August aforesaid. The defendant pleads not guilty. And the jury at the Bar gave a special verdict.

As to the house and 60 acres of land, &c. That Frances Duchess of Richmond was seised thereof in fee, and being so seised, June 1632, 8 Car. 1, by indenture made between her of the one part, and John Lord Powlet, Sir Edward Gourdon, Sir Edward Hungerford, and Sir Richard Young, of the other part, in consideration that Henry Prannel, her late husband, did out of his affection convey (amongst others) the lands in question to her and her heirs, and that she had no issue of her own to inherit, she by way of loving contribution thought fit to convey the same to his next heirs, and for execution thereof did demise the same to the said John Lord Pawlet and the rest; to have and to hold to them from thenceforth for 40 years, if she lived so long, in trust that she might receive the profits during her life; and after her decease, then the one moiety thereof shall be, remain and come unto Mary Clark, wife of John Clark, Esquire, eldest sister of the said Henry Prannel, and the other moiety unto Joan Brook widow, some time the wife of Robert Brook Esquire deceased, and to their executors, administrators and assigns severally and respectively, for and during the term of 1000 years from the death of the said Frances.

Trin. 10 Car. 1, after a certain fine was levied with proclamations, &c. by the said John Clark and Mary his wife, and find it *in hæc verba.*

[141] And it is of the moiety of the manor of Newsils, &c. and other lands.

That afterwards the 21st of February 1634. By indenture between the said Joan Brook of the one part, and Frances Brook and Katharine Brook of the other part, the said Joan Brook did thereby recite the said indenture made by the said duchess and the grounds thereof; and did grant unto the said Francis Brook and Katharine Brook her two daughters the said term and interest of 1000 years in the said moiety.

That the 3d of June 1637. The said duchess and Henry Brook did seal and deliver an indenture made between her and one Denzil Hollis, and Dorothy his wife, and the said Henry Brook of the one part, and Sir Richard Young and Edward Savage of the other part, whereby in consideration of her near alliance to the noble and princely family of the Howards, and the support of the high titles and dignities that may come and descend to Thomas Howard, grandchild and heir apparent of the then Earl of Arundel, she covenants with Sir Richard Young and Savage, that she will before St. Andrew's Day next levy a fine of all those manors of Newsils, and of all other her lands in the county of Hartford, to the use of her self for life, afterwards to Thomas Howard aforesaid for life, remainder to his first son, &c. in tail male, &c. with divers remainders over.

Trin. 13 Car. 1. The fine was levied, &c.

That the duchess at the making of the deed, 21 Feb. 1634, and at the fine levied continued possession.

And that Sir Richard Young in the first deed, and Sir Richard Young in the fine, is the same person.

Ult. Octobris 1639. The duchess died.

3 Nov. 1639. The said Thomas Howard the younger, now Earl of Arundel, entered, claiming by the same fine and indenture.

That after the said fine levied and before the ejectment lease, the interest of the said Mary Clark, and of the said Frances Brook and Katharine Brook, to the lands in question, came to the lessor, Robert Slingsby.

Afterwards and before the ejectment lease the said Joan Brook died intestate.

Afterwards, &c. 50 *Junii* 1651, administration was committed to the said Robert Slingsby, who afterwards upon the possession of the said earl did enter and was possessed *prout, &c.* who the said 11th of August 1651, made the lease to the plaintiff *prout* in the declaration, who was possessed until the defendant Stone did by command of the said now Earl of **[142]** Arundel enter upon him, and actually eject him. And if for the plaintiff, for the plaintiff; and if for the defendant, for the defendant.

Glyn Serjeant. I pray judgment for the plaintiff.

The points are, 1. Whether the estate limited to 1. Mary Clark, 2. Joan Brook, be good, and what kind of estate?

2. Whether the fine levied by Mary Clark, and her husband, 10 Car. 1, do operate any thing upon her interest?

3. Whether the fine levied by the duchess doth turn the estate of the sisters to a right, so that they can any way be barred thereby by that fine and non-claim?

4. Whether a good title be found by the jury for the lessor Mr. Slingsby?

1. Point. I conceive the limitation to Mary Clark and Joan Brook is a good remainder for 1000 years.

Every deed shall be taken most strictly against him that makes it. And if it cannot take effect as the parties express: yet it shall take effect as it may, rather than the deed shall be void. *Bredon's case*, 1 Co. 76. If tenant for life, the remainder in tail, the remainder over, tenant for life and he in the first remainder levy a fine *sur conusance &c.* to another in fee, who renders a rent-charge to the tenant for life; resolved this is no forfeiture or discontinuance; *ut res magis valeat quam pereat.* And the law construes this, the grant of the remainder man first, and after the grant of tenant for life. 38 H. 8, Bro. Fine 118 there cited. If tenant in tail, and A. levy a fine to a stranger, who grants and renders to A. for years, rendering rent, and by the same fine grants the reversion to tenant in tail and his heirs, this is good. And although all be by one fine in an instant, yet in judgment of law the lease precedes the grant of the reversion, *ut res magis valeat.*

30 Ass. pl. 47. If tenant for life, and he in reversion in fee make a feoffment by parol, it shall be the surrender of tenant for life, and the feoffment of the reversioner. But if by deed, otherwise. *Vid.* 6 Co. 14, 15. *Treport's case* applied.

In this case it appears, that the intention of the duchess was to give an estate for 1000 years, and the words are, *And after her decease, then the one moiety shall be, remain and come, &c.* And the scope of the deed was that she would advance her nieces, being the sisters of Prannel her former husband.

1. *Object.* That no estate passed because it is by indenture, and the sisters not parties, and so they cannot take. Hob. 313. *Winsmore's case*, 314, Greenwood.

[143] *Resp.* The difference will be between a present estate and an estate in remainder. It's true, he that is not party to the indenture, cannot thereby take a present estate, but may take by way of remainder. Lit. sect. 374 proves this, where he puts the case, If a man by indenture grant an estate to H. for life, the remainder to another in fee, upon condition, this is a good remainder, and he shall be bound to perform the condition though he was no party. 1 Inst. 131. Coke on this section takes this very difference that I have taken. And Hob. 313, 314, are judgments in the very point, with that difference. *Greenwood's case* was, Lord Sturton seised in fee, by indenture demised to Thomas Hobart, *habend.* to the said Thomas Hobart and Michael Hobart, and to one John Hobart and Henry Hobart, the sons of Thomas, for term of their lives, and the life of the longer liver of them *successivè*. Resolved by the Court upon great debate, that none could take immediately, but Thomas Hobart, because he is only party to the deed, and the rest not named but by the *habendum*, then they cannot take but by way of remainder; yet in this case they could not so, because of the incertainty who should take first, according to the book of 20 Eliz. Dyer, the words being omitted *prout nominatur in charta*, and the same difference agreed in *Greenwood's case*, fol. 314.

2. *Object.* That the sisters were not named in the premisses.

Resp. That is not material; and in truth when a remainder is limited it is most proper to come in the *habend.* and it cannot be otherwise; and the cases before cited grant the estates in the *habend.* The common conveyances of England prove it; a lease for life to A. remainder to the right heirs of J. S. 2 Co. 81, *Bredon's case, &c.* Plow. 160 a. *Tracy and Nicholson's case* 93. An estate may be granted in the *habend.* to whom none is in the premisses. So I conclude this point that Mary Clark and Joan Brook have a good remainder for 1000 years.

1. Because the grant shall be expounded best for the grantees.
2. Because of the intention.
3. It hath a present estate to support it.

Now the next question upon this point will be, what kind of remainder this is, viz. whether a remainder vesting presently or a contingent?

It is a contingent remainder. For the lease made by the duchess to the Lord Pawlet, &c. is for forty years, if she **[144]** live so long; and after her death, to come, remain and be as to one moiety to, &c. so the remainder is not after the end of the term, but after the death of the duchess, which may be within the forty years, or after the forty years; so that its doubtful whether the remainder will vest *eo instanti* that the precedent particular estate shall end or not.

In which case by the rule of our books the remainder is contingent. 3 Co. 20, in *Boraston's case.* If one grant to J. S. for life, remainder to the right heirs of J. D. this is a contingent remainder, viz. its a good remainder if J. D. dies in the life of J. S. but otherwise if J. S. dies before this vest.

10 Co. 17, *Lampet's case.* A termor devises his term to A. for life, remainder to B. It is there agreed that this is a contingent possibility. Upon the same reason, if A. shall live after the term, the remainder shall never vest; but if during the term he dies, it shall vest.

In Plowd. the case put in *Colthurst's case*, a lease is made to A. for life, the remainder to R. for life; if B. dies before A. the remainder to C. for life, this is a good remainder upon a contingency, viz. if B. dies before A.

So in our case the lease is made to the Lord Pawlet and others for forty years, if the duchess live so long, and after her death the remainder to Mary Clark and Joan Brook for 1000 years; this is a contingent remainder; for the particular estate on

which it depends is the estate for forty years, which may or not determine before her death; if it determine before, then the remainder, as a remainder, is gone.

Object. My brother Bernard would seem to object that this remainder should not be good because of that manner of limitation; for it is not to begin after the forty years, but after the death; and so the life of the duchess interposed, and compares it to the case put in *Colthurst's case*, Plowd. 25. If the estate be limited to A. for life, and after the death of A. and one day after, to remain to D. for life, that is a void remainder, which is law.

Resp. But the reason is because there is no probability for the remainder to vest when the particular estate ends, which is a necessary incident to every remainder: but there is a possibility in our case, for if the duchess die within the forty years, then the particular estate ends when the remainder commenceth. This is expresly agreed in 3 Co. 20, *Boraston's case.* If a lease be made to A. for twenty years, if B. shall so long live, and after the death of B. a remainder over in fee, this remainder is void, because if the remainder shall **[145]** be good, then shall the fee-simple be in abeiance, which the law will not suffer. But if the remainder had been for years it had been good, for that may be in abeiance; and so he concluded the first point.

2. Point. Now the estate being thus settled (viz.) a remainder for 1000 years to Mary Clark after the death of the duchess, the jury find that afterwards Trin. 10 Car. a certain fine with proclamations thereof made according to the form of the statute by the said John Clark, and the said Mary Clark his wife, in C. B. the tenor whereof followeth, and recites *in hæc verba, &c.* whereby it appears, that Thomas Roper, Esq; and Robert Pickring were plaintiffs, John Clark and Mary his wife deforciants. The fine was of the moiety of the manor of Newsils Rookey, Walter Andros and Berwick, eight messuages, four cottages, and three tofts, and divers numbers of acres in Barkway, Barley and Royston; so the point is whether Mary Clark by this fine hath passed away her interest, or extinguished it in the lands in question: and he held she had not.

1. Because it is not found that the fine was levied of the lands in question, and if it be not found, being matter of fact, the Court will not presume it.

Object. That it appears that the fine is levied of lands of the same name, and in the same place, as are mentioned in the indenture of June 1632.

Resp. If it were so, unless the jury find it to be the same lands, the Court cannot presume it; for it may be of lands of the same name and in the same place, and yet not the same lands; and the presumption is against it; for if it had been the same, the jury would have found it so: and it were dangerous for the Court to supply it by intendment, for thereby they might subject the jury to an attaint.

2. But in truth it doth not appear the fine was levied of lands in the same place or name, as in the indenture of June 1632.

For the lands given Mary Clark by the indenture are the moiety of the manor of Newsils, &c. situate in the parishes of Barley, Read and Royston in the counties of Hartford and Cambridge, or one of them; and the fine is of lands in the county of Hartford, and so *non constat* whether the same.

[146] 2. Admit the fine were of the same lands; yet I conceive the estate of Mary Clark is neither given away or extinguished.

The case for that is,

The Lord Pawlet is lessee for forty years, if the duchess live so long; this is in trust that the duchess might receive the profits, the remainder after the death of the duchess to Mary Clark for 1000 years. The duchess being in possession, Mary Clark levies a fine to a stranger *sur conusance de droit come ceo, &c.*

1. Nothing passeth from Mary Clark; for Mary during the life of the duchess, hath not any interest in her to grant; for the remainder being contingent is not grantable over, 10 Co. 47, *Lampet's case*, resolved, devise of a term to A. for life, and after his death to B. this being but a possibility is not grantable during the life of A. and yet this is an executory devise, which is much favoured, 4 Co. 66 b, in *Fulwood's case* accordingly, and 8 Co. *Mathew Manning's case.* One devises a term to baron and feme for one and twenty years, remainder to the survivor of them; neither baron nor feme during their joint lives may grant this over; so that with some clearness he held that the fine doth not give the estate of Mary Clark, because it is not grantable.

2. This contingent remainder is not by the fine either released or extinguished, 10 Co. 48, in *Lampet's case*, it is said, that a right or title to a freehold or inheritance, whether it be present or future, may be released in five manners. 1. To the tenant of the freehold in deed or in law without privity. 2. To the tenant in remainder. 3. To him in reversion without any privity; but an estate cannot be enlarged so. 4. To him that hath a right only in respect of privity, as if a tenant be disseised, and the lord release the services to the disseisee. 5. In respect of privity without right. But in our case the conusees of the fine levied by Mary Clark have not any of these qualities, for they have neither estate in the land in question, nor privity, or right, &c. therefore the fine cannot operate by way of release.

3. By way of extinguishment or estoppel it cannot be; for the right in remainder is not in the conusor; and it is not an estoppel to any but those who claim under the conusees of the fine; for an estranger shall not take advantage of it, because it is not reciprocal. *Vid.* 2 Co. *Buckler's case.*

[147] 3. Point. If the fine levied by the duchess to Sir Richard Young puts the remainder to a right, so that for default of entry within five years, this is a bar, or the remainder is destroyed. I hold that the fine doth not touch either the estate for forty years, nor the remainder for 1000 years.

As to that, the case is, the Lord Pawlet and Sir Richard Young are lessees for forty years, if the duchess live so long, the remainder over to the sisters. Now the clause in the indenture is, that the duchess shall take the profits, and the continuance in possession makes her lessee at will to the Lord Pawlet and Sir Richard Young.

Now that she is tenant at will, *vid.* 1 Inst. 171 a. If H. enter into lands by the consent of the owner, he is tenant at will, Littl. 108. H. makes a feoffment in fee upon condition to perform his will, and the feoffor enters, Littleton's opinion is, that he is tenant at will; Coke is of that opinion, and so upon debate it was resolved, Hill. 11 Car. 1, B. R. betwixt *Wilkinson and Meriam*, Cro. Car. 323. In case of a mortgage the perception of the profits doth make the mortgagor become tenant at will to the mortgagee, and there adjudged that the mortgagee might devise the lands, Cro. Jac. *Powseley and Blackman;* so that the duchess here hath a rightful possession, and a fee-simple in the reversion. And then I conceive the fine doth not stir any of the estates for years, for these reasons.

1. Because it is a fine which works by way of grant, and if there be an estate large enough in the grantor to satisfy the grant, the law will never expound it a tort, if it may be otherwise. Now the duchess by fine grants a fee-simple, and she hath a fee-simple to grant, and therefore no wrong: upon this reason it is in 1 Co. 76, *Bredon's case*, tenant for life, remainder in tail, tenant for life and he in the first remainder levy a fine to a stranger; adjudged there that it is not any forfeiture of the estate for life, neither any discontinuance of the remainder, because it is by fine; yet in this case, if it had been by feoffment without deed, it is there agreed to be a forfeiture and discontinuance. But any estate by fine that operates by way of grant, the law to avoid wrong expounds it so, that every one grants that that he may lawfully grant, 10 Co. 98, *Sir Edward Seymour's case.* Upon the same reason, if tenant in tail bargain and sell in fee, and then levies a **[148]** fine, this fine shall work no discontinuance or wrong. But the law to avoid a tort doth expound it to operate upon the base fee that was formerly granted, which wrought no discontinuance, as it is there adjudged; and yet if the fine had been levied before the bargain and sale, there it had been a discontinuance; for then the law had had no means to expound it otherwise.

2. *Reason.* Because the duchess being tenant at will continues the possession, as well at the time of the fine levied, as after, even to her death; and the possession of the tenant at will is the possession of him in remainder, and this preserves the estate without any wrong done to it, or turning it to a right. 1 Inst. 270. The possession of the particular tenant is the possession of the lessor, and the possession of the remainders. The possession of a guardian in chivalry or a guardian in socage is the possession of him in reversion. 29 Assises pl. 161. 20 Assises pl. 9. 22 E. 4, 14 a. &c. And the possession of a tenant at will doth much more intitle him in reversion

to the possession than any other. For if tenant at will commit any voluntary waste and dies, and his heir enters, in such case the lessor may have an action of trespass *vi & armis, &c.* without any entry. Litt. sect. 82. 5 Co. 13. 10 E. 4, 18. 21 H. 7, 12. But in case of tenant at sufferance the lessor cannot have trespass without entry. Hence follows that the possession of the duchess is the possession of the lessor, so long as the will continues. The levying of the fine by the duchess is no determination of the will, for she continues her possession still; and the levying of the fine by her is a lawful act, and a lawful act shall never determine the will. 1 Inst. 85. A lease at will reserving the trees, &c. If the will be determined yet her continuance in possession makes her tenant at sufference, which still continues the possession of the lessor. And the fine being a lawful act doth not turn the estate to a right. 9 Co. 104, *Podger's case.* 10 Co. 96, *Seymour's case.*

The 3d, and main reason. Because the fine is levied to Sir Richard Young, who is one of the lessees for years, and by the statute of 27 H. 8, cap. 10, the estate of Sir Richard Young is expresly saved, as appears by 7 Co. *Lillingston's case.* If there be lessee for years to the use of another, and the lessor infeoff the lessee for years to uses, the term for years is saved by the proviso of the statute. So if the **[149]** lord infeoff a copyholder to the use of another, the copyholder's estate is preserved. Then if the estate of Sir Richard Young by express proviso of the statute of 27 H. 8 is saved, and no wrong done to it, it follows that the remainder is not touched.

The conclusion. If by the fine no wrong is done, and the estate for years not turned to a right, then no bar can be, and no claim is necessary; and this is resolved 5 Co. 124, *Sander's case*, cited to be adjudged in *Saffine's case.* If a man hath a future interest, and the lessor is disseised, and the disseisor levies a fine, the future interest is not touched, and because it is not turned to a right he is not bound to make claim. And the case put out of Plowd. 373, *Stowel's case.* If H. levy a fine in which another hath title of common, and five years pass, the commoner is not barred, because the fine doth not do any wrong to it.

3 Co. 77, *Farmor's case*, agreed that a fine and non-claim doth not bind the estate, but the right; and therefore when the fine doth not turn the estate to a right there needs no claim. 9 Co. 105, *Margaret Podger's case.*

2d Resolution. That no fine bars any estate in possession, reversion or remainder, which is not devested and put to a right; and there it is also said, that he that at the time hath not any title of entry shall not be barred, so the possession continuing in the lessees, and not being turned to a right, there it is not touched nor barred by the fine.

4th Reason. Because the remainder limited to Mary Clark and Joan Brook is contingent, so that at the time of the fine levied it is not vested in them, but in the custody of the law, in which case a fine levied by a stranger doth not bar it, 9 Co. *Podger's case*, it is said when the estate is so settled, that he who claims the interest of it, cannot by any possibility enter and make his claim, he shall not be barred by the statute; for it is not reason that he shall be barred by non-claim who is not guilty of any *laches;* and therefore H. who had a future interest at the time of the fine levied shall not be barred. So in the case of feoffee upon condition, if he levy a fine, and five years pass, and then the condition is broken, he is not barred. And now in our case at the time of the fine levied the sisters could not enter, for their estate was not in them, and therefore not touched, Hill. 29 Eliz. Rot. 8240, C. B. *Grant's case.* John Grant seised of lands **[150]** in fee, held in socage, devises them to his nephew John Grant when he comes to his age of twenty-five years, to hold to him and the heirs of his body; John Grant the nephew, after his age of twenty-one levies a fine of 'em to a stranger, and having issue after attains to his age of twenty-five years, and dies.

Three points were adjudged.

1. That the gift and devise to John Grant the nephew, was in contingency and *futuro* at the time of the fine levied.

2. That the estate-tail in contingency was not barred by the statute of 4 H. 7.

3. That this estate in contingency was barred by the stat. of 32 H. 8, cap. 26. And this by force of the words of that statute, *All fines levied by proclamation, &c. of any mannors, lands, &c. before the time of the said fine levied, in any wise intailed to the*

person so levying the fine, or to any of his ancestors: and this is a resolution for us, and our case is more strong; for in our case the fine is levied by a stranger, but in *Grant's case* by the party himself, and yet not touched by the statute of 4 H. 7. And our case clearly is not within the statute of 32 H. 8, for that there is no intail *per que, &c.* And admit the particular estate of 40 years should be turned to a right, and displaced, this right supports the remainder. 1 Co. *Archer's case*, Co. *Chudleigh's case.*

Object. The last thing objected was to the verdict, which found, that the interest of Mary Clark, Katharine Brook and Francis Brook came to the lessor, and doth not find how.

Resp. It is good enough; for when the jury finds the interest to come to the lessor, the Court intends all circumstances which conduce to that fact; for the Court does not doubt when the jury doubts not. 4 Co. *Fullwood's case* 65. The jury found that Thomas Castle came before the Recorder of London, and mayor of the staple, and acknowledged himself to owe to Thomas Rivet 200l. Exception was taken, that there was no finding of any statute there, for it was not found that this was *secund' formam statuti*, and that it was by writing.

Resp. It is good enough, for all circumstances shall be intended.

The Court did object and doubt that the remainder limited by the two sisters was void, because, 1. That it could not pass to them by way of present estate, because they were not parties to the indenture. 2. It could not be a **[151]** contingent remainder, being a remainder for years depending on an estate for years; and there cannot be a contingent estate for years; because a lease for years operates by way of contract, and therefore the particular estate and the remainder estate operate as two distinct estates grounded upon several contracts; but it is true, such a remainder may be of a freehold, as upon an estate for life, the remainder to the right heirs of J. S. and then in law the particular estate, and the remainder, is but as one estate in law, and is created by the livery.

2. The Court objected, that the sisters were barred by the fine and non-claim: for admit it to be by way of contingent remainder, when the remainder vests the sisters are bound within five years after to enter; as in case where tenant in tail, remainder in tail doth levy a fine, and tenant in tail dies without issue, he in remainder is bound to enter within five years after the death of the tenant in tail, else he is barred. Judgment for the plaintiff.

[152] TERM. PASCH. 18 CAR. 2, B. R.

Mandamus. 1 Lev. 162. 1 Keb. 868, 880. 2 Keb. 1. Privilege.

Mills had a *mandamus* to restore him to the place of one of the approved men of Guilford; and upon the return appeared just cause of restitution, and upon that the parties submitted by rule of this Court to Onslow and Weston, who made an award that Mills should be restored, and the approved men refused to restore him. And upon this Serjeant Wild moved for an attachment against the approved men. But by the Court an attachment doth not lie against a corporation: but if it be granted *nisi*, and the corporation will not restore him, the Court will grant a restitution.

Dixon had a debt due to him from Killegrew, a grand officer of the King's household, and for that he could arrest him, he took process and outlawed him, and Killegrew hearing of it, caused the plaintiff to be imprisoned, and Dixon obtained an *habeas corpus* of the Chief Justice in the vacation, and an *alias & pluries*, and upon speech with the King, the Chief Justice informed him in this manner (as the Chief Justice reported in open Court), (viz.) *That his servants are free of arrests, and therefore he should not be deprived of them without his leave;* but this privilege is for the advantage of the King, but not for his servants, and therefore they may be sued, so as he be not deprived of them, and so may be outlawed. But notwithstanding this resolution, Dixon was arrested again and imprisoned; and now Kelyng moved for a *plur. habeas corpus*, and the Court granted a *habeas corpus* but not a *pluries*, because none was granted before in open Court.

[153] ——— *versus* HARVEY EXECUTRIX OF SIR JOB HARVEY.

Survivor.

In debt. The defendant pleaded a joint judgment against the testator, and Erasmus Harvey who is now alive, and that he had not assets beyond the said judgment to satisfy. The plaintiff demurs; and adjudged for the plaintiff, because the lien survives, and the executrix not liable. *Vide antea* 26, *Edsar and Smart.*

Mandamus.

A *mandamus* was granted to restore the Recorder of Barnstable, directed to the mayor of the corporation; and he returned *quod non constat nobis*, that he was ever elected; and the return adjudged insufficient, and restitution awarded.

BRETTON *versus* PRETTIMAN.

Assumpsit. 1 Danv. Abr. 45, p. 24. 1 Sid. 283. 2 Keb. 26, 44.

In *assumpsit.* The plaintiff declares, that the defendant promised, that in consideration that the plaintiff would take an oath that money is due to him, he would pay him; and the plaintiff avers, that he swore before a Master in Chancery. The defendant demurs; and adjudged for the plaintiff, because it shall be intended an affirmation upon solemn protestation, and not such an oath for which he may be indicted, Cro. Eliz. 470, *Knight* versus *Rushworth*, Mich. 1658, *Perkins* versus *Binck.* In consideration the plaintiff would come before a Master in Chancery and swear, he will pay; and adjudged for the plaintiff; and here the subject matter expounds the thing. *Vide* Mod. Rep. 166, *Amy* versus *Andrews.*

A week before this term Sir Robert Bernard, Serjeant at Law, died, who was a baronet, and of the county of Huntington.

[154] TERM. TRIN. 18 CAR. 2, B. R.

This term was very defective in business, and therefore I did not attend above two or three days, in which no case remarkable occurred; except the case following.

Courts.

Presentment was in a leet in Westminster against divers persons for using several trades, having not served as apprentices for seven years, according to the statute of the 5th of Eliz. and upon this presentment Benet chief bailiff of this liberty would have levied 40s. a month upon them, and they removed the presentments by *certiorari;* and it was now debated if the leet had conusance of such things by the last clause of 31 Eliz. cap. 5, and it seems not, because the offences there mentioned, and the Courts, shall be expounded, *reddendo singula singulis.*

THE KING *against* THE EARL OF DORSET, IN CHANCERY.

Scire facias. Postea 177.

Upon a *scire facias* against Richard Earl of Dorset, and others, members of Sackvile College in East Greenstead in Sussex, to shew cause why the letters patent, which incorporated and constituted the said hospital, should not be repealed as they concerned Edward Earl of Dorset, and the heirs males of Robert Earl of Dorset who was the founder of the said hospital, and cancelled, and the inrolment of them vacated. The *scire facias* recites the will of Robert, and that he devised to his executors, by which it was provided, that his executors should found and endow the said hospital, and make by-laws, and that the heirs of Robert should have the patronage and visitation of the hospital; and the King by letters patent intending to incorporate the said hospital according to the said will, and that the charitable cure might be

performed according to the intent of the founder, constituted the corporation, and granted licence to purchase the endowment intended. And he farther granted, that Edward Earl of Dorset, who was heir **[155]** male of the founder, should have the patronage and visitation. The *scire facias* recites, that the Lady Thanet, and the Lady Compton are heirs of the founder, and that Edward Earl of Dorset had taken upon him the patronage and visitation of the hospital, to the disinherison of the said ladies; and upon this *scire fac.* the Earl of Dorset demurs in law.

Finch Solicitor General, for the Earl of Dorset; and he said that this *scire fac.* is rather process in the name of the King, than the process of the King himself; and such process doth not consist with the interest of the Crown; and reduced his argument into five heads. 1. This *scire fac.* need not to be brought in the name of the King. 2. This *scire fac.* doth not lie at the suit of a subject. 3. A *scire fac.* doth not lie to repeal part of a patent. 4. This patent is good *in toto.* 5. Admit it is not good *in toto,* yet it is not fit to repeal this patent at this time.

As to the first. Because the conclusion of the writ is *ad damnum* of a particular subject, and the King cannot have a *scire fac.* but where the thing is *in deceptionem Regis,* or *ad gravamen populi.* 10 Co. *Magdalen College's case.* The King is called *sponsus Regni,* and the writ of *ad quod dammum* is, *ita quod patria non gravaretur;* but if the writ be not brought against a publick injury, the King cannot make a private quarrel himself; and no *scire facias* lies to repeal a patent but in two cases. 1. A *scire fac.* to repeal a prior patent is always at the suit of a subject, 2 E. 3, 7 b. Hill. 16 E. 3, Fitz. Grant. 53, the case of *The Burgesses of Wells,* 17 E. 3, Dyer 269 a. pl. 18. Lands held of the Bishop of Winton were conveyed to the King by covin to make the bishop lose his seigniory, and the King *sede vacante* granted them to the brothers Carmelites; and this grant was repealed by *scire fac.* Mich. 21 E. 3, 47 a. pl. 68, and in *The Prince's case,* 8 Co. the King brought the *scire fac.* But the King there had an interest, and the prince could not have those lands without the King by seisure. 2. Here it doth not appear to the Court that the ladies ever petitioned to the King to have any such writ of *scire fac.* Pasch. 27 Eliz. Sir Henry Nevil in Chancery brought a *scire fac.* to repeal a patent, and the writ was *unde nobis supplicavit.*

Object. The King may maintain this *scire fac.* because it is *in deceptionem dom. Regis.*

[156] *Resp.* Admit that it is, yet no deceipt will be sufficient ground for any such writ, if it be not to his damage, or to the damage of his people.

2. The King here is not deceived, because he recites the will, and yet goes contrary to it, which is according to his prerogative; and there is a difference where the King takes notice of the estate of the testator, and where he hath not notice, but only by the suggestion of the party.

To the second point. Such *scire facias* doth not lie at the suit of a subject, for two reasons. 1. Because although the King may bring a *scire facias* in Chancery to repeal a patent; yet when a subject repeals a patent of another, not upon privity but grievance, there it ought to be repealed in Parliament. Hill. 16 E. 3, Fitzh. Brief. 651. Mich. 21 E. 3, 46 b. pl. 65. It ought to be grounded on matter of record, and not upon suggestion of matter of fact only. If the King grants two patents of the same thing, the second patentee cannot have a *scire facias* against the first. Mich. 7 E. 4, 22 b. by Catesby. Dyer 176, 277 a. pl. 54. Where the title of a subject appears upon record, there he may have a *scire facias,* otherwise not. 11 H. 4, 67. Fitzh. Scire Fac. 70. 12 R. 2, Fitzh. Forfeiture 20. 41 Assise, pl. 25. Fitzh. Scire Fac. 133. Pasch. 49 E. 3, 11. Fitz. Traverse 19.

To the third point. A *scire facias* doth not lie to repeal part of a patent. Letters patent may be void in part, and good in part, but they cannot be repealed in part; 1. Because the record of the patent is intire. 2. The form of the entry of the judgment in a *scire facias* to repeal a patent, is *quod literæ patentes vacentur,* and not part of them. Dyer 197. In the prince's case they are repealed *quoad maneria, &c.* but it doth not appear there were other lands. And there is a difference between a *scire facias* and a *quo warranto,* for a *quo warranto* may be good for part, and ill for another part, because the record is not to be touched by it; but upon a *scire facias* the record

is to be cancelled. 5 R. 2, Rot. Parliamenti 89, the case of *Laystoffe*. Reversal of records in part, Cro. Jac. 303, *King* versus *Marlborough*, and Croker in ejectment against an infant and others, reversed against all. Hill. 1653, B. R. *Symonds* versus *Bockle*.

[157] *Object. English's case.* Where a fine is reversed *quoad* an infant, and good for the other, and F. N. B. 98 b. Fine of lands in ancient demesne, and at common law, reversed as to the lands in ancient demesne, and stood as to the others.

Resp. Upon the Book of Entries appears a rational difference; for if a fine be reversed, generally the writ issues to the *custos brevium* to cancel the fine. Coke's Entries 252, *Gage's case.* Rastal's Entries 278 a. But when there is a reversal as to part, there is no such writ. Coke's Entries 257 b, *Peirs and Parmiter's case.* So a fine may be reversed in part, but not cancelled in part; and as to the case of ancient demesne the fine may be reversed by writ of deceipt; but the judgment is only *quod dominus rehabeat Curiam suam.* Rastal's Entries 100 b. 7 H. 4, 44, *Countess of Kent's case.* In case of an obligation for performance of covenants, the obligation may be good for part, and not good for the other part; but the obligation cannot be cancelled for part, and stand good for another part; and here the judgment ought to be *quod literæ patentes concellentur.* There are precedents in point, Pasch. 27 Eliz. *Privit* versus *Ward.* In a *scire facias* to reverse a patent for a walk in Cranburn chase; the judgment ought to be given in B. R. when the record is brought there to try the issue, but judgment was not given, 28 Eliz. The Countess of Bath brought a *scire facias* to repeal a patent for a market; *vide* such a *scire facias*, Mich. 11 H. 4, 5, pl. 13.

Object. Then all the patent is to be repealed if any part be defective.

Resp. It cannot be repealed upon this writ. 2. Then the whole corporation is dissolved, and all the revenue returns to the defendant.

To the fourth point. This patent is good in the whole, because although the King takes notice of the will of Robert, yet he is not tied to pursue those rules in the erection of the college prescribed in the said will, because a corporation is a creature of the King. 11 H. 7, 27 b. and 28. 21 E. 4, 7 a. by Choke, 2. *Ab inconvenienti*, if any variance will destroy corporations, Sutton's hospital and the school of Sevenock in Kent, and many others would be destroyed. 3. I will go over the desire of this writ of *scire facias.*

[158] *To the fifth point.* It is not fit to repeal this patent at this time, because the Court will not repeal the patent without calling the guardians and assistants of the hospital; and here they are not parties. Keilway 194, *Sir John Savage's case.*

Maynard Serjeant *contra*, and it was adjourned. *See after* 177.

JEMOT *versus* COOLEY. SEE BEFORE 135.

Estate. 3 Danv. Abr. 163, p. 4. 1 Sid. 223, 262, 344. 1 Lev. 170. 1 Saund. 112. 2 Vent. 193. 1 Keb. 784, 915. 1 Keb. 20, 184, 270, 295. 3 Keb. 6.

In ejectment of the demise of Sir Ralph Bovey. Upon not guilty the jury found a special verdict. Francis Drake seised in fee of the land in question, in consideration of 6000l. grants a rent-charge of 420l. per annum to Sir Ralph Bovey and his heirs, and in the deed of grant is this clause; *And the said Drake doth covenant and grant to the said Sir Ralph Bovey, that if the rent be arrear above twenty days after any day of payment, that then the said Sir Ralph Bovey and his heirs, &c. may enter into the lands and receive the profits until he shall be satisfied of the arrears; the rent is behind, and Bovey enters and makes a lease to the plaintiff; and if Bovey hath such an interest as he may maintain an ejectment*, was the question.

Morton Justice for the plaintiff. Here an inheritance passes, and not a chattel, and the rent is the principal, and the power to enter is a farther remedy, Littleton sect. 327, it is more than a penalty. For Cro. Jac. 511, *Hare* versus *Havergil.* This grant is in the nature of a common assurance, and therefore ought to be favoured; and it is of more antiquity than a common recovery. 19 E. 3, Fitz. Bar. 280. 13 R. 2, Fitz. Done 10. Authority in point, Hill. 13 Jac. C. B. Rot. 868. *Brown* versus *Hagger*, cited in *Price and Vaughan's case;* and Trin. 14 Car. 2, Rot. 2511, C. B.

Eger versus *Malin.* Ejectment upon a lease of the Lord Byron. Special verdict was found; Sir John Byron seised in fee, by indenture grants a rent-charge for life to commence after the death of the grantor; and if the rent be arrear, that the grantee may enter and take the profits without account till the rent and arrears shall be paid; the rent was arrear, and the grantee enters and makes a lease to the plaintiff.

[159] And by Bridgman Chief Justice, there is not more difference betwixt a grant and feoffment, than betwixt one egg and another; and the justices agreed for the plaintiff there, besides Brown Justice.

Wyndham Justice accordingly. Here the thing granted is only a power, and not the term it self, and it is as a distress; but this power produces a real effect, when the grantee hath entered he hath only a pernancy of the profits; for he cannot cut trees, or pull down houses, and if he doth, trespass lies against him, as against him who abuses a distress; this power goes to the heir, but the inheritance subsequent goes to the executors, and follows the arrears of rent.

Twisden Justice, and Kelyng Chief Justice accordingly; and judgment was given for the plaintiff.

[160] TERM. HILL. 18 & 19 CAR. 2, B. R.

RYMES *versus* BAKER.

Covenant. 2 Keb. 139.

In covenant. The plaintiff counts that he demised to the defendant certain land for thirteen years, to pay to him 40l. quarterly, and doth not say *annuatim.* The defendant pleads *non est factum*, and found for the plaintiff, and after plea pleaded, the plaintiff amended his declaration, and inserted the word *annuatim.*

And Powis moved for the defendant, that it should be examined.

But by Kelyng Chief Justice, and Wyndham Justice, the addition of *annuatim* is no more than what was implied before.

And by Twisden Justice. The defendant ought to have demanded oyer of the deed, and now he having pleaded *non est factum* he is not prejudiced by the amendment; and therefore let the amendment stand.

Presentment. 2 Keb. 130.

Ayres was presented at the leet for digging cony-boroughs, and breaking the soil in the waste.

Winnington moved to quash it, because it is not *ad commune nocumentum.* Cro. Jac. 156, *Leicester Forest's case.* 27 Ass. pl. 6.

Kelyng Chief Justice. A leet cannot amerce for things done to the damage of the lord; and the presentment was quashed.

[161] TERM. PASCH. 19 CAR. 2, B. R.

BILTON *versus* JOHNSON AND OTHERS.

False Imprisonment. 2 Keb. 173, 198.

Trespass and false imprisonment in London. The defendant pleads that J. S. sued forth a writ of *latitat* the last day of Trinity term, directed to the Sheriff of R. and by virtue of that the sheriff of the said county made a warrant to the defendant, and he upon that took the plaintiff, which is the same imprisonment, *absq; hoc*, that he is guilty in London, *vel aliter vel alio modo.* And the plaintiff replies, that the said writ was truly prosecuted after the imprisonment, (viz.) the 9th of August. And upon this the defendant demurs; and adjudged for the plaintiff, because although the *teste* of the writ is upon record, and the plaintiff cannot aver against it; yet here great inconveniencies will be, if the plaintiff cannot set forth the very time of the purchase of the writ, and the relation of the *teste* is only to prevent fraud, and not justify a tort; and judgment was given for the plaintiff.

Rescous. 1 Lev. 214.

The sheriff returns a rescous against Syms, and others; and the return is, that A. being in custody of my bailiffs, the defendant rescued him out of the custody of the bailiffs; and Stroud moved to quash it, because it ought to be out of the custody of the sheriff.

Twisden Justice. This hath been ruled both ways, for it is good, *e custodia mea secundum veritatem legis*, and good *e custodia ballivi mei secundum veritatem facti*; and if an action of the case be brought for the rescous, it ought to be, that he returned the prisoner being *in custodia ballivi*; but the other justices ruled that it ought to be *ex custodia vicecomitis*, and upon that the return was quashed.

[162] TERM. MICH. 19 CAR. 2, B. R.

KNIGHT *versus* BUCKLEY.

Debt. 2 Danv. Abr. 485, p. 9. 1 Lev. 215. 1 Sid. 338. 2 Keb. 260, 277.

Debt for rent by the assignee of a reversion. The defendant pleads, that before any rent arrear he had assigned to another. The plaintiff demurs; and adjudged for the plaintiff, by Kelyng and Wyndham, contrary to the opinion of Twisden; because the defendant doth not alledge that he gave notice to the reversioner of this assignment. *Vide* Cro. Eliz. 22, *Serjeant and Gibson's case.*

This term proclamation was made in Court for the county of Middlesex, for the rates and prices of hostlers, viz. hay for a night and day for one horse 9d. with litter; hay for one day 4d. For one horse without hay 2d. oats 8d. by the peck, and not more.

SNOW *versus* CUTLER. SEE BEFORE.

Devise. 2 Danv. Abr. 520, p. 16. Eq. Ab. 188, p. 10. 1 Lev. 135. 1 Sid. 153. 1 Keb. 567, 752, 800, 851. 2 Keb. 11, 145, 296.

In ejectment of the demise of Henry Chomeley of lands in Hackney. A special verdict found, that Sarah the wife seised in fee of a copyhold, surrenders to the use of her self, and Robert Jaques her husband, and the heirs of the husband; the husband after surrenders to the use of his will, and makes his will, and by this devises his land in these words; *My lands in Hackney which were my wife's, and now her's for life, I give to the heirs of the body of my said wife, if that he or they live till fourteen years of age; and for want of such heirs, then to William Jacob and his heirs.* 10 August, 1 Car. 1, Robert Jaques dies, Sarah survives and marries Henry Chomeley, by whom she had issue the lessor of the plaintiff. Henry Chomeley suffers a recovery, 20 Febr. 15 Car. 2. Sarah dies, and the lessor of the plaintiff enters and the heir of Robert Jaques, the devisor, enters upon him.

[163] The points were two, viz. 1. What passes by the will. 2. What operation the recovery hath.

Moreton Justice. 1st, If this devise of the remainder in fee be good to the heirs of the body of the wife, by way of executory devise. 2. If the recovery be a good bar to the executory devise.

As to the second point he did not meddle; but as to the first, he held it is a void devise. Conveyances at common law are good directions for wills. 1 Co. 85. Perkins 97. There ought to be a devisee, as well as a devisor *in rerum natura* and *in esse* at the time of the devise. 2 H. 7, 13. 9 H. 6, 23. Moor 637. To an infant *in ventre sa mere.* Dyer 303. Trin. 16 Car. 2, C. B. *Woodley* versus *Nightingale.* There was a good executory devise, but not better for being a surrender. Cro. Eliz. *Clamp's case.*

Object. It passes by way of reversion, and the inheritance descends in the mean time.

Resp. It cannot, because there is a remainder over. 9 H. 6. A use to a monk,

the remainder to J. S. and his heirs, the remainder vests immediately, and cannot pass as an executory devise, because there ought to be such manifest intent, and not by averment. *Shelton* versus *Bine*, Pasch. 17 Car. 2. A devise of land to one after the death of J. S. is a present devise; and a devise to the first son of J. S. when he is born, is void without an estate of freehold precedent.

Wyndham Justice accords with Moreton Justice. The questions are:

1. If the devise to the heirs of J. S. (he being then alive) be good?
2. The feme here having an estate for life, if this alter the case?
3. If the recital here alter the case?
4. If the words (viz.) *If he live to fourteen years*, alter the case?

As to the 1st, It is a ground, that Judges ought to keep within bounds: and it is said, that if *Matthew Manning's case* had been to be adjudged now, it would have been otherwise determined. A devise to the heirs of J. S. he being alive, is a void devise. Power to make leases to one, two or three persons, he cannot make a lease for the life of the first son of J. S. because the person ought to be *in esse*, per Noy Attorney General.

As to the 2d, The estate for life of the wife doth not alter the case. 40 E. 3, 9, *Beverly's case*. A lease for the life of A. remainder to his right heirs, A. hath an estate in fee presently.

[164] To the 3d, The recital doth not alter the case, because in no case where there is a present devise there shall not be a contingent executory devise; *Wild's case* express in the point.

Object. Devise to an infant *in ventre sa mere* is good.

Resp. The greater opinion is, that such devise is void; yet an infant *in ventre sa mere* is *in esse*, and may be vouched; *The Earl of Bedford's case.*

To the 4th, It is a contingent upon a contingent.

Twisden Justice *contra.* It is a good devise to the heirs of Sarah; and he took a difference between acts executed, and devises, because a devise may be *in futuro;* as a devise to J. S. when he marries such a one, there no estate vests in him till marriage. 11 H. 7, 17. As to the devise to an infant *in ventre sa mere*, 11 H. 7, 13, it is frequent. Moor. 177. Dyer 342. This is a contingent pursuant to the course of nature.

To the 2d point of the recovery it works nothing, because copyhold and a recovery of a copyhold doth not dock the remainder without custom.

Kelyng Chief Justice agreed with Twisden, and so the Court was divided.

[165] TERM. HILL. 19 & 20 CAR. 2, B. R.

JOHN PEMBLE *versus* STERNE.

Intr. Hill. 16 & 17 Car. 2, Rot. 1521.

Estate. 2 Danv. Ab. 752, p. 5. 3 Danv. Abr. 244, p. 2. 1 Lev. 212. 1 Sid. 316, 416. 2 Keb. 213, 230, 325, 440, 460, 464, 484, 525.

On an ejectment a special verdict found, that the lands in question were parcel of the inheritance of the Archbishop of York, and usually and anciently demised by lease. For 12 Decemb. 1604, the Archbishop of York on surrender of a former lease demises this to Robert Nevil for 21 years under the old rent. Nevil surrenders this in the year 1630, to Harsnet Archbishop, *ea intentione* to preserve this land for the maintenance of his successor; the archbishop enters, and dies 1631, after whose death Neal was made archbishop, who died in 1641, and William was made archbishop, during all which time the land was in the hands of the archbishops. In 1642, an ordinance was made for sequestering the lands of the church; and after (viz.) in 1646, there was a sale of the lands of the church; Williams died 1646, and after (viz.) in 1660, Fruyn was made archbishop, who made a lease for 21 years to the lessor of the plaintiff; Fruyn dies, and Stern is made archbishop, who demises the land to the defendant.

The question is, if this lease made by Fruyn be good?

Moreton Justice for the defendant. Because the verdict is insufficient and void:

1. Because here is a demise of divers things, and the verdict finds only for part, and nothing for the residue. 30 E. 3, 33. 1 Inst. 227 a. 2. The jury finds that the lands in question are part of the inheritance of the church of York, and commonly demised, and doth not say for what time, which ought to be for the greater part of 20 years.

As to the matter in law, the lease is not good by 32 H. 8. And to this point it is to be considered, what the law was before this statute: the bishop could not by himself do any prejudice to the church, he could not disclaim, release, grant an annuity. 1 Inst. 102. He might grant the inheritance with **[166]** the confirmation of the dean and chapter; and before the third Council of Nice 710, without such consent, receipt of rent by the successor would bind him. In this statute the proviso is considerable; the statute doth not mention bishops, and the greater mischief is of tenants in tail; and this statute aimed at the benefit of the successor; leases ought to be in the form there prescribed. Bridgman's Rep. *The Bishop of Chichester and Freedland's case.* Here was 32 years without any demise, but kept in demesne; and it ought to be demised within eleven years before. 1 Inst. 44. Cro. Eliz. 707.

If the temporalities continue twenty years in the hands of the King, this doth not hinder the demise, because the King cannot charge the church.

A bishop is not compellable to demise his lands, no more than another lord of copyhold. If tenant in tail make a lease for 21 years, which expires, and then the land continues twelve years undemised, and tenant in tail dies, his issue cannot demise this land by the statute.

Wyndham Justice for the defendant. He took the like exception to the verdict which Moreton took; and as to the matter in law, this part of the proviso ought to be as strictly observed as any other part of it. Sequestration doth not hinder the demise; but if it be in the King's hands it is a great doubt, and this statute being an enabling law, implies a strong negative, that it shall not be otherwise, being an introductive law. For authorities, the case of Cro. Eliz. is a stronger case, Cro. Eliz. 708, *Mallet* versus *Mallet*, and *Sir John Marvin's case* in Harpur's Rep.

Twisden Justice for the plaintiff. As to the exception to the verdict, the first he allowed, but not the latter. As to the matter in law; in this statute there is an enacting part and a restrictive part; this case is of a new nature, and never brought in question before.

Here it is to be inquired, 1. If land be kept in the hands of the bishop, if it may be after demised by the successor?

2. If the lessee surrenders, and the bishop keeps the land?

3. It was demised here in 1604, and Octob. 1630, surrendered to Harsnet, and it was not for eleven years together in the hands of any bishop.

The statute extends directly, and not obliquely to bishops. Here is a shell and a kernel, words and meaning. Space, and term of twenty years is not all one here. The preamble is the key for reformation thereof, &c. which implies a mischief before. They were to pay first-fruits, and yet they could not **[167]** raise money without the chapter, who would have money also to consent. The meaning arises from the time of making the statute, where many lands were which never were demised, as palaces. But those which were then demised, and had gained a customable rent, the successor could not devest this power after by not demising it. The Act doth not force bishops to keep lands in their hands. A bishop makes a lease of a reversion of a copyhold, it is a demise within this statute. 6 Co. 39. Moor. 719. A demise for years of tithes is good within this statute, *Denton's case.* As to *Mallet and Mallet's case*, the chief gist of that case was concerning the comprize of lands by the name of a manor. Whatsoever comes within the body of the Act ought to be averred, but not when it comes in by the proviso. Plowd. 376. As to *Scrog's case*, Cro. Eliz. that makes nothing to this case. And as to the case in Harpur's Reports, it is only, *nota, dictum fuit per Catlin* and his companions.

As to the 2d, If a bishop make a lease for years, and the lessee surrenders, and the bishop keeps the land in his hands, as long as the lease hath existence, the successor notwithstanding may demise the land. 1. Because the lease hath existence to some purpose, 9 E. 4, 18, and *The Lord Abergavenny's and Davenport's case*, 8 Co. 140. Litt. sect. 636, and this case is not like the case of a fine.

If the words (*most commonly*) extend to eleven years, those mischiefs will ensue on such construction: in case of tenant in tail he takes a wife and dies, the feme lives above eleven years, and hath this land in her hands: so of an infant tenant in tail. Dyer 271, and *Ninian Menvile's case.* 26 Eliz. *Haines* versus *Holland*, Shute's Rep. *Cox Bishop of Ely's case.* No lease questioned, although the bishoprick was in the hands of the Queen for twenty years.

Kelyng Chief Justice for the plaintiff. He agreed that the first exception to the verdict is good; but as to the point in law he concluded for the plaintiff. A bishop makes a lease for one and twenty years of lands never demised, and dies, the King keeps it in his hands. Dyer 261. As to the twenty years before this lease made, seventeen years of it the land was in the hands of a disseisor. Statutes are to be construed according to the design of the makers of them. Plowd. 106, Fulmerston Sherrard, Magna Charta, cap. 11. F. Br. 661. Marbl. cap. 4. Literal interpretations are not necessary. Grotius de Jure Belli & Pacis, page 30. The design of this statute was for the benefit of the lessees in one degree, and for the **[168]** bishop in another; it was to avoid long leases, and in reversion, and the ancient rent ought to be reserved. If this statute shall be construed for the defendant these inconveniences will ensue.

1. A lease expires, and then the bishop is disseised for twelve years, then he recovers. The drift of the statute was only to restrain the demises of ancient palaces and demesnes, and not other things.

2. It shall be in the power of a bishop to repeal this statute.

In the proviso are two clauses of qualification, viz. Let to farm. 2. Or occupied by farmers by the space of twenty years; the words *by the space of twenty years* extend only to the second part of the disjunctive, and not to *let to farm.* And this hath been the exposition of this statute in the case of *The Bishops of Winchester and London* for their houses lately. And as to the cases of *Mallet and Mallet*, and *Scrogg's case*, they are not to the purpose; and so he concluded for the plaintiff. And for that the Court was divided, no judgment was given. But the cause was adjourned. *Et sic pendet.*

[169] TERM. MICH. 20 CAR. 2, B. R.

BARKER *versus* DURRANT.

Award.

Debt upon an obligation to perform an arbitrament. Upon no arbitrament pleaded, the plaintiff replies and sets forth the award, which consisted of two parts (amongst others) to which exception was taken (viz.) 1. That the defendant shall make a release to the plaintiff until the time of the arbitrament, and then the bond of the submission is discharged. But it was not allowed, because divers things are to be done together, and if all had been done the release shall be no prejudice; and so it differs from the case where money is to be paid after the release is to be given. 2. The award was in part of satisfaction, which is not good. Mich. 45 E. 3, 16 a. pl. 18, and Trin. 1653, B. R. *Penros* versus *Tubb. Sed non allocatur*, because it is *tant. existen' partem redditus*, which is only a description when he will pay it, and not by way of discharge of rent in controversy: and judgment was for the plaintiff.

SMEDLY *versus* HEAP.

Words. 1 Lev. 250. 2 Keb. 404.

The plaintiff declares, that he is a mercer, and the defendant said to him these words, viz. *Thou art a cheating knave and a rogue.* On not guilty, verdict for the plaintiff.

And Bigland moved in arrest of judgment, because there was not any communication by the defendant of the trade of the plaintiff: and therefore stay, &c.

[170] TAYLOR *versus* BROWN.

Prohibition. 1 Vent. 5. Clift's Entries 13.

A prohibition was granted to the Ecclesiastical Court, because they refused to deliver a copy of the articles; and the rule was, that a prohibition go until they deliver such a copy, and the writ of prohibition was absolute without a *quousque*.

And Linley moved for a consultation; but the Court would not grant a consultation, but a *supersedeas;* and farther resolved that the statute of 2 H. 5, cap. 3, extends where the proceeding in the Ecclesiastical Court is *ex officio*, as well as betwixt party and party; and the report of Moor 756, is ill reported; for Cro. Jac. 37 is contrary, and that a prohibition lies for not delivering the copy of a libel in such case.

Information against Buckworth and others for perjury, in ejectment. The defendants justify; upon not guilty, and now upon evidence to prove the perjury, one was produced to prove what one, that is since dead, swore upon the first trial.

And by Kelying Chief Justice, It shall not be allowed, because betwixt other parties.

But Twisden and Morton *contra*. And it was allowed.

WARD *versus* CULPEPPER.

Inquiry. 1 Vent. 40. 1 Lev. 255. 1 Sid. 380. 2 Keb. 409, 431, 536.

Replevin. The defendant avows for a rent-charge. The plaintiff pleads in bar *non concessit;* and upon this issue is taken according to the statute of 17 Car. 2, c. 7. And the jury found the value of the cattle, but not the arrears.

And Winnington moved in arrest of judgment upon the said verdict; because perhaps there are only 20l. arrear, and the value of the cattle are 50l. And the Court ruled that judgment shall not be entered upon this finding, but the avowant may have judgment at common law, if he will, and then the plaintiff is put to a second deliverance.

[171] RUMSEY *versus* RAWSON.

Common. 1 Vent. 18, 25. 2 Keb. 410, 493, 504.

In replevin. The defendant avows as a commoner for taking goods damage-feasant *in loco in quo, &c.* The plaintiff pleads in bar of the said avowry, that the Parson of Dale is seised of such glebe land, and that he had common *in loco in quo, &c.* for two hundred sheep levant and couchant upon the same glebe land, and that the plaintiff by the licence of the said parson put in his cattle, and issue is taken upon the levant and couchant, and found for the plaintiff.

And Serjeant Maynard moved in arrest of judgment for the avowant, because licence cannot be given by a commoner to put in the cattle of a stranger, and here the plaintiff was only a trespasser upon the parson, and such licence cannot be without deed, 2 Cro. 574, *Monk* versus *Butler:* and stay until, &c.

NEEDHAM *versus* BENNET.

Return. 1 Sid. 407. 2 Keb. 410, 464. *Vide ante*, fo. 81. *Long* versus *Emot*, ejectment in B. R. of lands in Lancashire. See after fo. 206, *Draper and Bailie's.*

Upon a judgment in B. R. a *fieri facias* issued (after a *testatum*) to the Sheriff of Chester, who returns *quod fieri fecit* the goods, but that they remain in his hands *pro defectu emptor'*, and upon that a *venditioni exponas* issues to him, of the which he doth make no return, nor gives satisfaction to the plaintiff; and upon this he moves for an attachment.

And Williams moved to stay the attachment, because a *fieri facias* cannot issue out of this Court to the County Palatine of Chester, and made a difference betwixt

a judgment originally given in this Court, and when a judgment is removed hither by writ of error; in the second case it lies, but not in the first, Mich. 21 H. 7, 33, pl. 32. Judgment in Callais or Wales cannot be here reformed, because not parcel of the realm, otherwise of Lancaster; *sed non allocatur*, and an attachment was granted.

[172] DANBY *versus* PALMES.

Estrepement. 1 Sid. 369. 2 Keb. 376, 381, 413, 580.

A writ of error to reverse a judgment given in C. B. in a writ of partition upon a *nihil dicit*, of divers manors, and view of frankpledge, and free warren, and other things of great value. Upon *in nullo est erratum* pleaded, the counsel for the plaintiff in the writ of error assigned divers errors, some in form, and others in the substance of the proceedings.

And as to the form Coleman shews, 1. The executory judgment is *quod partitio fact.* and not *fit*, or *fiat*, and so not sense. 2. The precept to the sheriff after the executory judgment is *quod per sacramentum proborum hominum in comitatu, &c.* and doth not say, *de comitatu.* 3. Here is a discontinuance, because there is not any continuance for the tenant *per idem dies*, when the partition shall be made.

The errors in substance are: 1. No mention is of the view of frankpledge, and yet in the writ is mention of the view of frankpledge, not as appurtenant to the manors, but distinct; and here is not any mention of it in the partition; and *cum pertinentiis* shall not supply it. 2. The sheriff returns *unam medietatem eorundem*, (viz. the premisses before) to be delivered to Danby, viz. such manors *per parcella medietatis suæ*, and other manors to Palmes, and then again, *alteram medietatem* to Danby again, and so Danby hath two moieties. 3. The sheriff delivers *quartam partem* of such a thing, and doth not say *per metas & bundas*; and if the parties have a fourth part, then the writ ought to be so. 4. The sheriff divides the rents without shewing which (viz.) copy or free, or upon leases for lives, years or at will. 5. The sheriff delivers to Danby and Margaret his wife, whereas it appears upon the writ, that Danby was only seised in the right of his wife, and now by this delivery he hath an interest in his own right. *Sed non allocatur per Curiam.* 6. By Offly upon the return of the sheriff he doth not conclude that those are all the lands comprehended within the writ to him directed, as it is in Co. Entr. 412 a. pl. 2, and by Weston 7. The demand is of 400 acres of wood, and no mention of that in the partition, but only of a park *una cum omnibus arboribus eidem pertinent'*, which is not the wood here. 8. Divers things are delivered in the partition, which are not demanded or mentioned in the writ, and yet the writ of **[173]** partition lies of them, viz. pasture for six beasts, *shopas, &c.* 9. The sheriff delivers three acres of meadow lying in the meadow of Middlefield, excepting *duobus rodis*, and there is not any disposal of those two rods after or before. 10. The writ is that the sheriff shall go to the advowson, which cannot be, because it is incorporeal. *Et adjournatur.*

CRISPE *versus* MAYOR AND COMMONALTY OF BERWICK.

Trin. 20 Car. 2.

Trial. 1 Lev. 252. 1 Vent. 58, 90. 1 Sid. 381, 462. 2 Keb. 391, 397, 414, 602, 676. 1 Mod. 36.

On covenant upon an indenture the plaintiff counts that the defendants at York demised to him certain messuages in Berwick, for years; and that they covenanted that they had power to demise them, and that the plaintiff should enjoy them quietly, and assigns a breach, that such a one entered upon him and ejected him out of the said messuages. The defendants plead that the strangers did not enter upon the possession of the plaintiff; and upon this issue is joined, and a suggestion is made upon the roll, that the King's writ doth not run in Berwick, and therefore that the *venire fac.* shall be of the next vill to Berwick, which is Belfort; and upon this a *venire fac.* is directed to the Sheriff of Northumberland to make to come twelve out of Belfort to try this issue, and the jury found for the plaintiff.

And now Stote for the defendant moved in arrest of judgment, that this trial is not good, because Berwick being out of the realm, the trial ought to be where the action is brought, viz. at York, and not at Belfort. And there is a difference betwixt a County Palatine, which is part of the realm, as Lancaster, Chester and Durham, and Wales, which is not part of the realm, and Berwick here, Fitzh. Trial. 4. Kelw. 202 a. pl. 19. Mich. 18 Eliz. C. B. *Christmas's case.* Appeal doth not lie in B. R. for the murder of a man in Berwick.

Object. There will be failer of justice, because the defendants are judges.

Resp. The law of England doth not take conusance of that which is out of its jurisdiction; and Berwick is not part of England, 7 Co. *Calvin's case*, 23 b. And by the same reason that such trial shall be of a thing in Berwick, it shall be in Ireland, &c. And the privileges of Berwick are confirmed by Alexander King of Scotland, and 42 Eliz. C. B. Rot. 630, *Shepardson* versus *Chambers*, in debt upon an obligation conditioned **[174]** to pay money in Berwick, was tried at Belfort, but then the action was laid there.

Shafto for the plaintiff. Here would be a failer of justice, Mich. 19 H. 6, 12 b. pl. 31, per Askue, a thing done in Wales shall at common law be tried in the next county adjoining, and there no mention is made of it, which Fitzh. in the abridgment of this case mentions tit. Trial 4, a more strong case of a thing in Ireland tried in the county of Salop, which is alleged to be the next county to Ireland. 2 Roll. 597, pl. 8, *Barnwel* versus *Ratchford*, and a writ of error lies to Berwick or Callais, 4 Inst. 282, and there is a like suggestion for York, Dyer 279 b. pl. 10. Moor 581, pl. 796. 8 Co. 125 a. Lands in Wales are pleadable here. Fitzh. tit. Jurisdiction 34, and Scotland, Br. 551, and 12 H. 4, 16, pro Normandy.

Wyndham Justice. It ought to be tried in York, where the action is brought as Co. *Dowdale's case* is. And adjourned; and after resolved for the plaintiff in this point.

This vacation died Sir Wadham Wyndham Knight, one of the Justices of the King's Bench, and of the county of Somerset, who was a good and prudent man.

[175] TERM. HILL. 20 & 21 CAR. 2, B. R.

WATSON *versus* BAKER. ERROR, B. R.

Condition. 2 Danv. Abr. 18, p. 1. 1 Sid. 387. 2 Keb. 446.

In debt upon an obligation. The condition being that the defendant being Parson of A. should resign upon request. The defendant pleads that he did resign according to the condition, and found against him, and judgment for the plaintiff; and now brought a writ of error because a simoniacal condition: but judgment was affirmed, because the condition is good.

This term in the place of Justice Wyndham came Baron Rainsford, who being a Baron, before that Morton was Judge, was now made the third Justice of this Court, and took place of Morton.

SALMON *versus* SMITH.

Pleading. 1 Lev. 263. 1 Saund. 206. 1 Sid. 405. 2 Keb. 467, 470.

In debt for rent. The plaintiff counts of a demise of four rooms. The defendant pleads, that as to part *actio non*, because the plaintiff demised to him the said four rooms; and also another room into which the plaintiff entered before any rent due, and is in possession of it. The plaintiff demurs, because the defendant doth not traverse the demise by the plaintiff set forth in his count.

Sanders for the defendant. And he cited Mich. 5 E. 4, 8, pl. 19, where such a case is cited without a traverse. But judgment was given for the plaintiff by the whole Court, because the plea doth not answer to the count, nor is it *ad idem*, Mich. 32 H. 6, 3 b. pl. 1, and Mich. 35 H. 6, 38 a. pl. 47, and the pleading in the case of Dyer

32 b. pl. 7 is not controverted; and this case is resolved, 1 Leon. 43, *Kempton and Bellamy*, and so are all the precedents.

[176] TERM. PASCH. 21 CAR. 2, B. R.

Sir John Kelyng, Chief Justice; Twisden, Rainsford and Morton, Justices.

SKINNER *versus* GUNTON, LYON, AND OTHERS.

[Followed, *Walters* v. *Green* [1899], 2 Ch. 701.]

Case. 1 Danv. Ab. 208, p. 5, 213, p. 3. 1 Vent. 12, 18, 19. 1 Saund. 228. 2 Keb. 473, 476, 497. 3 Keb. 118.

In an action upon the case. The plaintiff declares, that the defendants, with others, conspired together to arrest the plaintiff in a grand action in London, and took out a plaint in the Sheriffs Court there, of 300l. with an intent that the plaintiff should not find bail; and upon this the plaintiff was arrested, and was compelled to continue in prison twenty days and nights, *ad damnum* of 100l. Upon not guilty, one only was found guilty.

And Sanders for the defendant moved in arrest of judgment. 1. Because the plaintiff doth not shew that there was any end or determination of that suit, which ought to be shewn. 2. It is an action of conspiracy, which doth not lie against one only.

Pemberton for the plaintiff. The complaint is only of an arrest, and not any other proceeding as joint, &c. And as to the 2d, it is only an action upon the case. F. N. B. 116 a. And before the Statute de Conspiratoribus made 33 E. 1, page 89, an action of conspiracy doth not lie for any thing, besides for indicting for felony or treason; but by this statute it lies for trespass, and so against one only. Trin. 11 H. 7, 25, pl. 7. And this action is only an action upon the case in the nature of a conspiracy. Cro. Eliz. 701, *Marsh* against *Vaughan*. And judgment was given by the whole Court for the plaintiff.

Apprentice. 2 Keb. 480. Trem. 465.

The town of Nottingham impose by order of the sessions an apprentice upon one Mr. Selwin, and he moved by Bigland for a *certiorari* to remove this order, with an intent **[177]** to quash it, because the statute of 39 Eliz. cap. 2 doth not compel any to take an apprentice.

Kelyng Chief Justice. The validity of this clause is to be tried in an action.

Twisden Justice. It hath been an opinion, that a man cannot be constrained to take an apprentice: but of late time it hath been held otherwise.

Kelyng Chief Justice. It was held in King Charles the 1st's, that an apprentice might be imposed; and so it was given in charge by the Lord Keeper in the Star-Chamber; and there is no inconvenience, because the master may assign the apprentice over.

Twisden Justice. If the apprentice may be imposed, it will be hard for merchants in London, &c.

Morton Justice. It was always ruled by Damport Chief Baron, in his circuit, to confirm such orders. See this case before.

THE CASE OF SACKVILE COLLEGE. SEE BEFORE IN CHANCERY.

Scire facias. *Antea* 154.

Twisden Justice for the plaintiff. The questions in this case are three. 1. If these grants are repealable, and are void? 2. If this be an apt *scire facias*, being to repeal part of a patent? 3. If this writ may conclude to the exheredation of the heirs?

As to the first. These letters patent to Edward Earl of Dorset, and his heirs male, are void, and ought to be repealed, and may be repealed though void. Hill. 12 H. 7.

Kelw. 19 a. by Keble. And that these letters patent are void, appears, 1. Because they are contrary to the intention of the King. Hob. 223, *Anne Needler's case.* 10 Co. 110 b. *Vowe's case.* 2. The King cannot deprive the patron of those rights which are appendant to him, which is *jus patronagii, & jus visitandi*, which are in Earl Robert and his heirs.

As to the second. This grant may be repealed in part. Dyer 276 b. pl. 53, because it consists of things of several natures; and as a patent may be good in part, and naught in part, so it may be repealed for part, and stand for another part.

As to the third. Here are apt persons, because the heirs are concerned, because the question is, Who is the dotator? not the executors, but Earl Robert and his heirs, and the executors are only instruments; and the conclusion *ad* **[178]** *damnum* of the heirs doth not vitiate, because the Court knows to whose damage the patent is.

Object. If this grant shall be repealed, the indowments of the hospital fail.

Resp. It was subject to repeal originally in the creation.

Hale Chief Baron *contra.* I premise three things, 1. Why I cannot give an opinion to repeal these letters patent without grand cause. 2. How the case stands here upon the patent and the will. 3. The reasons why this writ of *scire facias* will not lie in this case.

As to the first. This is the first case in which clauses which have a general influence through the whole patent may be repealed. 2. It is a case of great moment in particular, because by this repeal the indowment is void; as the case of the Abby of Fountain is; and here no master nor other officers may subsist. 3. Because there is no necessity to repeal them, because there are void clauses, and they may be tried at law; and that is the reason that judgment upon an issue tried in a *scire fac.* to repeal a patent in B. R. is not there given, but the record is to be returned into this Court, which is not in another case; and those things are of long continuance, (viz.) from 6 Jac. for then was the will, and the letters patent were 7 Car. 1, and it cannot be known what transactions have been passed betwixt the King and the heirs of Richard Earl of Dorset during the time.

As to the second observation, upon the patent and the will. 1. No will of Robert appears by other record than by recital in these letters patent. 2. Although Richard son and heir of Robert was dead at the time of the letters patent, it appears not. 3. Although *de facto* Edward was father of Richard, it appears not. 4. It doth not appear that the land, upon which the hospital was built, was the indowment of the hospital; and if no indowment, no hospital. 1. It cannot be understood that Edward was heir to Robert, because here is an averment contrary; and he might be heir male in vulgar appellation. 2. The clauses are not substantive and independent clauses, but have an influence through the whole letters patent: and so by the repeal of them the patent shall be vitiated, viz. the naming and appointment of the several officers making of rules, constitutions and by-laws; and in this particular, this patent is not like to the patent in the prince's case. 3. If here were not derogatory clauses, viz. to create a corporation according to the intention of the will, this will create a right to the heir **[179]** to nominate; but here are derogatory clauses in it *secundum voluntatem*, which shall be according to the King's pleasure, otherwise the name shall be altered. 4. The licence to amortize. 5. Those clauses are not simply void, but only voidable, because the King takes notice of the will of Earl Robert. 6. The grant made to Edward to make by-laws, is to him, and the heirs male of his body; but concerning election of members, this is to Edward, and the heirs male of the body of Robert.

As to the third. Such *scire facias* lies not in point of form. 1. A patent may be repealed in part, but this shall be only in clauses independent. Fitzh. Petition 19. 2. There will be an infinite inconvenience, if by this way part of this patent may be repealed; for by this way a good patent may be made naught, and *e contra.* 3. The King hath said how he will have this corporation qualified, and he is dead, and now we will make other patrons after his death. 4. The King hath said how it shall be governed, and not otherwise. And here is no necessity to repeal this, because if there be void clauses they may be tried in assize, and therefore the writ is ill. 2. It doth not lie for the matter. 1. Because the King takes notice of the clauses in the will which are desired to be repealed, and therefore he is not deceived in this grant. In the creation of the hospital *sunt tres actores fabulæ.* 1. Earl Robert. 2. The King,

whose right is to grant the incorporation. 3. The executors, which ought to indow this hospital. 2. The executors are not at any prejudice, because they are not compellable to indow this corporation, if it be not according to the will of Earl Robert. 3. If the executors have indowed the hospital, being so created, it is a breach of trust.

Object. The King cannot dispose of the right of another, and here the founder was Earl Robert.

Resp. There is no patronage till the foundation of the hospital, and the heir of Robert hath not to do with it till the foundation; and the executors do not break the trust. The Lord Keeper would advise, and so it was adjourned.

8 *Maii* 1669, William Lenthal was sworn in the office of Marshal of the King's Bench, in the place of Sir John Lenthal, his grandfather, who died the last vacation.

Privilege. 2 Keb. 477, 486, 491, 508. This privilege denied Sir Walter Vane, Captain of the Guards, which see before. 2 Keb. 309, 321. 1 Sid. 355.

Stone an Attorney of B. R. having land within the manor of Harrow in the county of Middlesex, *ratione tenuræ*, ought **[180]** to serve as reeve there, when elected; and he being now elected, prayed a writ of privilege, that he should not be compelled to gather the rents of the lord, and to serve in that office.

Kelyng Chief Justice. This writ lies here, and is a stronger case than *Prouse's case*. Cro. Car. 389.

Twisden Justice. A tenure may be created to such intent to collect the rents of the lord; and Coke's Entr. 436, an attorney exempted to be a soldier; so of a clerk of the bank, Cro. Car. 8, *Venable's case*. 2 Roll. 271. March 30, pl. 65. *Et adjournatur.*

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SIR ANDREW HENLEY *versus* DR. BURSTAL.

Case. 1 Danv. Abr. 211, p. 17. 1 Vent. 23, 25. 2 Keb. 486, 494. *Vide* before 135, *Low* versus *Beardmore*, for indicting the plaintiff of a rescue, an action doth not lie.

An action upon the case for maliciously indicting the plaintiff, being a justice of the peace, for delivering a vagrant out of custody, without examination, contrary to law. Upon not guilty pleaded, a verdict found for the plaintiff; and Swain moved for the defendant in arrest of judgment, that such action doth not lie, because it deters a man from prosecuting for the King.

Maynard Serjeant for the plaintiff. Where the indictment is preferred maliciously, and such indictment contains matter of imputation and slander as well as crime; there the action lies; but otherwise where the indictment contains crime without slander, as forcible entry, &c. but here is slander as well as crime; and of that opinion was all the Court; and judgment was given for the plaintiff.

PRICE *versus* CROSS AND OTHERS. MICH. 1657, B. R.

Case.

An action upon the case in nature of a conspiracy, for indicting the plaintiff of barretry; one of the defendants is only found guilty.

And Baldwin moved in arrest of judgment, that one cannot be guilty of a conspiracy alone. But *per Cur.* it being but an action on the case it is well enough, and the plaintiff had his judgment.

[181] CRAFT *versus* WINTER.

Mistrial. 1 Danv. Abr. 456. 1 Vent. 22. 1 Sand. 246. 2 Keb. 496.

The plaintiff declares, that the defendant in London spoke these words to the plaintiff, *Thou art a thievish fellow, and stoledst the plate from Wadham College in Oxford.*

The defendant justifies, that the plaintiff stole the said plate in Oxford. The plaintiff replies, that the defendant spoke the words *de injuria sua propria;* and the issue tried in London, and found for the plaintiff.

And Sanders moved for the defendant in arrest of judgment, because a mistrial, because the issue ought to be in the county of Oxford where the justification is laid, and not in London; but adjudged for the plaintiff, because it is aided by the new statute of 16 and 17 Car. 2, cap. 8. But the defendant might have demurred upon it.

[182] TERM. TRIN. 21 CAR. 2, B. R.

Kelyng, Chief Justice; Twisden, Rainsford, and Morton, Justices.

LADY BROUGHTON *versus* VOSEY.

Pleading.

Trespass for taking two horses. The defendant pleads, that the Dean and Chapter of Westminster have a court-leet in a particular jurisdiction, called the sanctuary in Westminster, within which the plaintiff hath a house, and that she by reason of the tenure of that messuage, ought to have that part of the street before the door, and for not paving she was presented at the leet held such a day, and affeered to 5l. and estreated, and the defendant as bailiff justifies the taking for the said 5l. The plaintiff replies, and traverses the *ratione tenuræ*, that she ought to repair, and concludes, *et hoc paratus est verificare, unde petit judicium*, if the plaintiff *ab actione sua prædicta præcludi debeat;* and upon this the defendant demurs specially, because she doth not conclude *unde petit judicium, & damna sua occasione transgressionis prædict' sibi adjudicari, &c.* and for this cause the Court seemed for the defendant; but a rule made by consent to take traverse and trial upon the tenure, upon payment of costs to the defendant.

In the last vacation died Sir Edward Atkins Knight, one of the Barons of the Exchequer.

[183] TERM. MICH. 21 CAR. 2, B. R.

PORDAGE *versus* COLE.

[See the note in E. R. to S. C. 1 Wms. Saunders, 319.]

Covenant. 2 Danv. Ab. 229, C. p. 1. 1 Lev. 274. 1 Sid. 423. 1 Sand. 319. 2 Keb. 533, 542.

Debt upon a deed poll concerning the purchase of land made by the defendant, of the plaintiff, dated the 1st of May 1668, where the plaintiff declares, that by the said deed it was agreed betwixt the plaintiff and defendant, that the defendant should pay to the plaintiff so much money, upon such a day, for the said land, the which he hath not done, *unde actio accrevit;* and upon this count the defendant demurs. And Withins for the defendant alledged the cause to be, because the plaintiff doth not aver that the defendant enjoyed the land; and where there is not a mutual remedy (the deed being only poll, and not being by indenture) there ought to be such averment. 1 Roll. 518, pl. 3, *Holder* versus *Taylor*. In covenant to repair, where the lessee for years covenants to repair, proviso, that the lessor find grand timber, there in an action of covenant the plaintiff ought to aver that he offered grand timber. So 5 Co. *Gray's case*, 78 b.

Jones for the plaintiff. Here the defendant covenants to pay at a certain day, and perhaps the conveyance cannot be made by that day; and it doth not appear that the land was not conveyed before.

Kelyng Chief Justice. It seems no agreement of the other part, for it is not by indenture.

Twisden Justice. In covenant the words were, the plaintiff putting the house in repair, the defendant covenanted to keep it so repaired. Resolved they were mutual covenants. Cro. Jac. 645, *Salter* versus *Stone*, Styles 140, *Brag* versus *Nightingale*.

Rainsford and Moreton Justices. It seems a covenant by it self; and judgment was given for the plaintiff; but the defendant brought a writ of error in the Exchequer Chamber upon the matter in law.

[184] DRAKE *versus* HILL.

Words. 1 Danv. Abr. 128, p. 38. 1 Lev. 276. 1 Sid. 424. 2 Keb. 549.

The defendant said of the plaintiff being a merchant and maintained himself and his family by buying and selling; *Austen Drake is broke, and gone for Virginia; I have ill fortune, for Austen Drake is failed, and I have lost my monies. Austen Drake is a beggarly fellow, and not worth a groat, and not able to pay his debts, and rides abroad with his man double armed for fear of bailiffs.* Upon not guilty, verdict for the plaintiff.

And Serjeant Maynard moved for the defendant in arrest. 1. That the last words are not actionable; for *beggarly fellow* are only words of reproach, and *not worth a groat*, the case of *Moon and Moxam*, 14 Car. 1. Judgment was there reversed in the Exchequer Chamber; and there is a difference when the words of themselves are not actionable, yet if they be accompanied with special damage, they are actionable, as *Low and Harwood's case.* Judgment in *Winsor* reversed where he said, that the defendant said, that the plaintiff had not title to land, by reason of which he could not sell, and *Nevill and Francis's case.* And bankrupt is a crime that implies deceit, but to be poor is no crime.

Kelyng Chief Justice. To say that *he is not worth a groat*, is not actionable, because he may be an honest man notwithstanding; but it seems that the other words seem actionable.

Twisden Justice. H. may pay his debts, and yet not worth a groat after; but to say that *he is not able to pay his debts* is actionable; and judgment was given for the plaintiff.

[185] TERM. HILL. 21 & 22 CAR. 2, B. R.

Coin.

Stinton, keeper of the Turnstile-Tavern in Holbourn, was informed against for uttering brass halfpence, and he came in and confessed the fact laid in the information, and his fine was pardoned, and he was bound by recognizance not to utter any more.

Trespass for taking forty sheep, and chasing of them, by reason of which chasing one of them died; and the defendant pleads, that the place in which the chasing is supposed was his freehold, and that he *leniter* chased them, *quæ est eadem transgressio.* The plaintiff replies, and justifies for common. The defendant rejoins by inclosure; and the plaintiff demurs. And Lèvinz for the defendant urged that the bar is not good, because he doth not answer to the chasing of the sheep, for he ought to have traversed it. Cro. Eliz. 384, *Hill* versus *Prideaux*, and Trin. 19 Car. 2, *Copley* versus *Perry.*

Jones for the plaintiff. It is frequent in trespass to answer to the beating *& male tractation'*, and that he *molliter manus imposuit, quæ est eadem transgressio.*

Twisden Justice. The plaintiff relies by his replication upon the common, and waives the staying of the sheep, &c. and therefore it is good enough; and with this agreed the whole Court; and judgment was given for the plaintiff.

This term Timothy Littleton, Serjeant at Law, was made one of the Barons of the Exchequer.

[186] TERM. PASCH. 22 CAR. 2, B. R.

Contempt. 1 Mod. 44. 1 Lev. 288. 1 Vent. 66. 2 Keb. 635.

Smith, Hains, Tunman, and others, commissioners of sewers in Middlesex, made an order concerning the amendment of a breach at Blackwall, and assessed the inhabitants of White-Chappel to contribute, and the inhabitants procured a *certiorari*, and notwithstanding that the commissioners proceeded; and upon this an attachment was granted, and they were committed to the Marshalsea for the said contempt.

Ways. 1 Vent. 69. 2 Keb. 617.

Frere of Rayneham in the county of Kent was indicted at the sessions at Maidstone, for not contributing to the repair of highways, contrary to the form of the

statute of 2 & 3 Phil. & Mar. cap. 8, and removed this by *certiorari;* and when the record of the indictment was removed into this Court, he came before Justice Morton, and submitted himself to a fine, who fined him upon two indictments to 20s. last Michaelmas term; and now the inhabitants suggest by motion and affidavit, that Frere hath eight plow-lands, and consequently that he ought to have found eight carts for six days, and that the Judge was surprised; and although that his land was pasture, yet the Court set aside the fine, and ordered, that he proceed to trial upon these indictments, if he do not agree with the parish before next Assizes, for by his own confession he hath 1700 acres of arable and pasture.

This term died Sir Jeoffry Palmer, Knight and Baronet, Attorney General, and Sir Heneage Finch Solicitor General succeeded in his place, and Sir Edward Turnor was made Solicitor General.

[187] COPPING *versus* HURRIER.

Intr. Hill. 20 & 21 Car. 2, Rot. 1261.

Award. 2 Danv. Ab. 540, p. 2. 1 Lev. 285. 1 Sid. 428. 2 Saund. 129. 1 Mod. 15. 2 Keb. 562, 619. *Postea Denovan* versus *Mascal.*

Debt upon an arbitrement, the submission was to two, *ita quod* they make their award before the last day of Michaelmas term, and if they cannot agree, then to A. who then shall be umpire to make the award within the said time; and the plaintiff declares, that the arbitrators did not make any award, but the umpire made his umpirage, and shews it; and the defendant demurs upon this count, because the umpirage was void, because the arbitrators had all Michaelmas term, and the umpire cannot intermeddle during that time, and for that it was adjudged for the defendant; and in this case was cited Roll 261, 1 part, *Lumley and Hatton's case* and *Barber and Giles's case,* and Dyer 347, and *Barnard and King's case. Vide* Godbolt 241, pl. 334, *Fial* versus *Varier, contra.*

HORSELEY *versus* POTTON.

Case. 1 Lev. 286. 1 Sid. 457. 2 Keb. 620, 647.

In an action upon the case; the plaintiff declares, that he did lend his gelding to the defendant to ride from Swaffham in Norfolk to Peterborough in the county of Northampton, and the defendant abused the said horse *in itinere.* Upon not guilty pleaded, verdict was for the plaintiff. And Holt Junior moved in arrest of judgment, because there is not any *visne* where the abuse of the gelding was, but only *in itinere,* Cro. Jac. 266, and Cro. Car. 20, *White* versus *Risden;* and judgment stayed till the other party moved.

CHESTER AND WILLAN. EJECTMENT.

Release. 1 Vent. 78. 2 Sand. 96. 1 Sid. 452. 2 Keb. 641.

A devise to eleven and their heirs; the defendant being one of the eleven, by indenture for 100l. granted, bargained, sold and confirmed to another of the eleven; and if any estate passed was the question, (viz.) where one joint-tenant grants to another, if this amounts to a release; and adjudged that it doth. Roll 810. 1 part, Cro. Jac. 314.

[188] TERM. TRIN. 22 CAR. 2, B. R.

Mandamus. 1 Lev. 291. 1 Vent. 77, 82. 1 Sid. 461. 2 Keb. 641, 656.

Dighton, town-clerk of Stratford upon Avon, was turned out of his place by the corporation, and he prayed a writ of *mandamus* to restore him; and it was granted; and upon this the corporation returns, that the King by his letters patent grants, that they shall have a town-clerk which shall continue *durante bene placito* of the mayor and aldermen, and that the said Dighton was made town-clerk, and they

turned him out; and upon this return the question was, if the corporation hath an arbitrary power to turn out the said town-clerk, or ought to shew reasonable cause.

Jones for Dighton. Many corporations have such officers, and it is of consequence. Cro. Jac. 540, *Warren's case*. An alderman cannot be so turned out; and as to *Blackgrave's case* this was not argued; and here they did not give notice: but by all the Court, the continuation of him in his office is in the will and pleasure of the corporation; and upon this restitution was denied; but the Court advised to repeal the patent because inconvenient.

This term Hugh Wyndham Serjeant at Law was made Baron of the Exchequer.

[189] TERM. MICH. 22 CAR. 2, B. R.

The Justices being Kelyng, Chief Justice; Twisden, Rainsford and Morton, Justices. But Kelyng was sick the whole term.

MICHEL *versus* BISBY.

Prohibition.

The defendant sued the plaintiff in the Court of Feversham upon an *assumpsit* for wares; the defendant there, and the plaintiff here, tenders a plea, that the contract upon which the action is brought, was made out of the jurisdiction, and demands judgment if the Court will take conusance, &c. the Court there refused to allow this. And Jones moved for a prohibition, producing an affidavit of the said tender of the plea and refusal; and the Court granted the said prohibition.

RINCH *versus* ———.

Error.

The case was such. Rinch brought two actions on the case against a widow in the Pipowder-Court in Gloucester about two years ago; and about January last brought two other actions of the same nature against the same party. Upon the two first, judgments were given long since, and upon the two last the defendant had demurred, and judgment given against her, and writs of inquiry were executed, but no final judgment given. The defendant brings two writs of error, which were allowed by the mayor and town-clerk, and the two first judgments removed; whereas in truth [190] the defendant intended to have the two other causes removed, and not the two first, for that they were long before satisfied; but notwithstanding the said writs of error, after the return thereof was out, the plaintiff entered judgment upon the two last actions, and took out execution upon the same; and the defendant moved by Saunders for the attachment. But resolved *per Cur.* there is no contempt, because when there were two judgments formerly entered, the town-clerk might certify them to satisfy the writs of error; and he could not certify the other two, because no judgment was given upon them, and the writ of error commands to certify *si judicium redditum sit*, and the defendant might have helped this by moving the Court below after costs taxed to have judgment entered in the two last actions as well as the plaintiff, for judgment ought to have been given at the request of either party; and so the contempt was discharged.

LASSELS *versus* CHATTERTON.

Condition. 2 Danv. Ab. 38, p. 24. 1 Sid. 467. 1 Mod. 67. 2 Keb. 685. *Vide* Syd. 467. Mod. Rep. 67.

Debt for 1000l. upon an indenture. The plaintiff declares, that by indenture the defendant did covenant with the plaintiff to convey certain lands in Bowmer, demised to Bointon to the plaintiff, by such conveyance as the plaintiff's counsel should advise; and that the plaintiff, by the advice of his counsel, did tender to the defendant a conveyance by lease and release, and sets forth both in *hæc verba*, which release con-

tained several covenants, amongst which one was against a stranger; and also here was comprehended a warranty against the defendant and his heirs, and that the plaintiff tendered the said conveyance, and the defendant refused to seal the same. The defendant pleads, that he did not tender the said conveyance; and issue was taken thereupon; and verdict *pro quer'*.

And Levinz for the defendant moved in arrest of judgment, because the conveyance tendered is not such as is warranted by the said articles, because it comprehends covenants, which it ought not to have done, and that the articles had been to make such reasonable assurance as counsel should advise, and perhaps reasonable covenants might have been inserted, but not any covenant against a stranger, nor warranty. 2 Cro. 571, *Coles* versus *Kinder*. 1 Roll 424, pl. 13, per Coke 2. The agreement is to convey all the lands in Bowmer demised to Bointon; and the conveyance is not only of them, **[191]** but of all other his lands whatsoever; and for his last exception, Weston for the plaintiff acknowledged that it cannot be good, and thereupon judgment was stayed. But by Twisden Justice, The law is altered since *Cole and Kinder's case* as to covenants in a coveyance, if they be reasonable, but not that he is seised of an absolute estate in fee-simple, or the like.

Nota. By Twisden Justice. It was resolved in one *Long's case*, that upon an information upon the Statute of Usury, he who borrows the money may be a witness after he hath paid the money, but not before.

ELLIS *versus* WINNE.

Prohibition.

The defendant sued the plaintiff in the Court of the marches of Wales at Ludlow, for a legacy of 50l. and a brass pot; and the plaintiff prayed a prohibition, by Williams, *& habuit*, because this Court by their instructions have not power to hold plea of a legacy.

DOMINUS REX *versus* WILD.

Apprentice. 1 Lev. 296. 2 Keb. 686.

An informatien upon the statute of 14 Car. 2, cap. 5, against the defendant, being a worsted weaver in Norfolk, for retaining above two apprentices, contrary to the form of that statute. Upon *non culp.* pleaded, verdict was found against the defendant.

And Jones moved in arrest of judgment because the statute is misrecited, because it is said, at a session of Parliament holden at Westminster by prorogation, 18 Febr. 14, Car. 2, following the printed book of Mr. Manby. Whereas the Parliament roll is, and so is the print set out by the Company of Stationers, at the Parliament begun at Westminster the 8th of May 13 Car. 2, and there continued till 19th of May 14 Car. 2, and thence prorogued to the 18th of February then next following; and this misrecital vitiates the count, for there was no such session of Parliament as is alledged; and so was *Partridge's case*, Plowd. 84 a. Although it be a Private Act, for the Judges are to take notice judicially of all Parliaments and their sessions.

[192] Twisden Justice. There is a difference when the information or action is grounded upon an Act of Parliament, and the conclusion is, *contra formam statuti prædicti*, there the information is not good, if the statute be misrecited; but if the conclusion be *contra formam statuti in hujusmodi casu editi & provisi*, there it may be good, notwithstanding the misrecital, because the Court can take notice of a good Act of Parliament to punish the offence mentioned. But judgment stayed until, &c.

BOLUS *versus* HINSTORKE.

Extinguishment. 3 Danv. Abr. 419, p. 12. 1 Vent. 97. 2 Keb. 686, 707.

Trespass for breaking his close, and taking and impounding the plaintiff's oxen. The defendant pleads, that Sir Henry Vernon was seised in fee of the close called the

Low Leasow in Peplow, being the place where the taking is supposed, and he being so seised demised the same such a day to the defendant for ninety-nine years, determinable upon three lives, by virtue whereof he entered, and was thereof possessed, and justifies taking the beasts damage-feasant and impounding them. The plaintiff replies, and confesses the seisin of Sir Henry Vernon, and the lease to the defendant; but he farther says, that Sir Henry Vernon was also seised of another close called Bowns, adjoining to Low-Leasow Close, and that there is and hath been time out of mind a custom in Peplow, that the occupiers of Low-Leasow Close ought to repair the fences between the said closes; and that the said fences were out of repair, and that the cattle went into the defendant's close *pro defectu sepium*. The defendant takes issue upon the custom, and a verdict for the plaintiff. And Serjeant Baldwin moved for the defendant in arrest of judgment. 1. That the replication was not good, because the custom, if good, is extinguished by the unity of possession in Vernon. 2. Admitting it not extinguished, yet that custom laid in occupiers is not good; but it ought to be laid in them who have the inheritance. 1 Cro. 302, 418, *Baker* versus *Brereman*.

Twisden Justice interrupted, and said, that point had been adjudged both ways. As to the unity of possession, it doth extinguish the prescription. Dyer 295 b. pl. 19.

And by Twisden and Morton Justices, the prescription is gone by the unity. But it was adjourned, and stayed, &c.

[193] BLAND *versus* LEVIT.

Officer.

The plaintiff takes out a *latitat* against the defendant, with an *ac etiam billæ* for 60l. directed to the Sheriff of Cambridgeshire, who sends it to the bailiff of the franchise of Ely, who arrests the defendant, and takes sureties upon a bond of 40l. and then returns *cepi corpus*, but never brings in the body, but combining with the defendant lets him go at liberty, and the bailiff himself lives out of the franchise and employs a deputy. Several *distringas's* issued, but the bailiff is worth nothing, and so the plaintiff is like to lose his writ; especially the sheriff having already returned issues upon the bailiff, he cannot return *nichil;* and thereupon Levinz moved for an attachment against the bailiff; and it was granted, *nisi*.

DOMINUS REX *versus* LADSINGHAM.

Verdict. 2 Danv. Abr. 651, R. p. 1. 1 Lev. 299. 1 Vent. 97, 104. 1 Mod. 71, 288. 2 Keb. 687, 697. *Postea* 205.

An information was exhibited against Mr. Ladsingham of Devonshire, lord of a manor there, for oppressing his tenants, and for several misdemeanors; and upon not guilty pleaded, he was found guilty; and Stroud moved to set aside the verdict, because unduly given. The information being laid in Devonshire, and the trial there, and yet the jury gave a privy verdict in the county of the City of Excester, which was illegal. 1. To give a privy verdict in a criminal cause, contrary to Coke upon Litt. 227 b. 2. To give the verdict out of the county. But to both these the Court answered thus. *To the first.* 'Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time; but in criminal cases, where the defendant is not to be personally present at the time of the verdict, a privy verdict may be given. *And as to the second.* Custom hath always been to give the verdict in that place; and the Court did not think the first point fit to be moved, because contrary to the record, but however they resolved as before. *Vide post.*

[194] GOODYEAR *versus* BANKS.

Case. 1 Danv. Ab. 190, p. 3. 2 Keb. 688, 716.

A special action upon the case, wherein the plaintiff declares, that one Proctor brought an action against the plaintiff, in which the defendant was attorney for the said Proctor, and that there was a trial in the same against the now plaintiff; and that after the trial, and before the rules were out according to the custom of the Court, the defendant did enter judgment against the now plaintiff, by reason whereof he was prevented from moving in arrest of judgment. Upon this declaration the defendant demurred, but did not appear to maintain his demurrer. But Justice Twisden thinking it hard that an attorney should be sued after the said judgment was set aside, and consequently the plaintiff not damnified, respited the giving judgment for a while.

THE DEAN AND CHAPTER OF WINDSOR *versus* GOVER.

Rent. 1 Lev. 308. 1 Vent. 98. 2 Saund. 296, 302. 2 Keb. 688, 722, 737, 775.

Debt for rent due for six years, upon a lease for years to the defendant, of tithes; the defendant as to the two years pleads *nil debet*, and as to the other four years he pleads, that before any of the said rent incurred, he assigned over the said lease and tithes to one Vaughan, of which the plaintiff had notice, and did receive rent from him; judgment *si actio:* and upon this the plaintiff demurred generally.

Jones for the plaintiff. The points are, 1. When the dean and chapter make a lease of tithes rendering rent, whether the money reserved be a sum in gross, or a rent. 2. Admitting it to be a rent, yet the case being concerning a politick body, whether the acceptance shall bind, as in case of a private person. 1. This is a sum in gross, and doth not pass by the grant of the rent, neither is the assignee liable thereto. 5 Co. 3 a. *Juel's case*, 2 Roll. 446 and 451. That rent issues not out of tithes. Co. Lit. 47 a. The rent shall not pass with the grant of the reversion. 2. Admitting that it be a rent, yet this acceptance alledged in the plea shall not bind the corporation, because they can do nothing but by attorney or bailiff made by their common seal, and cannot by themselves take notice of this assignment.

[195] Saunders for the defendant. If it should be a sum in gross, then the plaintiff had no cause of action, for all the days are not yet incurred; and 2 Cr. 111, *Talentine* versus *Denton*, it is a good lease, being for years: and it would be mischievous if it were not a good lease, for if it were only a personal contract it would only go to the executors of the dean or bishop, and not to the successor, which would be contrary to the intent of the parties; and it is a rent payable for the tithes, though not issuing out of the tithes. *As to the second point*, it shall be presumed that the plaintiff accepted the rent from Vaughan legally.

Twisden Justice. As to the second point 'tis resolved in *Magdalen College's case*, 11 Co. 79 a. that such acceptance is void. *Adjournatur.*

MORTLOCK *versus* CHARLETON. ERROR IN NOTTINGHAM.

Amerciament. 1 Danv. Abr. 479, H. p. 1. 2 Saund. 191. 1 Mod. 73. 2 Keb. 688, 704. 2 Rol. Rep. 45, *Gerard* vers. *Warren*. *Vide post. Powel* vers. *Row.*

Debt upon a bond; the defendant pleads *non est factum*, and afterwards *relicta verificatione cognoscit actionem*, and judgment for the plaintiff, and the defendant *in misericordia;* and this assigned for error, because the judgment ought to have been, that the defendant *capiatur*, 8 Co. 60 a. *Breecher's case;* but because 2 Cro. 64, *Devis* versus *Clerk*, is, that it shall be *in misericordia*, and so the books vary. *Adjournatur.*

YARD *versus* FORD.

[See the note in E. R. to S. C. 2 Wms. Saunders, 172.]

Nusance. 1 Lev. 296. 2 Saund. 172. 1 Vent. 98. 1 Mod. 69. 2 Keb. 689, 706.

In an action upon the case. The plaintiff counts that he is possessed of the manor and borough of Newton Abbots in the county of Devon, and hath and ought to have a market every Tuesday in the said town; and that the defendant at Ashburton in the same county, within seven miles of the said Newton Abbots erected a new market, and keeps the same every Wednesday, to the plaintiff's prejudice. Upon *non culp.* pleaded, verdict was found for the plaintiff. And Jones for the defendant moved in arrest of judgment, that this action will not lie, because it appears that the erecting of this new market cannot be to the plaintiff's damage, it not being kept on the same day that the plaintiff's market is kept. 2 Rol. 140, pl. 2.

[196] Twisden Justice. There seems no difference when the new market is kept, whether on the same or any other day, so as it be to the plaintiff's prejudice, which is here found: but let it stay for a while to consider; *et adjournatur.* But afterwards it was adjudged for the plaintiff.

DOMINUS REX *versus* MORE.

Peace. 2 Keb. 689.

More together with Turner and Smith enter into a recognizance to the King, upon condition for the good behaviour of More; then More is indicted, for that he being so bound, did assault J. S. and so he hath forfeited his recognizance; and Williams moved to quash this indictment, because More ought to have been prosecuted by *scire facias* and not by indictment; and for this reason the indictment was quashed.

JONES *versus* POWEL. ERROR IN C. B. FOR WORDS.

Words. 1 Danv. Ab. 118, p. 1. 1 Lev. 297. 1 Vent. 98. 1 Mod. 272. 2 Keb. 710.

The plaintiff declares, that he is an Attorney of C. B. and that the defendant and he had discourse of the plaintiff, and of his profession; and that the defendant said to the plaintiff *in auditu quamplurimorum, Thou canst not read a declaration,* by reason of the speaking of which words, A. B. and C. the plaintiff's former clients deserted him, *ad damnum.* Upon not guilty, a verdict for the plaintiff, and a judgment; and the said judgment was affirmed.

DOMINUS REX *versus* ALLEN.

Usury. 2 Keb. 690. 1 Mod. 69.

An information upon 12 Car. 2, cap. 13, for taking excessive usury. The information is, that the defendant 16 November 20 Car. 2 did lend to J. S. 20l. till June then next following, and that afterwards, viz. *ad finem termini prædicti,* he took of the said J. S. *corrupte & extorsive,* for the loan aforesaid, 30s. which was above the rate by the said statute allowed. Upon not guilty pleaded, a verdict was found against the defendant; and Kelyng moved for him in arrest of judgment, because the corrupt agreement ought to be within the statute at the making of the contract, and not at the end of the term, as it is laid in the information.

[197] Twisden Justice. There is this difference, if the party who lends the money contracts for more than 6l. per cent. all the assurance is void: but if he doth not contract for more than the statute allows, and afterwards he will take more, the assurance shall not be avoided, but the party shall forfeit the treble value; as if a man when money was at 8l. per cent. lends money, and takes bond for the same, and then the statute of 12 Car. 2 is made, and he will continue the old interest upon that bond, the bond shall not be avoided by such acceptance of interest, but the party

shall forfeit the treble value by the statute; but judgment was staid till the other side moved, because the Court would advise.

TWYFORD *versus* BERNARD. TRIN. 22 CAR. ROT. 586.

Obligation. 2 Keb. 690, 733.

Debt upon a bond of 300l. The defendant pleads that the said writing was delivered as an escrow to one Godfrey Woodward a stranger, upon condition, that if the plaintiff shall procure a demise of certain tenements to the defendant from a certain company in London, or should give good security that he would procure the said demise before such a day, that then the said Woodward should deliver the same, *ut scriptum suum* to the plaintiff, otherwise that he should keep the same in his hands; and the defendant pleads, that the said Woodward did not procure the said demise, nor give security as aforesaid; & *sic non est factum suum.* The plaintiff demurs, because he anwers not the deed, for Woodward never had authority to deliver his writing *ut factum*, but *scriptum suum*, which is not good; and such was the opinion of Twisden and Rainsford Justices; but Morton *contra.* But Simpson being of counsel for the defendant, moved that the plaintiff might take issue upon the special plea, *scriptum* being made *factum;* and judgment thereupon was staid entering for a time.

[198] FOXWIST AND FOUR OTHERS EXECUTORS OF MR. PINSENT, LATE ONE OF THE PROTHONOTARIES OF THE COMMON PLEAS, *against* TREMAIN. TRIN. 21 CAR. 2, ROT. 1512.

Executor. 1 Danv. Abr. 604, p. 3. 3 Danv. Abr. 412, p. 3. 1 Vent. 102. 1 Lev. 299. 1 Mod. 47, 72, 296. 2 Keb. 625, 633, 691, 698, 537. 1 Sid. 449. 2 Saund. 212. *Vide post.* 243 *S. Barbe* versus *Burton.*

Indebitatus assumpsit for monies received to the testator's use for damage clere. The defendant pleads in abatement, that two of the plaintiffs (and names them) are under the age of seventeen years. The plaintiff demurs, and whether the three that were of full age, and the infants ought to join in this action was the question. Coleman for the defendant, that they cannot join, because the infants under seventeen years are not capable of administering, but there ought to be an administrator *durante minori ætate*, as *Sir Moil Finch's case* is, and therefore they cannot be more able by being joined with others.

HATTON *versus* MASKEW AND ANOTHER.

Trin. 15 Car. 2, B. R. Rot. 1117.

Executor. 3 Danv. Abr. 412, p. 3. 1 Lev. 181. 1 Lev. 750.

In a writ of error in the Exchequer-Chamber, upon a *scire facias* brought by Maskew and one other to have execution of a judgment in debt; the plaintiff sets forth in the writ of *scire facias*, that the testator made the plaintiff and another his executors, and that the other is under the age of seventeen years; and the defendant demurred upon the writ, for this very cause, that the other upon the plaintiff's own shewing was a joint executor, and not joined in the action. But resolved the writ was good, because the infant ought not to join, and so judgment was here given, and also affirmed in the Exchequer-Chamber.

Offley for the plaintiff. There is a difference where there is but one executor, and he an infant under the age of 17, and where there are other executors joined with such infant; for in the first case the infant cannot sue, but in the other case an infant may be joined with the others. True it is, the executors of full age may sue without the infant, and set it forth in their declaration, as in *Hatton and Maskew's case* cited by Coleman; but 'tis as well where they all join. **[199]** 1 Roll. 288, pl. 2, and the very case ruled in Yelverton 130, *Smith* versus *Smith*, and 3 Cro. 378. If

three executors, and one be an infant, yet they shall all join in the action by an attorney, and the infant shall not sue by guardian, because they all make but as it were one person, and represent their testator jointly.

Twisden Justice. The action is well brought by all the executors jointly, and no administration can be granted during the minority of the infants, and all make but one person; and it may be brought either as *Hatton and Maskew's case* is, or this way, and both good. *Sed adjornat.* But afterwards adjudged *quod def. respondeat ouster*, by Rainsford and Moreton against Twisden, who held the plea good, because an infant is an executor, *quoad esse, non quoad exercitium.*

HAYMAN *versus* TRUANT.

Pleading. 1 Vent. 101. 1 Mod. 72. 2 Keb. 692.

In *assumpsit.* The plaintiff declares that the defendant such a day and year bargained and sold to the plaintiff certain corn, affirming the same to be his own, and warranting it to the plaintiff, whereas it was the corn of one Stokes, who since recovered damages against the plaintiff for the same. The defendant pleads a prior action for the same matter still depending in abatement of the bill. The plaintiff replies, that the contracts are several, and cause in the former action and this are several and for several matters, *absque hoc*, that they are for the same matter. And the defendant demurs specially, viz. because the plaintiff ought to have concluded to to the country, and not taken a traverse; for by that means the defendant might have rejoined, and so an infinity might be in the pleading; and so seems 3 Cro. 755, *Huish* versus *Philips.*

Twisden Justice. The pleading is well, and so is the constant practice. And the case of *Huish and Philips* was adjudged upon another point, viz. for defect in the plea, because it is, *et prædictus Bush (un stranger) dicit, pro le defendant.* As appears in Yelverton 38, & 3 Cro. 13, where the same case is also reported. *Et judgment fuit done pur le plaintiff quod def. respond' oust'.*

[200] HAMBLETON *versus* BERE.

Damages. 2 Danv. Abr. 460, p. 12. 1 Lev. 299. 2 Saund. 169. 2 Keb. 693, 697.

In a special action upon the case for inticing his apprentice out of his service. The plaintiff declares, that 16 Car. 2 he entertained A. his apprentice to serve him for nine years, and that the defendant inticed the said A. from his said service, *per quod* he hath lost his service for the whole term of nine years: upon *non culp.* pleaded, a verdict was given for the plaintiff.

And Saunders for the defendant moved in arrest of judgment, because the plaintiff hath brought his action too soon, or at least hath laid his damnification too large, because he hath alledged his damage to be by the loss of the apprentice's service for the whole term, whereas it appears that some years of the nine are yet to come; and so the jury have given damage for what the plaintiff hath not sustained loss, and the apprentice may return, and yet the plaintiff recover for his absence; and of this opinion was Justice Twisden, and therefore the judgment was staid till farther motion to be made by the plaintiff; and afterwards judgment was arrested, because the jury was guided by the *per quod.*

GUILLIAMS *versus* MUNNINGTON. HEREFORD.

Replevin. 1 Lev. 308. 1 Vent. 180.

On replevin for taking his cattle; the defendant avows for that A. was seised in fee in the place where, &c. and being seised, by his deed *hic in Curia prolat'*, granted to Anne Munnington a rent-charge out of the said lands with a clause of distress to Anne Munnington, who by indenture of bargain and sale duly inrolled in the sessions at Hereford, granted the said rent and arrears thereof to the defendant; and because

so much was in arrear, the defendant avows the taking. The plaintiff pleads in bar to this avowry, that the defendant took the said cattle *de injuria sua propria, absque hoc*, that the said Anne Munnington did grant the said rent and arrears to the defendant; and issue is taken thereupon, whether Anne Munnington did grant the rent and arrears to the defendant; and verdict for the defendant.

And Jones moved for the plaintiff in arrest of judgment. 1. Because the grant is alledged to be of a rent and of the arrearages thereof, and issue is taken thereupon, and the **[201]** jury find the grant of the rent and arrearages; whereas it is impossible that any such grant can be, because the arrears are not grantable over, because things in action, and therefore there ought to be a repleader in this case. Hob. 112, *Tasker* versus *Salter*, Moor 867, pl. 1198. 2 Cr. 131, *Marham* versus *Pescod*. And though issue be found for the avowant, yet it being impossible. 1. It will not be helped. 2 Cro. 682, *Buckland* versus *Otely*. 2. The avowant hath not made a good title to the rent, because he pleads it by way of bargain and sale, and that by virtue thereof, and of the statute for transferring uses into possession he was seised, and yet alledges no consideration, not so much as *pro quadam pecuniæ summa*, which is not good.

Twisden Justice. The first exception seems of little validity after verdict, but the second is material, and judgment staid until, &c.

DOMINUS REX *versus* SAUNDERS.

Scandal.

Information for writing a scandalous letter to Hatton Rich, brother to the Earl of Warwick, who was indebted to him 300l. and this Saunders having been delayed for three years by the said Mr. Rich's obtaining a protection, and at length taking the prison of the King's Bench, he wrote a letter to him, wherein he tells him, *that if he had any honesty, civility, sobriety, or humanity, he would not deal so by him; and that he would one day be damned and be in hell for his cheating*, or words to the like effect, and cited several places of Scripture to make good his allegations. And in the information was laid, that he published this letter in the presence *quamplurimorum;* and upon *non culp.* the defendant was found guilty of all; whereas (in truth) if the matter had been taken care of at the trial, the publication was not proved.

And now Saunders moved in arrest of judgment, for that the substance of the letter is not scandalous, but impertinent and insignificant, and shews a zeal in the defendant to manifest his sense of the injury he hath sustained by the non-payment of the money.

Twisden Justice. The letter is provocative, and tends to the incensing Mr. Rich to break the peace, and therefore an information lies: *mes adjornat'*. And afterwards the Court adjudged the letter scandalous; and Saunders was fined 40 marks.

[202] DOMINUS REX *versus* SYKES.

Perjury.

Information for perjury; upon not guilty pleaded, upon the trial the record of the trial wherein the defendant is alledged to be perjured, was produced, and it varied from what it was laid in the information, and at the Assises it was allowed to be found specially: and upon opening the verdict by Bigland for the defendant, it was resolved by Twisden Justice and the whole Court (*absente* Kelyng Chief Justice) that the jury cannot have conusance of any variance between the record and the information; but the Judge at the trial ought to have determined it; and so a *venire facias de novo* ought to issue.

POWEL *versus* ROW.

Mich. 21 Car. 2, Rot. 807.

Amerciament. 1 Danv. Ab. 479 H. p. 1. 2 Keb. 674, 694. *Vide ante Northlock* versus *Charlton.*

Error to reverse a judgment given in Bristol. In an action of debt upon an obligation, the defendant pleads *non est factum*, and afterwards *relicta verificatione* confesses the action, and the judgment thereupon is entered, *quod defendens sit in misericordia.* And the error assigned was on that part of the judgment, whereas it ought to be *capiatur*, according to Dyer 67, pl. 19.

Aires for the defendant. That it is well enough, for that no book warrants the case in Dyer, but 8 Co. 60 a. *Baker's case;* and if we look into the reason, it is plain, that it ought to be *misericordia*, because the judgment is upon the confession of the action, and not upon the defendant's former plea: and of this opinion is 2 Cr. 64, *Davidge* versus *Clark.* Mich. 33 H. 6, 54 b. pl. 44. Mich. 34 H. 6, 20 a pl. 37. Keilw. 42 a. pl. 4. Rast. Intr. tit. Debt, in Recovery 4, and Judgment 3. 1 Roll. 224, *Wrign's case*, and so is the constant course, and so are all the precedents in B. R. and C. B. And the case of Dyer is but as he found it recorded, but Trin. 9 E. 4, 24 a. is *misericordia.*

Twisden Justice. As for the book of 2 Cr. it is but the opinion of Fenner and Williams againt Gawdy, and Coke and Dyer are for a *capiatur*, and therefore it seems it should be **[203]** so; but if the precedents are *misericordia* it will alter the case. *Et adjornat'.* Mich. 44 E. 3, 42 b. pl. 47. Mich. 45 E. 3, 11 a. pl. 4.

COCK *versus* HONYCHURCH.

Accord. 1 Danv. Ab. 240, p. 18. 2 Keb. 696.

Trespass and assault. The defendant pleads a concord between him and the plaintiff, viz. that he should pay the plaintiff 3l. in hand, and should undertake to pay the plaintiff's attorney's bill; and avers that he paid the 3l. and that he was always ready to have paid the attorney's bill, but he never shewed him any. To this the defendant demurred.

Pawlet for the defendant. That it is a good plea.

The grand objection is, That here is no execution of this agreement.

Resp. 'Tis an execution, for the payment of the 3l. is made, and the agreement is not to pay, but to undertake the payment of the attorney's bill, which is accordingly done. And upon his undertaking, the plaintiff or the attorney may have a remedy, and so good according to Plowd. 11 b. and in *Peytoe's case*, 9 Co. 77 b. there was an obligation given for payment of the money, and here is a promise made, which are of the same nature.

Twisden Justice. This accord is not good, because not executed; and of that opinion was the whole Court (*absente* Kelyng Chief Justice) and judgment was given for the plaintiff.

SMITH *versus* SMITH. ASSUMPSIT.

Assumpsit. 1 Mod. 284. 2 Keb. 695, 703.

The plaintiff declares, that he and the defendant were executors to A. and the defendant did receive all the estate of the testator, whereas a moiety thereof did and doth belong to the plaintiff, and that the plaintiff did threaten the defendant to sue him to come to an account; and thereupon the defendant, in consideration that the plaintiff did promise to forbear the said suit, and to shew an account concerning the estate of the testator, the defendant promised to pay to the plaintiff 100l. The plaintiff avers that he did forbear the said suit, and did shew an account to the defendant, and yet that he hath not paid the 100l. Upon *non assumpsit* pleaded, and verdict for the plaintiff,

[204] Jones moved in arrest of judgment. 1. The plaintiff doth not set forth

where he would have sued the defendant, and perhaps it was in some Court which had not jurisdiction. 2. He avers that he shewed *quoddam compotum*, which is not good; but he ought to have said *compotum prædictum*. Dyer 70 b. Pasch. 1 H. 7, 19, pl. 4. But notwithstanding these exceptions, judgment was given for the plaintiff.

PIERSON *versus* RIDDLEY. REPLEVIN.

Distress. 2 Danv. Ab. 636, p. 7. 1 Vent. 105. 2 Keb. 701, 739, 745.

The defendant avows the taking, for that he is seised of the manor of A. to which he hath a leet belonging, and that by custom time out of mind used, the inhabitants of D. used to send a constable to the said leet; and that he before H. his steward at A. held the said leet, and gave notice thereof at D. and that they did not send a constable, and thereupon the said steward imposed a fine of 39s. 11d. upon the inhabitants, and that he distrained the plaintiff for the said fine. The plaintiff traverses the custom, and found for the avowant.

And Shafto for the plaintiff moved in arrest of judgment for two causes. 1. Because the avowant ought to have alledged a custom to distrain for the fine, as well as for the sending the constable, which he hath not done. 1 Leon. 242, pl. 327. *Blunt* versus *Whitacre*, 11 Co. 44 b. *Godfrey's case;* for it is against common right. 2. The fine is unreasonable.

Weston *contra*. To the 1st. A distress is incident to a fine of common right; and when he alledges a custom to impose a fine, a distress is thereby implied, and it differs from an amerciament in a court baron.

To the 2d. All the ville is amerced, and 39s. is no great fine for a whole township.

Twisden Justice. When a duty is raised by custom, a distress for that duty must be maintained by the like custom. *Sed adjornat'.*

GIBBS *versus* STRATFORD.

Discontinuance. 2 Keb. 702.

Trespass of false imprisonment. The defendant justifies by virtue of an arrest in obedience to a precept out of Warwick Court, returnable *ad proximam Curiam;* and upon this the plaintiff demurs, because the process ought to **[205]** be returnable on a day certain, and not *ad proximam Curiam;* for so the Court not being held, the party may be perpetually imprisoned, and so is 2 Cr. 314. *Johns* versus *Smith*, Dyer 262 b. pl. 33. 3 Cr. 105, *Leat* versus *Jennings*.

Twisden Justice. The case of Dyer was good enough notwithstanding that error; but the judgment was reversed for other errors, as appears, 1 Roll. 486, pl. 2, *Jesson* versus *Laxen*. *Sed adjornat'.*

DOMINUS REX *versus* LESINGHAM. ANTEA 193.

Verdict. 2 Danv. Ab. 651 R. p. 1. 1 Lev. 209. 1 Vent. 104. 1 Mod. 71, 288.

Information. For that the defendant did outrageously make distresses upon his tenants, and was a perturber of the peace and common oppressor; and upon not guilty pleaded, the jury found him guilty.

And Jones moved in arrest of judgment, 1. For that at the common law a lord was not punishable for distraining, and so no information lies therefore; but the party is to be amerced by the Statute of Marlb. cap. 4, not fined, as he must be upon an information; and an action upon the case did lie at the common law. 2 Co. Inst. 107.

2. Admit that an information lies in this case, yet it is not good without shewing when he distrained, which is not done but in general, *his tenants*, which is uncertain; and also he ought to shew how the distresses were unreasonable.

3. The information is, that he is *perturbator pacis & communis oppressor*, which is too general; true it is, that *communis barrectator* without other circumstance is good, but in no other case, as *communis latro*, 29 Ass. pl. 45 a. as *oppressor multorum hominum*

without saying *whom*, is not good. 2 Roll. 79, pl. 2. Moor 302, pl. 451, *Cornwall's case.*

Twisden Justice. The information can never be made good, because too general; and information lies not for distresses, because private offences: and so judgment was staid.

DENOVAN *versus* MASCAL.

Award. 1 Danv. Ab. 541, p. 5. 1 Lev. 302. 1 Mod. 274. 1 Keb. 714. *Copping* versus *Hurrier*, *ante* 187.

Debt upon an obligation, *conditioned to stand to the award of A. and B. Ita quod they make their award upon or before the 19th of February, and if they shall make no award, then to stand to the umpirage of such a one as the arbitrators shall chuse.* And the words are: *But if they do* [206] *not award, then I bind myself to stand to the award of such umpire as they shall chuse.* And upon *nullum arbitrium* pleaded, the plaintiff sets forth an umpirage, and the defendant demurs; and adjudged for the defendant; for though the arbitrators may chuse an umpire at any time during the continuance of their power, yet that umpire cannot act till the arbitrators time is expired, which in this case is now. By Twisden and Rainsford Justices.

DRAPER *versus* BLANEY.

Writs. 1 Lev. 291. 2 Keb. 649, 657, 724. 2 Saund. 193. *Nedham* versus *Benet*, *ante* 171.

Upon a judgment in this Court, a *fieri facias* issued out; and upon a *nulla bona ret'* in London, the plaintiff takes out a *testatum fieri facias* directed to the Sheriff of Montgomery to levy the monies in the hands of the defendant executor. The sheriff returns that this is a county in Wales, and that *breve domini Regis non currit in Wallia.*

And Saunders moved that the sheriff may be amerced, and amend his return. By the statute of 1 E. 6, cap. 10, the sheriffs of Wales ought to have their deputies in the Courts at Westminster, and the sheriff cannot dispute the process of the Court. 2. This writ doth lie in Wales. The question in the old books is concerning original writs, as *quare impedit, &c.* but no question concerning writs of execution, and by the statute of 27 H. 8, cap. 26, Wales is made parcel of the realm of England; and in 34 & 35 H. 8, cap. 26, there is a clause, *that all process for weighty causes shall be directed into Wales by the Chancellor and Council*, which is intended the Judges. And here is a weighty cause; for unless this process be allowed, the plaintiff hath no remedy for his debt; for an action of debt lies not in Wales upon judgment given here.

Object. The statutes of 1 E. 6, cap. 10, and 5 E. 6, cap. 26, in the recital.

Resp. An original out of the Chancery here doth not run in Wales, as in a County Palatine; but a writ of execution doth. Het. 18, *Manser* versus *Lewys*, *elegit* lies and a *fieri facias*, 2 Cr. 484, *Carp's case*, a *certiorari*, and by Dodderidge a *capias* upon a recovery, 2 Bulstr. 156, *Bedo* versus *Piper*, and 54, *Hall* versus *Rotheram.* And afterwards it was adjudged an ill return by Twisden, Rainsford and Morton Justices.

[207] VIVIAN *versus* WILLET.

Words. 1 Danv. Ab. 128, p. 40. 2 Keb. 718.

The plaintiff declares, that he was at the time of the words spoken, and yet is, a merchant; and there being a communication of him the defendant spake these words of him: *I believe all is not well with Daniel Vivian; there are many merchants that have lately failed, and I expect no otherwise of Daniel Vivian.* After verdict adjudged for the plaintiff.

WILSON *versus* ARMOURER.

Heir. 1 Lev. 287. 1 Vent. 78, 87, 106. 2 Keb. 642, 643, 667, 719. 3 Salk. 157.

Debt upon an obligation against the defendant as heir; the defendant pleads *riens per discent*, and issue taken that he had assets; and the jury find a special verdict, viz. *that William Armourer the defendant's father, was seised in fee of the manor of D. and 8 April* 1657, *made a feoffment to Bray and others of all the said manor, except the two meadows in question, during his life, to the use of the defendant in tail;* and whether the meadows excepted did descend to the defendant, was the question.

And after argument at the Bar several times, judgment was delivered by Mr. Justice Twisden in the name of the other Judges for the plaintiff, *that the meadows did descend:* wherein these points were proposed.

1. Whether the exception of these meadows for his life only, be a good exception? And resolved a void exception, because contrary to the rules of law to have a livery operate *in futuro;* otherwise perhaps it had been if the exception had been for years only.

2. Whether in this case the exception be all good, or all void? And as to this point some of the Judges differed. This is a *quære* in Plowd. Quæries 71, pl. 146. But though it be void, yet it doth amount to an indication of the intent of the feoffor, that the same should not be according to the limitations of the other lands. So Plowd. 85. Lease of an house with the lands thereto appertaining, though lands cannot properly belong to an house, yet it declares the intent of the party that it should pass, and so it is as much as therewith used. Perkins 13. Dyer 319. 11 Co. *Auditor Curl's case.* **[208]** And judgment was given for the plaintiff. *Vid.* Dyer 264 b. pl. 40. 1 Anders. 52, pl. 129.

DOMINUS REX *versus* BROWN.

Deodand.

Outlawry upon an inquisition for a deodand for the death of one Barker, *existen' infra ætatem quatuordecim annorum.*

Coleman moved to quash the inquisition, because no deodand is due therefore. 1 Stamf. cap. 12. 3 Co. Inst. Fitz. Corone, 8 E. 2.

Twisden and Morton Justices. There is no reason for that opinion. *Mes adjornat.*

[209] TERM. HILL. 22 & 23 CAR. 2, B. R.

HARRISON *versus* GROSVENER. REPLEVIN IN ESSEX.

Distress. 2 Keb. 692, 704, 726, 823, 836, 841.

The case was, Sir Thomas Smith devised his estate to trustees in fee to such charitable uses as the Lord Lumley, Sir Henry Hen, &c. shall dispose. They declare 5l. to the poor of the parish of St. Mary in Chester; and the commissioners decree that the churchwardens and overseers of the poor of St. Mary shall distrain for this 5l. And upon this two questions were made: 1. Whether the commissioners may add a power of distress, where there was none by the original gift? And 2dly, Whether the commissioners in Cheshire can bind lands in Essex with such clause adjoined? Adjudged for the avowant in both points.

TERM. PASCH. 23 CAR. 2, B. R.

This term Sir Matthew Hale, Lord Chief Baron, was sworn Chief Justice of the King's Bench after the death of Sir John Kelyng, who was a learned, faithful and resolute Judge.

[210] TERM. TRIN. 23 CAR. 2, B. R.

BURNET *versus* HOLDEN.

Executor. 3 Danv. 386, p. 13. 1 Lev. 277. 1 Mod. 6. 2 Keb. 549, 559, 592, 783, 800.

A *scire facias* against an executor to have execution upon a judgment obtained against the testator. The defendant demands oyer of the record, and by it it appears that the plaintiff brought an action upon the case upon a promise against the testator. And upon *non assumpsit* pleaded, a trial by Nisi Prius; and between the trial and day *in bank* the testator died. The defendant pleads a debt due to him from the testator upon an obligation, and that he retains so much in satisfaction of his said debt, and that he hath not assets *ultra*. The plaintiff demurred; and the sole question rests upon the construction of the statute of 17 Car. 2, cap. 8, whether that Act shall supply the death of the defendant, so as to make the judgment good against the defendant's debt; and after argument adjudged for the plaintiff.

[211] TERM. MICH. 23 CAR. 2, B. R.

Sir Matthew Hale, Chief Justice; Sir Thomas Twisden, Sir Richard Rainsford, and Sir William Morton, Justices.

Officer. *Mandamus*. 1 Vent. 143, 153. 2 Keb. 802, 807, 820.

Isles, sexton of the parish church of Kingsclere in Hampshire, moved for a *mandamus* to be restored to his office: and the Court gave time to consider, whether any precedents would warrant such a writ. And it was afterwards allowed.

DAVISON *versus* HANSLOP. ASSUMPSIT.

Executor. 1 Danv. Abr. 31, p. 11, 53, p. 33. 3 Danv. Ab. 380, p. 2. 2 Lev. 20. 1 Vent. 152. 2 Keb. 813. Oath. 1 Vent. 171. 2 Keb. 825, 830.

The plaintiff declares, that one Fenwick was in arrear to him in 100l. for an annuity, and that the defendant was bailiff and receiver of the rents of the said Fenwick, who appointed the defendant to account with the plaintiff, and to pay all which should be found in arrear of the annuity, out of the next rents due at Martinmas; and that upon an account there was 100l. found due to the plaintiff; and the defendant *adtunc existens receptor* of the rents of the said Fenwick assumed to the plaintiff, that if he would forbear the said arrears for a month after the said Martinmas, that he would pay the same, and avers, that he staid accordingly, and that yet the defendant hath not paid. Upon *non assumpsit* pleaded, a verdict was found for the plaintiff.

And Weston moved in arrest of judgment, for that it doth not appear that the defendant had effects in his hands at the time of the promise.

[212] *Per Curiam.* It shall be presumed that he had effects after a verdict, being alledged that he was *adtunc receptor;* and judgment was given for the plaintiff.

Theophilus Green and others were indicted at Justice Hall in the Old Baily for refusing the oath of allegiance contained in the Act of 3 Jac. cap. 4. And being convicted, judgment of *præmunire* was given against them according to the drections of that statute; and they brought a writ of error; and by Coleman assigned for error, that the oath injoined by that statute is not now in force, but expired with the death of King James: for that the words thereof are, *That King James is rightful King, &c.* and doth not mention his heirs or successors; and the statute says, *they shall take the oath*, and the indictment is, *for refusing the oath, in his Anglicanis verbis*, and sets forth the oath *verbatim*, and so it is not like 7 Jac. cap. 4, which orders taking the tenor of the said oath; and the words King JAMES shall not include his successors. Moor 176, pl. 311.

Hale Chief Justice. The constant practice hath been otherwise, and the same

objection may be made to the oath in 1 Eliz. cap. 1. And the word tenor is as much as that it were *verbatim;* and the name of the person is only an instance of the thing intended, and the word King extends to his successors; and judgment was affirmed.

Murder. 1 Vent. 158. 2 Keb. 829.

John Manning was indicted in Surrey for murder, for the killing of a man. And upon not guilty pleaded, the jury at the Assizes find that the said Manning found the person killed committing adultery with his wife in the very act, and flung a jointed stool at him, and with the same killed him; and resolved by the whole Court, that this was but manslaughter; and Manning had his clergy at the Bar, and was burned in the hand; and the Court directed the executioner to burn him gently, because there could not be greater provocation than this.

[213] SACHEVEREL *versus* FROGATE. COVENANT.

Heir. 1 Vent. 148, 161. 2 Lev. 13. 2 Saund. 367. 2 Keb. 798, 819, 833, 839.

The plaintiff's ancestor (whose heir the plaintiff is) seised in fee, demises to the defendant, rendering rent to the lessor, his executors, administrators and assigns during the term. And the plaintiff declares as heir, and the defendant demurs in law; and adjudged for the plaintiff. For though the reservation be but to the lessor, his executors, &c. and not to his heirs, as it ought to be to intitle the heir, yet it being (*during the term*) it shall run with the reversion. And the case of *Richmond and Butler*, 3 Cr. 217, is mistaken in the law, for the case there intended, viz. 12 E. 3, Fitzh. Assise 86, is contrary, as appears by the antithesis there used. And Latch. 274, *Wooton* versus *Edwyn* is without the words *durante termino;* and agreeing with this judgment is Latch 99, *Sury* versus *Brown.*

[214] TERM. HILL. 23 & 24 Car. 2, B. R.

Mandamus. 1 Vent. 187. 2 Keb. 871.

Mr. John Amherst of Gray's Inn being owner of ground adjoining to Newgate market in London, had some of his said ground laid to the said market for the enlarging thereof, and thereupon according to the Acts of Parliament of 19 Car. 2, cap. 8, and 22 Car. 2, prayed satisfaction from the city, and had a jury impanelled, who gave him five hundred pounds and upwards, and upon that verdict the mayor and aldermen refused to enter up judgment; and thereupon Mr. Amherst prayed a *mandamus* to make them give judgment; and it was granted.

[215] TERM. PASCH. 24 CAR. 2, B. R.

Chimin. 3 Salk. 183.

Nota. Upon an indictment against Houghton of Somersetshire, for stopping a way, it was declared to be the course of this Court, that the offender is admitted to a fine upon his submission before verdict, if there be a certificate that the way is repaired. But if the party be convicted by verdict, such certificate will not serve, but the party ought to cause a *constat* to issue out to the sheriff, who ought to return, that the way is repaired, because the verdict, which is a record, ought to be answered with matter of record.

[216] TERM. MICH. 24 CAR. 2, B. R.

Extortion. 2 Lev. 71. 3 Keb. 32, 89, 92, 106, 151.

The lady Broughton, keeper of the Gate-house prison in Westminster, was informed against; and upon not guilty pleaded, she was found guilty; and her crime was extortion of fees, and hard usage of the prisoners in a most barbarous manner;

and after she had by her counsel moved in arrest of judgment, and could not prevail, she had judgment given against her, viz. she was fined one hundred marks, removed from her office, and the custody of the prison was at present delivered to the Sheriff of Middlesex, till the dean and chapter should farther order the same, *salvo jure cujuslibet.*

Memorandum, This last vacation Justice Morton died, and all this term his place was vacant.

[217] TERM. HILL. 24 & 25 CAR. 2, B. R.

This last vacation Justice Archer was amoved from sitting in the Court of Common Pleas, *pro quibusdam causis mihi incognitis;* but the Judge having his patent to be Judge *quamdiu se bene gesserit*, refused to surrender his patent without a *scire facias*, and continued justice of that Court, though prohibited to sit there, and in his place Sir William Ellis, Knight, was sworn.

Also the day before this term began, Justice Wild was removed out of the Court of Common Pleas into this Court, and sworn privately; and in his room Baron Windham was sworn to be one of the Judges of the Common Pleas, and in his place Sir Edward Thurland, Knight, of the Inner Temple, the second day of this term was made serjeant at law, having his coif put on in the Treasury, and immediately sworn one of the Barons of the Exchequer.

Also this vacation Sir Orlando Bridgman, Knight and Baronet, was removed from being Lord Keeper, and in his place Anthony Earl of Shaftsbury, was made Lord High Chancellor of England.

Also this last vacation Francis Winnington, utter barrister of the Middle Temple, was knighted, and made solicitor to the Duke of York, and the first day of this term was called within the Bar.

Serjeant Baldwin was made King's Serjeant.

BLACKET *versus* LUMLEY.

Error. 1 Vent. 240. 3 Keb. 103, 116.

A writ of error to reverse a judgment given in the court of the Royal manor of Hexham in Northumberland. In a replevin the defendant avows for damage-feasant; the plaintiff pleads in bar to the avowry, that Fenwick was seised in fee of the manor of Fallowfield, and that he and all those whose estate, &c. have used time out of mind to have common of pasture *in loco in quo, &c.* for all his farmers and copyholders; and that he is a copyholder, and held of the said manor, and justifies for common belonging **[218]** thereunto. The avowant replies and traverses the prescription, and it is found against him; and judgment for the plaintiff; and now the errors assigned were, the *venire facias* is ill awarded, for that it is *præceptum est per seneschallum Cur. præd. quod ven. fac. duodecim tam de vicineto de Hexam quam de vicineto manerii de Fallowfield infra jurisdictionem, &c. quia nec, &c. quod sint hic ad horam secundam post meridiem hujus diei.*

1. 'Tis not *per Cur.* nor *per seneschallum in Cur.* and it may be it was out of Court, and process in private jurisdictions shall not be taken by intendment; and of this opinion were Twisden and Wild; but Hale Chief Justice *contra*, because 'tis returned the same day; and the Court shall be presumed to be continued the whole day.

2. The manor of Fallowfield is not laid to be within the jurisdiction, as it ought to be, in the pleading of the prescription; and the saying in the awarding of the *venire facias* that 'tis so is not sufficient. And to this opinion Hale agreed.

3. The *quia nec* for *qui nec* is not good; but they ought to have put it at large, and not as 'tis in B. R. And *quia nec* is nonsense. And Twisden and Wild allowed this exception; but Hale Chief Justice did not; but upon the consideration of all the exceptions, judgment was reversed, and so pronounced.

shall forfeit the treble value by the statute; but judgment was staid till the other side moved, because the Court would advise.

TWYFORD *versus* BERNARD. TRIN. 22 CAR. ROT. 586.

Obligation. 2 Keb. 690, 733.

Debt upon a bond of 300l. The defendant pleads that the said writing was delivered as an escrow to one Godfrey Woodward a stranger, upon condition, that if the plaintiff shall procure a demise of certain tenements to the defendant from a certain company in London, or should give good security that he would procure the said demise before such a day, that then the said Woodward should deliver the same, *ut scriptum suum* to the plaintiff, otherwise that he should keep the same in his hands; and the defendant pleads, that the said Woodward did not procure the said demise, nor give security as aforesaid; & *sic non est factum suum.* The plaintiff demurs, because he anwers not the deed, for Woodward never had authority to deliver his writing *ut factum*, but *scriptum suum*, which is not good; and such was the opinion of Twisden and Rainsford Justices; but Morton *contra.* But Simpson being of counsel for the defendant, moved that the plaintiff might take issue upon the special plea, *scriptum* being made *factum;* and judgment thereupon was staid entering for a time.

[198] FOXWIST AND FOUR OTHERS EXECUTORS OF MR. PINSENT, LATE ONE OF THE PROTHONOTARIES OF THE COMMON PLEAS, *against* TREMAIN. TRIN. 21 CAR. 2, ROT. 1512.

Executor. 1 Danv. Abr. 604, p. 3. 3 Danv. Abr. 412, p. 3. 1 Vent. 102. 1 Lev. 299. 1 Mod. 47, 72, 296. 2 Keb. 625, 633, 691, 698, 537. 1 Sid. 449. 2 Saund. 212. *Vide post.* 243 *S. Barbe* versus *Burton.*

Indebitatus assumpsit for monies received to the testator's use for damage clere. The defendant pleads in abatement, that two of the plaintiffs (and names them) are under the age of seventeen years. The plaintiff demurs, and whether the three that were of full age, and the infants ought to join in this action was the question. Coleman for the defendant, that they cannot join, because the infants under seventeen years are not capable of administering, but there ought to be an administrator *durante minori ætate*, as *Sir Moil Finch's case* is, and therefore they cannot be more able by being joined with others.

HATTON *versus* MASKEW AND ANOTHER.

Trin. 15 Car. 2, B. R. Rot. 1117.

Executor. 3 Danv. Abr. 412, p. 3. 1 Lev. 181. 1 Lev. 750.

In a writ of error in the Exchequer-Chamber, upon a *scire facias* brought by Maskew and one other to have execution of a judgment in debt; the plaintiff sets forth in the writ of *scire facias*, that the testator made the plaintiff and another his executors, and that the other is under the age of seventeen years; and the defendant demurred upon the writ, for this very cause, that the other upon the plaintiff's own shewing was a joint executor, and not joined in the action. But resolved the writ was good, because the infant ought not to join, and so judgment was here given, and also affirmed in the Exchequer-Chamber.

Offley for the plaintiff. There is a difference where there is but one executor, and he an infant under the age of 17, and where there are other executors joined with such infant; for in the first case the infant cannot sue, but in the other case an infant may be joined with the others. True it is, the executors of full age may sue without the infant, and set it forth in their declaration, as in *Hatton and Maskew's case* cited by Coleman; but 'tis as well where they all join. **[199]** 1 Roll. 288, pl. 2, and the very case ruled in Yelverton 130, *Smith* versus *Smith*, and 3 Cro. 378. If

three executors, and one be an infant, yet they shall all join in the action by an attorney, and the infant shall not sue by guardian, because they all make but as it were one person, and represent their testator jointly.

Twisden Justice. The action is well brought by all the executors jointly, and no administration can be granted during the minority of the infants, and all make but one person; and it may be brought either as *Hatton and Maskew's case* is, or this way, and both good. *Sed adjornat.* But afterwards adjudged *quod def. respondeat ouster*, by Rainsford and Moreton against Twisden, who held the plea good, because an infant is an executor, *quoad esse, non quoad exercitium.*

HAYMAN *versus* TRUANT.

Pleading. 1 Vent. 101. 1 Mod. 72. 2 Keb. 692.

In *assumpsit.* The plaintiff declares that the defendant such a day and year bargained and sold to the plaintiff certain corn, affirming the same to be his own, and warranting it to the plaintiff, whereas it was the corn of one Stokes, who since recovered damages against the plaintiff for the same. The defendant pleads a prior action for the same matter still depending in abatement of the bill. The plaintiff replies, that the contracts are several, and cause in the former action and this are several and for several matters, *absque hoc*, that they are for the same matter. And the defendant demurs specially, viz. because the plaintiff ought to have concluded to to the country, and not taken a traverse; for by that means the defendant might have rejoined, and so an infinity might be in the pleading; and so seems 3 Cro. 755, *Huish* versus *Philips.*

Twisden Justice. The pleading is well, and so is the constant practice. And the case of *Huish and Philips* was adjudged upon another point, viz. for defect in the plea, because it is, *et prædictus Bush (un stranger) dicit, pro le defendant.* As appears in Yelverton 38, & 3 Cro. 13, where the same case is also reported. *Et judgment fuit done pur le plaintiff quod def. respond' oust'.*

[200] HAMBLETON *versus* BERE.

Damages. 2 Danv. Abr. 460, p. 12. 1 Lev. 299. 2 Saund. 169. 2 Keb. 693, 697.

In a special action upon the case for inticing his apprentice out of his service. The plaintiff declares, that 16 Car. 2 he entertained A. his apprentice to serve him for nine years, and that the defendant inticed the said A. from his said service, *per quod* he hath lost his service for the whole term of nine years: upon *non culp.* pleaded, a verdict was given for the plaintiff.

And Saunders for the defendant moved in arrest of judgment, because the plaintiff hath brought his action too soon, or at least hath laid his damnification too large, because he hath alledged his damage to be by the loss of the apprentice's service for the whole term, whereas it appears that some years of the nine are yet to come; and so the jury have given damage for what the plaintiff hath not sustained loss, and the apprentice may return, and yet the plaintiff recover for his absence; and of this opinion was Justice Twisden, and therefore the judgment was staid till farther motion to be made by the plaintiff; and afterwards judgment was arrested, because the jury was guided by the *per quod.*

GUILLIAMS *versus* MUNNINGTON. HEREFORD.

Replevin. 1 Lev. 308. 1 Vent. 180.

On replevin for taking his cattle; the defendant avows for that A. was seised in fee in the place where, &c. and being seised, by his deed *hic in Curia prolat'*, granted to Anne Munnington a rent-charge out of the said lands with a clause of distress to Anne Munnington, who by indenture of bargain and sale duly inrolled in the sessions at Hereford, granted the said rent and arrears thereof to the defendant; and because

[222] WINTON *versus* PINKNEY. DEBT FOR RENT.

Debt. 2 Danv. Abr. 501, p. 13. 2 Lev. 80. 1 Vent. 242. 3 Keb. 131, 137.

Lessee for life makes a lease for years, which lessee for years surrenders to the reversioner, rendering rent; and resolved for the plaintiff, because 'tis a duty by way of contract.

MOSEDEL *versus* MIDDLETON. COVENANT.

Covenant. 1 Vent. 237. 3 Keb. 133.

The plaintiff declares, that the defendant covenanted for the true imprisonment of J. S. who escaped, and that thereupon the plaintiff was sued, and was forced to pay the debt. The defendant pleaded the statute of 8 H. 6, and that the covenant was for ease and favour of J. S. The plaintiff replied, that the said covenant was entered into for better security, *absq. hoc*, that it was for ease and favour; and the defendant demurred, and judgment was given for the defendant, *nisi*, because there was a covenant to pay chamber-rent, &c. which in itself is for ease and favour.

[223] TERM. PASCH. 25 CAR. 2, B. R.

YOUNG *versus* CAGE.

Amendment. 1 Danv. Abr. 337, p. 46. 3 Keb. 138.

Debt upon a bond. Judgment was had by default by the plaintiff as executor; and the attorney had left out, *et profert hic in Cur. literas testamentarias;* but the plaintiff is called executor in the declaration; and the defendant having brought a writ of error, Simpson moved to have the record amended in this particular, and to have those words inserted. But it was denied, because whether the plaintiff was executor or not, is matter of fact, and 'tis no reason to allow that to be true, which may be otherwise, without any proof but the plaintiff's own suggestion.

[224] TERM. MICH. 25 CAR. 2, B. R.

SYMS *versus* SYM. TRIN. 25 CAR. 2, ROT. 672.

Executor. 2 Lev. 90. 3 Keb. 206.

Debt for rent. Upon special pleading the case was this; lessee for years dies intestate. In May 1669 administration was granted of his goods to A. who assigns this term to B. who assigns to C. who surrenders to the reversioner; afterwards a third person cites the administrator before the Ordinary to repeal the administration, who confirms the same; then the third person appeals from that sentence to the Dean of the Arches, where the sentence is avoided, and administration granted to the appellant; and whether this avoidance of the sentence shall void all acts done by the administrator before the action, was the question. And resolved by Hale Chief Justice, Rainsford and Wild, *absente* Twisden, that it shall not; but is the same in effect with *Packman's case;* and judgment was given for the plaintiff.

DINSDALE *versus* ILES.

Estate. 3 Danv. Ab. 234, p. 9. 1 Vent. 247. 2 Lev. 88. 3 Keb. 166, 207.

Trespass for taking of goods. The defendant pleads that he let the land where the taking is supposed to be, to Iles at will, rendering rent at May-Day, and the Feast of St. Martin the Bishop, in winter; and for rent arrear at Martinmas 21 Car. 2, the defendant justifies the taking the goods as a distress. The plaintiff replies, and confesses the lease; but farther, that before the rent became due, viz. in August 21 Car. 2, the defendant let the same land to Iles for years, rendering rent, who

entered and was possessed; and so the lease at will to Iles was determined. The defendant rejoins, that in the said lease it was agreed, that the lessee should not enter till after Martinmas, *absque hoc*, that he entered *prout*. The plaintiff surrejoins, that he leased *prout, absque hoc*, that it was so agreed. And the **[225]** defendant demurs; and adjudged for the plaintiff, because the lease for years was a determination of the estate at will; and though upon the whole matter, and by virtue of the agreement it was a lease by computation from August, and in point of interest but from Martinmas; yet as this case is pleaded, where the plaintiff acknowledges the lease to commence in interest in August, the estate at will was determined.

FOSSET *versus* FRANCKLIN. DEBT UPON 2 E. 6 FOR TITHES.

Tithes. 2 Danv. Ab. 620, p. 5. 3 Keb. 208, 217.

The lands were parcel of the possession of the Prior of St. John of Jerusalem, and came to the Crown by 32 H. 8, cap. 24, and parcel of St. John Wood in the parish of Marybone and Hampstead, and whether they are discharged from payment of tithes, by 32 H. 8, cap. 24, was the question upon a trial at Bar, and a special verdict found thereupon. But it seemed to Hale Chief Justice, that they shall not pay tithes, by reason of the word (*privileges*,) and in *Whitty* versus *Weston*, Bridgman 32. Latch. 89. Godbolt 392, pl. 478, the Court was divided. But 2 Cro. 57. Moor 913, pl. 1291, *Cornwallis* versus *Spurling*, in debt upon 2 E. 6, judgment was given that the lands are tithable; and so in a prohibition, 2 Brownl. 8, 20, *Urrey* versus *Bowen*. *Adjournatur*. But Dyer 277 b. pl. 60 is, that they are not tithable. And judgment was afterwards given for the defendant, and resolved the lands are not tithable.

THE BISHOP OF EXON' AND MASTER HIS VICAR GENERAL *versus* STAR.

Excommunication. 3 Danv. 279, p. 1. 1 Vent. 166. 2 Lev. 36. 2 Keb. 814, 836, 848, 873. 3 Keb. 219, 285.

Debt upon an obligation of 20l. The defendant demands oyer of the condition, which is, *that whereas the defendant standeth excommunicated in the Ecclesiastical Court, and is to be assoiled, if therefore he do abide by and stand to omnibus mandatis ecclesiæ, that then, &c.* The defendant pleads, that he gave this bond to be freed from excommunication, and that the same is void in law, and so he ought not to be impleaded thereupon. The plaintiff demurs generally. Master for the plaintiff, The single question is, whether a bond given for caution be good? **[226]** It is clear, that before an excommunicate person be assoiled, he must give caution, and to compel the Ordinary to take the same a writ lies at the common law, *de cautione admittenda*, F. N. B. 63 c. which must be *idonea cautio & ad parend' mandatis ecclesiæ*, Regist. Orig. 66 and 67. And an action upon the case lies against the bishop for not taking such caution, if the person excommunicated requires it, Co. 2 Inst. 623, or the bishop may be indicted, *ibid.* But what is *idonea cautio* is left to the Spiritual Court to determine; and our law is not judge thereof. And there are three sorts of cautions, 1. *Juratoria*, when the party is poor and can give no other security. 2. *Fide-jussoria*, by bond or other security. 3. *Pignoratitia*, by pledge, as plate, money or other goods; and this is mentioned, Regist. 66 a. 67 b. It is called security, Flet. lib. 6, cap. 45, page 438, & Canon Aug. 354. *Caution upon marriage.* 2. This caution must be the act of the party excommunicate, he must tender it, and the Judge is not bound to require it. 3. This caution by an obligation is more for the ease of the party than a pledge. 4. 'Tis the constant practice and use of the Ecclesiastical Court. 'Tis not void by the common law, because it is to do a lawful thing. It is not void by statute law, nor within 23 H. 6, cap. 10, and 5 Eliz. cap. 23 saves the right and jurisdiction of the bishops.

Object. 1 Bulst. 122.

Resp. 2 Inst. 615. If the cause be of ecclesiastical cognizance, the Temporal Court will not intermeddle therewith; and *in homine replegiando*, the party must put in pledges, and find *sufficientem cautionem*. F. N. B. 66.

Jones for the defendant. He made three points. 1. If any bond ought to be given to the bishop. 2. If this bond be good in law. 3. Admit it not to be good, then whether it may be avoided by plea.

1. There ought not any bond to be given to the bishop. True it is F. N. B. 63 speaks of caution, but not of security by bond; and Regist. 66 and 67 describes the caution to be *pignoratitia;* and the reason is, because the caution is controllable by the successor, and not by the executors of the bishop, as it will be in case of a bond.

2. This bond is not good, because the same ought to be given to the bishop, or to his surrogate; and here it is given to the bishop and his vicar general.

And as to the objection, that it is the usage and practice,

'Tis answered. Such usage never came judicially in question.

[227] This bond is void by the common law, Moor 864, pl. 1191, *Slawny* versus *Elbridge*, in case of distribution, Stile 456, *Davies* versus *Mathews*. And here it will be a vexation to the people to have bonds put in suit against them.

Hale Chief Justice. The case in Bulstr. is by the whole Court, that such bond is not good; and the case of distribution hath been variously ruled, till the late statute.

Wild Justice. Such bonds have been frequent, and have been allowed in C. B.

Hale Chief Justice. A bond conditioned to perform a by-law hath been ruled naught. *Adjournatur.*

KING *versus* WELBY.

Prohibition. 3 Keb. 221.

The plaintiff had a judgment at law against the defendant, who exhibited his bill in Chancery to be relieved against this judgment, and the plaintiff pleaded this judgment, and over-ruled. And the plaintiff by Sanders moved for a prohibition, grounding his suggestion upon the statute of 4 H. 4, cap. 23. *Et adjournatur.*

And afterwards Hale Chief Justice directed, that the plaintiff should move the Court of Chancery to have the plea set down again to be heard, and when it should be over-ruled again, then the Court would consider whether a prohibition should be granted.

WRIGHT *versus* WOODHOUSE.

Costs. 3 Keb. 141, 228.

Trespass for entering his house, and taking a cup of silver. The defendant justifies by virtue of a clause in the Act of 16 Car. 2, cap. 2, *That if any person occupying any hearth or stove, chargeable to His Majesty, shall leave any house before any of the half-yearly feasts, whereon the same is appointed to be paid; the next occupier thereof shall be chargeable with the same for the said half-year*, and that the plaintiff was next occupier to him who was in arrear. The plaintiff demurs; and adjudged for the defendant; and now Winnington moved for the defendant to have treble costs, according to the Act of 14 Car. 2, cap. 10, which gives treble costs against any plaintiff, who shall have judgment against him in any action brought for acting by that Act; and the Court doubted whether this Act **[228]** of 14 Car. 2 be a continuation of 16 Car. 2 as to this particular. *Et adjournatur.*

KING *versus* ———.

Trespass. 3 Keb. 228, 250.

Trespass quare clausum fregit pedibus ambulando & prosternere ses fences, continuando transgression. præd. from such a day to such a day, *ad damnum, &c.* And after verdict, upon *non. culp.* it was moved in arrest of judgment, because there can be no *continuando* in breaking of fences. As if I bring an action of trespass for taking my horse, and using him twenty days; I cannot lay it with a *continuando.* So for cutting of trees. Mich. 20 H. 7, 3, pl. 7. 2 Roll. 549, pl. 5. *Et adjournatur.*

PYBUS *versus* MITFORD. EJECTMENT IN NORTHUMBERLAND.

Intr. Trin. 24 Car. 2, Rot. 703, B. R.

[Applied, *Bagshaw* v. *Spencer*, 1748, 1 Ves. sen. 153. Referred to, *Thompson* v. *Gibson*, 1841; 8 M. & W. 288. See *Coape* v. *Arnold*, 1854-55, 2 Sm. & G. 315; 4 De G. M. & G. 589; *Folkard* v. *Metropolitan Railway Company*, 1893, L. R. 8 C. P. 472; *Owen* v. *Gibbons* [1902], 1 Ch. 638.]

Estate. 2 Danv. Ab. 556, p. 2. 3 Danv. Ab. 158, p. 8. 2 Lev. 75. 1 Vent. 372. 1 Mod. 121, 159. 3 Keb. 129, 239, 316, 338.

Of the demise of Gray and his wife. Upon not guilty, the jury found a special verdict, that Michael Mitford was seised in fee, and had issue two sons, viz. Robert by his first wife, and Ralph by his second wife, whose name was Jane, and so being seised 23 Jan. 21 Jac. by indenture covenanted to stand seised of the lands in the declaration mentioned after the date of the indenture, to the use of the heirs males of his body begotten on the body of his said wife Jane, with remainders to his own right heirs, and dies. 16 Car. 1, Robert enters and levies a fine to the use of himself and Mary his wife, and the heirs of their bodies, and dies without issue. Mary marries the lessor of the plaintiff; the defendant Ralph enters, and the jury concluded, that if any use did arise to Ralph by the said indenture of 21 Jac. then they find for the defendant, otherwise for the plaintiff.

Jones Solicitor General for the plaintiff. That no use arises to the issue of the second wife. Here are two points. 1. If by this covenant an estate be raised by way of future use, to commence after the death of Michael the covenantor. 2. Admitting that no estate do arise, whether an estate by implication does arise to the heirs of the second wife. 1. No estate arises here as a future use, for these reasons. **[229]** 1. An use may arise *in futuro* to a person *in esse;* but it cannot be limited to one in being, to commence after the death of the covenantor, because a covenant shall not bind the heir, where the ancestor is not bound, and (*ergo*) a covenant that land shall remain to A. after my death, doth not raise an use. 21 H. 7, 18, pl. 30. Dyer 55 a. pl. 3. Hob. 313. 2. Whether this shall amount to a covenant to stand seised to the use of him and the heirs of his body; and I hold it doth not. 1. Here appeareth no intent to charge the estate in the life-time of the covenantor. Suppose I covenant, that after the death of J. S. I will stand seised to the use of J. D. that is by way of future use.

Object. 1 Co. 129 a. Covenant, that after his death his son shall have his land, raises a use to the son.

Resp. That case is only alledged by counsel, and not by the Judges. And Winch 61, *Buckley and Simond's case* is contrary, and so is *Mitford's case.* Coke on Litt. 22 b. And a man cannot make his right heirs purchasors.

Levinz for the defendant. 1. Here is a good use raised to Michael Mitford the father by implication, viz. to him for life, the remainder to the heirs of his body; and this appears by *The Lord Paget's case,* 1 Co. 154 a. where the estate to Farmer, and others, during the life of the Lord Paget being void, and the other estates not being to commence till after his death; the Lord Paget was resolved to have an estate for his life by implication. 1 Anderson, 263, pl. 270. Moor 284, pl. 437, *Fenwick* versus *Mitford.* 1 Anderson 288, pl. 297. 1 Leon. 182, pl. 256. 1 Leon. 101, pl. 133, *Allen* versus *Palmer.* Surrender to the use of the right heirs of the copy-holder; and it is frequent for uses to arise by implication, 2 Leon. 218, pl. 275, *Humphreton's case,* the mind of the party doth direct the estate. 1 Anderson 245, pl. 258.

2. Admit that there cannot be such an use by implication; yet this is a good use to commence after his death, as a new springing use.

Object. This covenant shall operate by way of contract.

Resp. It may do so in a subject proper for it; but here the land is bound by it. As to the case of Dyer 55 a. it is not a covenant to stand seised; for if it had been so, an use would have arisen. 2 Roll. 788, pl. 1, *Buckler* versus *Simonds.* And here the

covenant would be void if it did not raise a use; and springing uses frequently happen upon a contingent. 1 Co. 155 b.

[230] Hale Chief Justice. If a man covenant to stand seised after his death, it will raise a use to commence after his death, as well as during his life; for though the heir is not bound where the ancestor is not bound, yet land may be charged in the hands of the heir by the ancestor, and a use doth charge the land; but there may be improper words to charge the land, as the case of H. 7 and Dyer 55 is.

If H. covenants to stand seised after his death to the use of J. D. he hath the fee till his death. *Paget's case* comes not home to this case, because there was only an estate for life drawn out, and no contingent use. Here are clauses in the deed, which shew that it was never intended that there should be an immediate estate upon the heir. *Adjournatur.*

Winnington for the plaintiff. Here are three points. 1. If here be a contingent use raised? *And I hold there is not.* 2. Whether any estate arises to the covenantor by implication? *And I hold there doth not.* 3. Whether the issue by the second venter shall not take by purchase? *And I hold he shall.*

1. A future use may be raised upon a contingent. Plowd. 301, *Sherington* versus *Pledal, & in futuro.* 2. Here is no estate-tail vested in the covenantor, because no intent of the parties so to have it; but by implication he hath an estate for his life. The covenantor is in of his ancient seisin till the use arise, and not as in case where a use arises by transmutation of possession; and here is a new use raised, and therefore Michael could not be in of an estate-tail executed. 3. Ralph shall not take as a purchasor, for here is a description of the person, rather than a limitation of the estate.

Saunders for the defendant. Ralph here shall take *quasi* by discent. *Adjournatur.* And judgment given for the defendant.

Bradley *versus* Hutchinson, Executor.

Amendment.

A *scire facias* upon a judgment in debt. The defendant pleads *pleinment administre* generally; and the plaintiff demurs specially for that cause.

And Jones Solicitor General moved to amend the plea, because the defendant ought to have pleaded specially.

[231] Hale Chief Justice. The judgment binds the goods, and therefore it shall be presumed that the same were rightfully administered.

Twisden Justice. It hath been adjudged a good plea; but let the plea be amended, if the defendant will.

Okeover *versus* Overbury. Error, Fine in C. B.

Error. 1 Vent. 252. 3 Keb. 259.

In a writ of error to reverse a fine, infancy is assigned for error, and a *scire facias* issues to Overbury, ter-tenant and conusee, who pleads *in nullo est erratum.*

Hale Chief Justice. When error in fact is well assigned for error, *in nullo est erratum* amounts to a confession of the fact; as if infancy be assigned, the plaintiff cannot plead *in nullo est erratum*, because by it he confesseth the infancy, but he ought to take issue; but if the party assign for error, that the Court did not sit, or that the defendant did not appear, which assignments are of matters of fact, but not well made, there *in nullo est erratum* amounts to a demurrer.

Captain Waters being a captain in the Foot Guards, and his serjeant rescued one of his soldiers of his company from the custody of the sheriffs of London, and for that offence an information was exhibited against them, and they came into Court and confessed the fact; and upon that confession judgment was given against them, and the captain was fined 100l. and the serjeant 50l. and imprisonment awarded against them until payment of the same.

SOUTHAM *versus* ALLEN, FOR WORDS.

Words.

The plaintiff is a keeper of livery stables and an inn at the Belsavage; and the defendant had other stables for the same purpose, in the same yard. A stranger comes with a waggon into the yard, and demands of the defendant, which is Belsavage-Inn? the defendant replied, *This is Belsavage Inn, deal not with the plaintiff, for he is broke, and there is neither entertainment for man or horse;* and after verdict for the plaintiff, and great damages, judgment was given for the plaintiff after much debate.

[232] BAKER *versus* BULSTRODE.

Condition. 2 Danv. 39, p. 33. 2 Lev. 95. 1 Vent. 255. 1 Mod. 104. 3 Keb. 273.

Debt upon an obligation, upon condition that the defendant shall well and sufficiently execute, to the satisfaction of the plaintiff's counsel, a release within seven days after a decree of a moiety of the money decreed. The defendant pleads, that the plaintiff did not tender any release. The plaintiff demurs.

Hale Chief Justice. If advice had been necessary, then the plaintiff must have done the first act, but now it is at the peril of the defendant, that the release be to the satisfaction of the plaintiff's counsel; and judgment was given for the plaintiff.

PRIDEAUX *versus* WARNE. REPLEVIN.

Custom. 2 Danv. Ab. 428, p. 6. 2 Lev. 96. 1 Mod. 104. 3 Keb. 249, 275.

For taking of a sail of a ship; the defendant avows the taking, for that he is seised of the manor of Padstow, within which there is a common key, extending from such a place to such a place, for the unlading of salt, and that he and all those, &c. have used to repair the said key, and have kept a bushel for measuring of salt, and that they have had of every ship arriving there, laden with salt, one bushel of salt; and that the plaintiff had a ship arrived at the key laden with salt; and because a bushel of salt was not paid according to the prescription, he avows the taking of the said sail. The plaintiff pleads in bar of this avowry, that the river upon which this key is pretended, is a great river of ten miles breadth, and that the key extends but half a mile, and that the ship arrived seven miles distant, *absq; hoc*, that the said ship did arrive at the key within the said manor. The defendant demurred.

Pollexfen for the avowant. 1. Whether this be a good prescription without keeping a bushel, or repairing the key? and it seems it is. 21 H. 7, 16. Br. Prescription 92. 3 Cro. 710. Dyer 352 b. And the not coming up to the key makes nothing against the avowant, because he can come up if he please. Co. 2 Inst. 222. Murage. Roll. Prescription 265, for Dublin, Tronage, 1 Leon. 231.

Object. 'Tis out of the manor.

Resp. He may claim such a privilege in another manor.

[233] 2. The taking of the sail is lawful, because, 1. Though it is not the goods of him who ought to pay the duty; yet it is well enough, for that is not necessary. Pasch. 21 Car. 2, *Welch* versus *Bell*, 1 Roll. 666, *Agard* versus *Lisle*.

Courtney *contra*, for the plaintiff. It is no good prescription, because it hath no good foundation nor meritorious consideration. For 1. Reparation of the key extends only to ships lying at the same to lade and unlade; and the keeping of a bushel is no cause, no more than the case of aulnage, 1 H. 4, 14. Dyer 117. 2. This is a duty from the merchant, not from the ship. 3. The sail is an unreasonable distress, because it disables the whole ship.

Hale Chief Justice. This prescription is only for a wharf, not for a port, and here ought to be reasonable recompence for the prescription. For Magna Charta says, *Omnes mercatores peregrinos, &c.* without unreasonable toll; and he who hath a port ought to find and provide weights and measures, and other things. And in this case

the avowant may as well prescribe to the confines of France, and therefore it is not a good prescription; as the case of *The Belman of Litchfield*, More; and it is not said what salt was in the ship, and there may not be above two bushels; and therefore judgment was given for the plaintiff.

TAYLOR *versus* HOLMES. ERROR IN NORTHAMPTON.

Actions. 2 Lev. 101. 3 Keb. 264, 276, 296, 302, 335.

Assumpsit and trover in one declaration. The defendant pleads as to the *assumpsit, non assumpsit;* and as to the trover, *non culp.* The jury find, as to the *assumpsit* for the plaintiff; and as to the trover for the defendant, and the joining of these two actions in one declaration is assigned for error; and adjourned; but it seemeth not to be good.

LOMAX *versus* ARMOURER. ERROR IN NEWCASTLE.

Error. 3 Danv. Abr. 94, p. 11. 1 Lev. 98, 123. 1 Vent. 267. 3 Keb. 277, 326, 421.

Dower in Newcastle by plaint there. And the error assigned is, that freehold is not pleadable without original writ. Brit. 128 b. F. N. B. 77 b. Co. Inst. 2, 282, 311. Intr. 429. 3 Cr. 101, *Marshal* versus *Hobs*, as to fines, **[234]** 44 E. 3, 28, 37. 50 Ass. 9. But fines and real actions differ, for a fine is an amicable suit, & *cont.* 3 Cro. 114, 116. Owen 93. *Et adjournatur.*

Treason. 2 Lev. 98. 1 Vent. 254. 3 Keb. 278. Co. 3 Inst. 17.

Bellew and Norman, Frenchmen, were condemned for clipping, and judgment given by the second Judge, only to be drawn and hanged, *contra al Coke.* But by all the justices, this offence of clipping is made treason by the statute of 3 H. 5, cap. 6, and is of the same nature with coining, the punishment and judgment whereof is only drawing and hanging, because so the judgment was at the common law; and the statute of 25 E. 3, cap. 2, which declares what shall be treason, doth not appoint the judgment; and by the common law the judgment for coining was drawing and hanging for a man, and burning for a woman. Fleta, l. 1, cap. 22. *Vide* Dyer 230 b. pl. 55.

[235] TERM. MICH. 26 CAR. 2, B. R.

Sir Matthew Hale, Chief Justice; Sir Thomas Twisden, Sir Richard Rainsford, and Sir William Wild, Justices.

DUNKIN *versus* FRANCES MUN WIDOW, ADMINISTRATRIX WITH THE WILL ANNEXED OF QUARLES BROWN DURING THE MINORITY OF MARGARET BROWN.

Devise.

The case was, that in 1663, Quarles Brown made his will in writing, and made Michael Dunkin, the plaintiff's father, and three others his executors, in trust for Margaret, and died 1667, administration, with the will annexed, was granted to the said Michael Dunkin the father. In October 1673, Michael Dunkin the father makes his will, and the plaintiff his executor, and dies; the defendant takes out administration of Quarles Brown's estate for the use of Margaret, and puts in a *caveat* against the now plaintiff's proving his father's will, and prays that the said will may not be proved till a commission of appraisement hath issued out, to appraise the goods of Michael Dunkin deceased, and a commission of inspection to view the books, papers and writings of the said deceased, and had them. The plaintiff appeals to the delegates, where Mun put in her allegations.

And the plaintiff moved by Sir Francis Winnington for a *mandamus* to be directed to the Judge of the Prerogative Court to command him to proceed in proving the will; and alledged F. N. B. 63, *de cautione admittenda*, and the case of *The Chrisms*,

and *Gold's case*, 1652, and the rather, for that the will is not controverted, but the probate stopped for a collateral cause; and the *mandamus* was granted by the three **[236]** Judges, *absente* Hale. *Nota;* The suggestion for the *mandamus* was brought into Court, and read before the *mandamus* granted. *Vid.* F. N. B. 200 a. *ex grave querela* to inforce the Mayor of Oxford to prove a will. *Et ibid* a. a writ lies to the Ordinary.

BENSON *versus* HODSON.

Pasch. 26 Car. 2. Intr. Hill. 25 & 26 Car. 2, Rot. 696.

Remainder. 1 Lev. 28. 1 Mod. 108. 3 Keb. 274, 287, 292.

A. tenant for life, the remainder to the use of B. in tail, remainder to C. in tail, remainder to the heirs of the defendant. Provided that A. shall have power to make leases for years in possession, reversion or contingency. A. makes a lease for years, to commence after the death of B. without issue.

By Hale Chief Justice. B. may bar this lease by a common recovery, although this arise precedent to the estate-tail, because it is in continuance of the estate of B.

WILLIAMS *versus* FRY.

Mich. 22 Car. 2, Rot. 392, B. R.

Condition. 2 Danv. Abr. 10, p. 9, 30, p. 2. 2 Lev. 21. 1 Mod. 68. 1 Vent. 199. 2 Keb. 756, 787, 814, 867. 3 Keb. 19.

Ejectment for Newport house of the demise of George Porter. Upon *non culp.* a special verdict. The Earl of Newport was seised in fee, and had issue three sons yet living, and two daughters Anne and Isabel; Isabel married the Earl of Banbury, by whom she had issue Anne, now defendant; the other sister Anne was married to Thomas Porter, by whom she had issue George Porter, the lessor of the plaintiff. 8 Feb. 18 Car. 2, the Earl of Newport made his will in writing, and devised the house to his wife for her life, remainder to the defendant Anne and the heirs of her body, under this condition (on which the case depends) viz.

Provided always and upon condition, that if my said grandchild do marry without the consent of my said wife, Charles Earl of Warwick, and Edward Earl of Manchester, and the major part of them; and in case the said Lady Anne Knowles do or shall marry without the consent of the major part of my **[237]** *said trustees, or shall happen to depart this life without issue of her body, then I will and bequeath the said premisses unto my grandchild George Porter, son of my said deceased daughter Lady Anne, late wife of Thomas Porter, and his heirs for ever.*

18 Aug. 1667, Anne marries Christopher Fry without the consent of the Countess of Newport, Earl of Warwick, and Earl of Manchester, and the said Anne had not then notice of the will of the said Earl of Newport, and then she was but of the age of fourteen years.

Resolved 1. It is a limitation, and not a condition; tho' the words are the express words of a condition, yet they must always be conformable to the intention of the parties. Dyer 317, pl. 5. 3 Co. 21. 3 Cr. 833, 2, 591, 3, 376. 2 Leon. 31. Owen 8. Roll. Abr. 411. By which cases it appears that words of condition in a will shall enure as a limitation; and though in *M. Portington's case* 10 Co. it is said otherwise, yet that is but an accumulative reason, which was not necessary.

Resolv. 2. Notice of the condition was not necessary: 1. None is appointed by the devisor to give notice. 2. No body is concerned to give notice, the heirs and executors have nothing to do therewith. 3. All parties had equal means of coming to notice; and if notice be requisite it might be a means to avoid the will of the devisor. 2 Cr. 119, 1, 575. 4 Co. 82, 5, 110. 1 Co. 391. 4. It is a thing which concerns his own interest, which is the true reason of *Sir Andrew Corbet's case.* 5. It was not impossible for the defendant to have inquired and informed herself; and if she remains ignorant and not informed, it is her own folly. 1 Roll. Abr. 463. Hob. 68.

As to *Francis's case*, 8 Co. 92, there the party had other means to claim besides the will, and should not need to take notice of the will. But in our case the will is the only way to claim the estate, and therefore the defendant ought to take notice thereof. As to the case 2 Cr. 144. Molineux, It lies there properly in the conusance of the younger son, that the legacies be paid or not, &c. and differs from this principal case. And so judgment was given by the whole Court (*absente* Morton) for the plaintiff. Finch Attorney-General, Jones King's Counsel for the plaintiff. North solicitor, and Winnington for the defendant.

[238] *Memorandum, Quod decimo sexto die Octobris anno regni Regis Caroli Secundi* 29, *annoque Domini* 1677. *recepi breve domini Regis, quod sequitur in hæc verba: Carolus Secundus, Dei gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, fidei defensor, &c. dilecto & fideli nostro Thomæ Raymond armigero salutem, quia de advisamento consilii nostri ordinavimus vos ad statum & gradum servientis ad legem a die Sancti Michaelis prox. futur. in tres septimanas suscipiend. Vobis mandamus firmiter injungend quod vos ad statum & gradum prædict. in forma prædicta suscipiend' ordinetis & præparetis, & hoc sub pœna mille librarum nullatenus omittatis. Teste meipso apud Westm. tertio die Julii anno regni nostri vicesimo mono.*

Sur le label sic inscribitur, dilecto & fideli nostro Thomæ Raymond armigero ad statum & gradum servien' ad legem suscipiend' ret. tres Michaelmis. Barker.

In this call were thirteen serjeants, (viz.) of Gray's Inn, Thomas Holt, William Gregory, Richard Weston, Sir Robert Baldock, my self and Sir Thomas Stringer. Of the Inner Temple, Sir William Dolbin Recorder of London, Richard Holloway, Thomas Street and John Simpson. Of the Middle Temple, Thomas Rawlins. Of Lincoln's Inn, Thomas Strode and Sir John Shaw. The inscription of the rings, *Gratia Regis, non operibus legis.*

[239] TERM. PASCH. 26 CAR. 2, B. R.

WIGSON *versus* GARRET. EJECTMENT.

Power. 2 Lev. 149. 1 Vent. 278. 3 Keb. 366, 489, 510, 536, 572.

The Earl of Leicester 21 Eliz. makes a settlement upon himself for life, the remainder to his issues, the remainder to others, with power of revocation, by indenture subscribed and sealed by himself, and to limit new uses. The 26th of Eliz. he covenants to levy a fine to other uses, and four years after levies a fine accordingly. And if this indenture and fine make a revocation of the uses in the first deed was the question. Resolved that it is a revocation, because that the deed and the fine are but one conveyance, and a case was cited in Mich. 26 Car. 1, C. B. Rot. 1442, *Ingram* versus *Parker*. Sir William Catesby makes a conveyance to the use of himself for life, the remainder to Robert his son in tail, with a proviso for him, or his son, by deed under hand and seal to revoke. Sir William dies, Robert, the son, by bargain and sale sells for 1000l. But the deed was not inrolled, and after a fine was received, and held by three justices that the fine was an extinguishment of the power:

But Hale Chief Justice doubted of the case to be law. And he cited *Dame Hastings's case*, which was tenant for life with a remainder over, with a power to make a jointure. And the tenant for life covenants to stand seised to the use of his wife, for her life, for her jointure. Resolved a good execution of the power. In covenant by indenture that when J. S. pays 10s. he shall have his land, is a revocation. Judgment was given for the plaintiff.

[240] RISLEY *versus* DAME BALTINGLASS. EJECTMENT IN THE EXCHEQUER.

Devise. 2 Danv. Ab. 528, p. 8.

The case was, Temple and two others were tenants in common of the manor of Burton Dasset in the county of Warwick in fee. Temple makes his will in writing of his third part, and after by indenture and fine partition is made betwixt the tenants in common; and if this partition be a revocation of this will was the question. And

it seemed to all the Barons, viz. Montague, Littleton, Thurland and Bertie, that it is not any revocation: but judgment was not given, because the plaintiff obtained leave to discontinue his action.

[241] TERM. MICH. 28 CAR. 2. IN THE EXCHEQUER.

THE ATTORNEY-GENERAL *versus* SIR EDWARD FARMER. BY ENGLISH BILL.

Grant. 2 Lev. 171.

The case was such, the King seised in fee of the manor of Halbeck in the county of Lincoln, grants it with the appurtenances, and also *omnia fundum, solum, arenas, terras marescales & omnes alias terras, quæ modo inundat' existunt, & quæ fuerint imposterum recuperat de mari,* with a *non obstante* the misrecital, &c. The lands in question were under the salt water at the time of making the patent, and were since recovered from the sea. And the sole question was, if these lands improved and recovered from the sea pass by the said grant?

Holt for the King. They do not pass; 1. Let us consider what shall pass if it were the grant of a common person.

2dly, How this differs being now in the case of the King.

3dly, The nature of the thing granted.

The words are, *All the lands contiguous and adjoining to the sea;* what signification these words shall have; for if all the lands pass, &c. it will extend to Denmark.

2. If this case be considered as the case of the King. Every grant of the King ought to comprehend certainty; and therefore his grant of demesnes doth not comprehend copyholds, although it be otherwise in case of a common person.

3dly, This grant is of part of the sea, which being parcel of the prerogative, ought to be expresly named; and the sea is the soil of the King, Selden's Mare Clausum 223, which refers to a proclamation of the King 7 Jac. mentioned in Lex Mercatoria 135.

Object. Here is a particular grant, and certain words, for they are *quandocunque in posterum recuperat fuerint per derelictionem maris.*

Resp. It is only a possibility, and therefore void; as if the King grants land when it shall escheat, it is a void grant. 2. If **[242]** it shall be a good grant, it shall be of a freehold to commence *in futuro,* which the law permits not.

Wallop for the defendant. It is inquirable, 1. If the thing here be grantable by the King. 2. If here be sufficient words to pass it.

As to the 1st, Here is a capacity in the King, because he is absolute lord of the British seas, as appears by Selden's Mare Clausum, he may grant part of his marine patrimony as well as his lands. 2. Here is a person capable to take; subjects are capable of a property in the sea. Selden's Mare Clausum, lib. 1, cap. 15, pag. 60. De Jure Belli.

As to the 2d, Here are words sufficient to pass these lands. True it is, that franchises or other things of prerogative do not pass without plain words; therefore a grant of *bona felonum, &c.* will not pass the goods of one that stands mute and will not plead. Mich. 8 H. 4, 2, pl. 2. So the grant of the amerciaments of his tenants doth not pass amerciaments of them by the King as commissioners of sewers. 2 Bulstr. 235, *The King* against *The Earl of Exeter.* But here the grant is not of a thing which is part of the prerogative; for the soil of the sea is in the King as part of his inheritance, and not as a thing of prerogative. 2 Leon. 158. By Walmsly. It was adjourned.

[243] TERM. MICH. 29 CAR. 2, C. B.

Sir Francis North, Chief Justice; Sir Robert Atkins, Sir Hugh Wyndham, Sir William Scrogs, Justices.

SERJEANT BARBE AND OTHERS, EXECUTORS OF JOHN PYNSENT, LATE PROTHONOTARY OF THIS COURT, *Plaintiffs*, *versus* JOSHUA BURTON GENT. *Defendant.*

Assumpsit. *Foxwist* versus *Tremain*, *ante* 198.

In assumpsit, the plaintiff declares that the defendant 28 Aug. 1668 was indebted to the said John Pynsent in his life-time in 60s. *pro pecuniis ipsius Johannis Pynsent eidem Johanni Pynsent in vita sua debit' pro damnis clericis ut un' Prothonotarior' Curiæ domini Regis de Banco hic & per ipsum Joshuam ad usum ipsius Johannis Pynsent ante tempus illud habit' & recept'*, the which he the same day and year promised to pay to the said John in his life-time upon request, the which he hath not done, to his damage of 20l. The defendant pleads *non assumpit infra sex annos.* The plaintiff demurs; and adjudged for the defendant, that this debt for damage clere is within the statute of 21 Jac. because it rises out of the action, and not grounded on the record.

[244] TERM. TRIN. 30 CAR. 2, C. B.

This term Justice Scrogs was made Chief Justice of the King's Bench, in the place of Sir Richard Rainsford; Vere Bertie, Baron of the Exchequer, made justice in his place; and Francis Brampston Serjeant, Baron of the Exchequer.

ANGEL *versus* CLEYPOOL.

Debt.

Debt for 300l. The plaintiff obtains judgment by *nihil dicit* five years ago; the defendant brings error *in Banco Regis*, and assigns for error, no original, and upon a *certiorari* the *custos brevium* returns no original. And after the plaintiff procures an original, and upon enquiry in Chancery the Master of the Rolls ordered that the writ should be set aside. And now Serjeant Barrel moved that the writ should be set aside and taken off the file.

North Chief Justice, The order of the Master of the Rolls hath not any authority here, for if the *custos brevium* take it off the file he forfeits his office.

[245] TERM. MICH. 30 CAR. 2, C. B.

BROOKS *versus* HAGUE. ASSUMPSIT.

Case. 3 Salk. 19. 3 Jac. cap. 7.

The plaintiff counts specially as attorney, for several fees and sums of money by him expended in several suits for the testator of the defendant, and that he demanded them, and neither the testator nor the defendant had paid them. The defendant pleads the statute of 3 Jac. cap. 7, and that the plaintiff had not given to the testator, nor to the defendant himself before the writ brought, any bill of charges according to the statute. Upon this the plaintiff demurs; and adjudged for the defendant, that it is a good plea.

[246] TERM. HILL. 30 & 31 CAR. 2, C. B.

LANGLEY *versus* CHUTE. PROHIBITION.

Prohibition.

The plaintiff suggests that there is a custom time whereof, &c. within the parish of Stretham in the county of Surrey, that the churchwardens with the major part of the parishioners may order the seats in the church, and the churchwardens are to see

to the repairs of them; and that the defendant libelled in the Ecclesiastical Court for the sole usage of a pew in the same church, and set forth in his libel, that one Bodvile 1611, being seised of the land within the parish, built an house upon it, and after in the year 1637 at his own cost built the said pew in the church for himself and his family, and sold the house and pew to the defendant Chute and his heirs, and by sentence in the Ecclesiastical Court the Ordinary annexed the said pew to the said house, and that the defendant and his heirs enjoyed it. And that the churchwardens would have placed the plaintiff there, and the defendant libelled against the plaintiff in the Ecclesiastical Court. Now the plaintiff prays a prohibition, and alledges 2 Roll. 24, *Brabin* versus *Tredinam*, Poph. 140.

North Chief Justice. A prohibition shall not be granted, because the Ordinary hath jurisdiction, and the churchwardens cannot justle out his authority, when the privilege is claimed only for the defendant and his family; because as to him and his heirs a prohibition lies, and if the plaintiff be grieved by the sentence, he may appeal. And the office of churchwarden is a kind of ecclesiastical office. True it is, the parishioners are to take care of the repairs of the church, as it appears, Regist. 44 b. but the Ordinary hath of common right the ordering of pews in the church. If this suggestion should hold, the Ordinary's jurisdiction would be totally set aside.

Wyndham and Bertie Justices accordingly; but Atkins Justice *contra*, that a prohibition lies, because this case doth not differ from the case of Brabin.

[247] BAYNES *versus* EDWARD BELSON.

Intr. Windford Trin. 30 Car. 2, Rot. 1496. Oxon.

Power.

Ejectment of the demise of Sir Thomas Curson Baronet: upon not guilty pleaded, the jury find a special verdict.

That Sir John Curson being seised of the manor of Waterbury, of which the lands in question are parcel, by indenture, dat. 12 Sept. 1654, in consideration of a marriage between his son Thomas, lessor of the plaintiff, and Elizabeth the daughter of William Burrows, and 1000l. portion, and for the affection he bore to his relations, covenanted to stand seised of the said premisses, to the use of himself for life, remainder to Broom Whorewood, William Burrows and Elues and their heirs, during the life of the said Tho. Curson, his son and heir apparent, remainder to the first, and every other son of Thomas successively in tail male, remainder to John Belson in tail male, remainder to Augustine Belson in tail male, remainder to Edward Belson, now defendant, in tail male, with remainders over, with power for Sir John to make leases to any persons for one, two or three lives, or for one and twenty years, reserving the ancient rent. That the marriage took effect between the said Thomas Curson and Elizabeth Burrows. That Sir John 11 January 1655 demised the premisses to the said Edward Belson for one and twenty years, to commence after the deaths of Jacob and Meeks, who were tenants for lives, and who lived several years after. That the said Whorewood, Burrows and Elues were not at all of kin to Sir John Curson. That Sir John Curson died before the said Thomas Curson had any issue male born. That afterwards Thomas had issue John Curson. That John Belson and Augustine Belson are dead without issue. That there was no other execution of the deed but sealing and delivery.

Croke Serjeant for the plaintiff. The questions upon this verdict are:

1. Whether the power to make leases being general, be good in this case?

2. Whether Sir John hath pursued the power in making a lease *in futuro?*

[248] 3. Whether the uses limited (after the estates in tail male to the sons of Sir Thomas Curson) to John Belson, Augustine Belson and Edward Belson do arise, partly upon sealing the conveyance, or that the use continues in the covenantor till after the deaths of the sons without issue male?

To the two first points. The whole Court gave their opinions, viz. to the 1st, That the power to make leases being general, is void, it being upon a covenant to stand seised. *Mildmay's case*, 1 Co. 2 Roll. Abr. 260.

To the 2d, The power is not well executed, the lease being to commence *in futuro.* 2 Roll. Abr. 261. Yelverton 222. *Stokham* versus *Hawkins,* 6 Co. *Fitzwilliam's case,* and *Lepar and Wroth's case,* Hob. 151. *Colt's case.*

As to the 3d point, Croke proceeds. The case is thus: *H. covenants to stand seised to the use of himself for life, remainder to the use of strangers and their heirs, during the life of Thomas Curson, remainder to the sons of Thomas Curson successively in tail male, remainder to Edward Belson in tail.* The covenantor dies before any son of Thomas is born, and afterwards a son is born, whether Edward Belson next in remainder will have the lands presently, or shall stay till all the issues be dead without issue male? And I conceive Edward Belson shall take immediately after the death of the covenantor.

1. Nothing passes to these strangers without inrolment, 7 Co. *Bedel's case,* 11 Co. *Harpur's case,* 2 Roll. Abr. 783, H. pl. 4, and consequently nothing accrues to the sons of Thomas. And when a grant is made to two, and the one is capable to take, and the other not, the estate shall vest in the person capable only at the common law. Perk. 108 b. pl. 566. Dyer 300 b. pl. 39, and 309 a. pl. 67. Moor 494, pl. 687.

Object. This case differs, because it is in case of an use by covenant to stand seised.

Resp. There is no difference, 6 Co. *Fitzwilliam's case,* uses shall be expounded according to the rules of common law. And this way of limiting estates by covenant to stand seised begun in *Englefield's case,* and *Bainton's case,* and *Sherington and Pledal's case,* Plowd. 301. And the statute incorporates the use to the possession, in case of a covenant to stand seised, as well as in other cases. And here Sir John Curson covenanting to stand seised to the use of himself for his life, is in of a new estate, and not of his old estate.

[249] *Object. Signior Pagit's case,* 1 Co. 154 a. and Moor 193, pl. 343.

Resp. There is a great difference between this and that case; for there the Lord Pagit had no estate for his life, but here the covenantor hath, and therefore the use here ought to vest immediately, Hob. 74, *Barnes's case.* And here the intent of the covenantor was that all estates should be out of him; and if the case should be otherwise, where should the estate be after the death of the covenantor? For Thomas cannot have the particular estate, and the inheritance also *simul & semel,* which he must have in this case, if the estate shall continue in the covenantor 'till the son of Thomas be born.

North Chief Justice. It seemed that this remainder vests immediately after the death of Sir John Curson in Belson, as *Lewis Bowle's case* is, 11 Co. 80 a. Adjourned.

PONT *versus* PONT. PARTITION.

Mich. 30 Car. 2, Rot. 559. Winford.

Ancient demesne.

In a writ of partition betwixt tenants in common by the statute of 31 H. 8, cap. 1, the tenant pleads *ancient demesne;* and adjudged a good plea, according to the case betwixt *Grace and Grace,* 1 Roll. Abridg. 322, E. pl. 10. But here upon the record there were found several discontinuances, and therefore judgment was given for the demandant.

CARSEY *versus* WOOD.

Trin. 29 Car. 2, Rot. 1236. Winford.

Devise. 1 Cr. 525, *Ascough's case.*

Ejectment. A special verdict. A man seised in fee of lands held in capite, devised the whole to the Corporation of the City of Norwich upon a charitable use, and whether the devise be good for the whole, or only for two parts, was the question. And whether the statute of 43 Eliz. cap. 4, doth make a good devise contrary to the statutes of 32 & 34 H. 8. And resolved, it is good but for two parts only. And by Maynard Serjeant, where 'tis said, that if a copyholder devise without a surrender, or tenant in tail devise, that 'tis good against the issue, 'tis not intended good by the common law, but to be made good by the decree of the Chancery grounded upon the statute of 43 Eliz. cap. 4.

[250] LUCAS *versus* HOW.

Condition.

Ejectment. Special verdict. The case was thus, A man makes a lease for years upon condition that the lessee shall not assign over his term to any but his kindred, without licence from the lessor; the lessor assigns over the reversion, and the lessee assigns over his term and breaks the condition. And whether the grantee of the reversion shall take advantage of this condition is the question.

And by Atkins Justice, it is such a condition as is within the statute of 32 H. 8, cap. 34. But it seemed to others to be a collateral condition. And it was adjourned.

STEPHENS *versus* HAYNS AND OTHERS.

Trin. 30 Car. 2, Rot. 361. Wryley.

Chimin.

Replevin for taking of five oxen. The defendant makes cognisance as bailiff to the lord of the leet, because the plaintiff was amerced there for not scouring a ditch in an highway, and the plaintiff demurred, because the statute of 18 Eliz. cap. 9, gives the forfeitures for highways to the surveyors of the highways; but adjudged by all the justices for the defendant, because the party may be punished in the leet, and also by this statute for divers causes.

JOHNSON *versus* COLTSON.

Trin. 30 Car. 2, Rot. 1463. Winford.

Process.

Trespass and battery. Upon *non culp.* a special verdict. The plaintiff being complained of to a justice of peace, he makes a warrant to the defendant to take the plaintiff, and to find sureties for the good behaviour; the defendant, being constable executes the warrant upon a Sunday, and whether good within the late statute which says, *that all process executed upon a Sunday other than for the peace shall be void.* Resolved for the defendant, that a warrant for the good behaviour is a warrant for the peace and more; and this statute is to be favourably extended for the peace. This **[251]** judgment was affirmed in a writ of error in B. R. Trin. 32 Car. 2.

Memorandum, That on Monday the fifth day of May 1679, 31 Car. 2, I was sworn one of the Barons of the Exchequer, though I had laboured (and not without great reason) to prevent it. I was sworn at the same time with Sir William Ellys, who had been formerly one of the Justices of the Common Pleas, and put out, and now brought in again. He was allowed precedency to Sir Thomas Jones and Sir William Dolben, Justices of the King's Bench, because they were put in since his turning out; but this precedency was only by verbal signification from the King, and not expressed in his patent. With me was also sworn Sir Francis Pemberton, to be Judge in the King's Bench; all of us were sworn at my Lord Chancellor Finch's house.

[252] GERRIT JOHNSON *versus* JAMES GRANT.

Replevin. Middlesex.

Avowry.

The plaintiff declares of the taking of divers goods 5 November 29 Car. 2, in a certain messuage of the plaintiff's situate in Long Acre, in the parish of St. Martin's in the Fields, and detaining them against sureties and pledges, *ad damnum* 200*l.*

The defendant avows the taking, for that *ante prædictum tempus quo, &c.* one Sarah Grant, widow, being executrix of the testament of one Samuel Grant, the father of

the said James Grant, gave to the said James security for payment of 600l. being a legacy given the same James by his said father, by his said will, which security the said James *ante prædictum tempus quo, &c.* surrendered to the said Sarah, and discharged her from the same, upon agreement that she should pay him yearly during his life 80l. per annum, and should give him sufficient security for the same; that the said Sarah was seised of ten messuages, of which the said messuage *in quo, &c.* was one, in her demesne as of fee; and so being seised after the agreement aforesaid, in prosecution of the said agreement, *ante prædictum tempus quo, &c.* by indenture dated the sixth of December 1658, between the said Sarah of the one part, and the said James of the other part, did demise the said ten messuages to the said James (and sets them forth by metes and bounds) *habend.* from Michaelmas last for ninety-nine years, if James should so long live. *Reddend.* a pepper-corn; by virtue whereof James entered and was possessed.

That he being possessed, by his indenture dated the seventh of December 1658, demised the same to the said Sarah for ninety-eight years, if James should so long live; *reddend.* the first year a pepper-corn, and the residue of the said term 80l. per annum quarterly, or within twenty days, by virtue whereof she entered and became possessed.

[253] And because 240l. for three years ending at Michaelmas 29 Car. 2, and for twenty days after was behind and unpaid, he avows the taking in the messuage *in quo, &c.* as parcel of the tenements demised to the said Sarah; *et cum solutione reddit' prædict' onerat' & obligat', &c.*

The plaintiff Gerrit Johnson, confesses, that *ante prædictum tempus quo, &c.* the said Sarah Grant being executrix of the said Samuel Grant, father of the said James, did give to the said James security for payment of 600l. given as a legacy as aforesaid. But *protestando*, that *ante prædictum tempus quo, &c.* he did not surrender the said security, and acquitted her therefrom upon the agreement alledged, nor that the said indentures aforesaid were in prosecution of the said agreement. And for plea saith, that as to 20s. per annum for the rent of two messuages in Long-Acre, parcel of the said rent of 80l. per annum for the three years, in the whole amounting to 3l. parcel of the said 240l. *rien arrear.*

And as to the residue of the 240l. viz. 237l. per annum for the said three years, he says, that before the said demises made, William Earl of Craven was seised of eight of the said ten messuages situate in the Strand, in his demesne as of fee, until the said Samuel Grant, father of the said James Grant, disseissed the said earl, and by reason thereof became seised thereof by disseisin, &c.

And so being seised 30 September 1655, made his will in writing, and thereby devised the said eight messuages to the said Sarah Grant and her heirs, and died 3 September 1658 so seised.

That by virtue of the said devise Sarah became seised in her demesne as of fee of the said eight messuages, and so being thereof seised, and of the said messuage *in quo, &c.* and also of one other messuage in Long-Acre, seised the residue of the said ten messuages by the said indenture first mentioned, demised the said premisses to the said James Grant for ninety-nine years, *prout*, and he by the second indenture redemised the same to the said Sarah for ninety-eight years *prout.*

That afterwards, & *ante prædictum tempus quo, &c.* and before any of the three years rent was behind, viz. 27 September 26 Car. 2, the said William Earl of Craven **[254]** entered upon the said eight messuages, claiming therein his former estate, and did expel the said Sarah therefrom, and hath ever since been seised thereof.

That all the said ten messuages October 1659, and ever since were worth 80l. per annum, and no more.

That the said eight messuages then, and ever since have been worth 79l. per annum, by reason whereof the said 237l. being residue of the said 240l. became insolvible to the said James Grant, and still remains insolvible. *Et hoc, &c.*

Upon this bar the avowant demurs, and the plaintiff hath joined in demurrer.

The sole point remains to be spoke to is, as it is objected by the other side, that the plaintiff in this replevin in his bar to the avowry, hath pleaded as to parcel of the rent, *rien arrear*, without making any title to himself.

And whether such his plea be good, is the question?

And I conceive 'tis a good plea.

1. I do agree, that at the common law a stranger could not, nor as yet can plead any thing to the lord's avowry for rent or services, but *hors de son fee*, or what doth tantamount.

He cannot plead tenure by less services, *rien arere*, or a release, 2 H. 6, 1 a. 22 H. 6, 2 and 3, and 9 Co. 6, 10 a. is against that opinion.

This was grounded upon these reasons and rules of law.

1. *Res inter alios acta alteri nocere non debet.* 'Tis not reason that he who is a stranger shall take upon himself to plead to the title of the tenure, with which he hath nothing to do, in prejudice of the very tenant; and there is a privity between the lord and tenant.

2. In pleading every man ought to plead that which is pertinent for him and his case; and therefore in an assise against a disseisor and tenant, the tenant shall plead a plea which concerns the tenancy, and not the disseisin.

[255] The incumbent at the common law could not plead to the right of the patronage, wherein he hath nothing, 7 Co. 26, *Hall's case*, 'till he was enabled by 25 E. 3, cap. 7.

2. But by the statute of 21 H. 8, cap. 19, this strictness is discharged, for as the avowant is not tied to avow upon any person in certain, but upon the land, as within his fee or seigniory; so the tenant of the land by the equity of that statute is allowed to plead any plea to save and discharge his goods from the distress, *legem feras quam ipse tuleris.* So that the law of avowries, and their bars, is much altered from what it was by the common law.

Hob. 108, *Brown* versus *Goldsmith.* In replevin, the defendant avows upon A. for services of suit of Court; the plaintiff pleads in bar, a lease for years from the avowant of the manor; and resolved a good plea, though a stranger.

Br. tit. Avowry 113. When the lord avows according to the statute, the plaintiff in the replevin may have every plea, that the very tenant might have had though he be a stranger to the lord; and so is Coke upon Lit. 268 b. and many books there cited.

3. Though the plaintiff make no title, yet he may plead by this statute, as well as if he did.

Trin. 15 Jac. Moor 883, pl. 1238, *Kingswell* versus *Crawley.* In replevin, the defendant avows for rent *eo quod* one Dering held certain lands of him by fealty, and certain rent; that the plaintiff hath the estate of Dering. The plaintiff replies, that Dering infeoffed one Wright, who made a lease for life to the plaintiff, *absque hoc*, that he had the estate of Dering; and ruled by the Court, that the traverse was void; for since the statute the party is to avow upon the land, and then 'tis not material what estate the tenant had, if he occupies the land; and so the statute hath changed the law in this point.

Hill. 17 Car. 1, C. B. March 166, *Layton* versus *Grange.* In a second deliverance, the defendant makes cognizance as bailiff to Thomas Marsh, and sets forth that Thomas Marsh, father of the said Thomas Marsh, was seised of the manor of Michael Hall, of which the land in question is parcel, and the said lands are held by fealty and certain rent, and derives the tenancy to Sir Anthony Cage, and the seigniory to the said Thomas Marsh the son; and as bailiff to him makes cognizance for fealty, *ut infra feodum & dominicum sua.* The plaintiff *protestando quod non tenet, pro placito dicit*, that the **[256]** defendant took the cattle as in the count, *absque hoc*, that Marsh the father was seised of the services *infra tempus.* The defendant demurs.

By Banks, Crawley and Foster, resolved that the plea was good, though no title were made by the plaintiff or his master. Reve Justice wavered in the point, but the others were positive in it; and Banks gave the reason, that as at the common law the tenant might plead any plea in bar to an avowry for a rent-charge, as 8 E. 4, 23 a. is; so now since this statute, the ter-tenant shall plead any plea to discharge the land from the distress. 2dly, That as this statute hath been always construed favourably for the benefit of the lord; so it ought to be for the benefit of the tenant. 3dly, That

'tis no reason that the tenant shall have his goods taken, and not use all ways to redeem them, when not party to the wrongs.

But 'tis objected, that our case is not within this statute; the words whereof are, *Wheresoever any manors, lands, tenements or other hereditaments be holden by any manner of person or persons by rents, customs or services, if the lord of whom any such manors, lands, tenements or hereditaments be so holden, distrain upon the same manors, lands or tenements for any such rents, customs or services, and replevin thereof be sued, that the lord of whom the same lands, tenements or hereditaments be so holden may avow, or his bailiff or servant make conusance, or justify for the taking the said distresses upon the same lands, &c. so holden, as in lands or tenements within his fee or seigniory, alledging the said avowry, &c. the same manors, lands, &c. to be holden of him without naming any person certain to be tenant of the same.* And whether the lessor be a lord within this statute is the question. And I conceive he is lord here within the words and meaning of this statute.

Lord is a relative word; and so a mesne is lord in reference to the tenant, and tenant in respect of the lord paramount.

He is lord within the Statute of Marlb' cap. 3. *Non ideo puniatur dominus.*

Hill. 5 H. 7, 10, pl. 2. *Trespass quare vi & armis clausum suum fregit & averia sua cepit & abduxit.* The defendant pleads his frank-tenement, and that he took the cattle damage-feasant. The plaintiff replies, that he had a lease for years from the **[257]** defendant, yet continuing, and the defendant demurred; and the question was, whether this action did lie between the lessor and lessee, notwithstanding the Statute of Marlbr. cap. 3.

Resp. It did not lie for so much as the lessor did as lord, as to distrain for his rent, and to demean himself accordingly: but as this case was, he broke his close, which he could not do as lord; and so not within the statute.

The objection was, that he could not be lord, because if the lessee should be distrained by the lord paramount, he could not have a writ of mesne. But answered, that he should have a writ of covenant in lieu thereof, Mich. 2 H. 6, 1 b. Thus are the books following, viz. Mich. 28 E. 3, 97 a. pl. 15. Mich. 38 E. 3, 33 b. Hill. 48 E. 3, 5 b. pl. 10. Co. 2. Inst. 106. 9 Co. 135 b. *Ascough's case.* At the common law there are 4 sorts of avowries. 1. By reason of a tenure, when the lord hath fee in the seigniory, and the tenant hath fee in the tenancy, *ut supra verum tenentem suum.* 2. Upon one as his very tenant by the manner, *ut supra verum tenentem suum in forma prædicta, viz.* when the tenant makes a lease for life, or a gift in tail, as upon his very tenant by the manner. 3. Upon one as his tenant by the manner, omitting this word (*very*) and that is, when the lord hath a particular estate in the seigniory, as an estate in tail, for life, or less interest, *super tenentem suum in forma prædicta.* So shall the donor upon the donee, the lessor upon the lessee for life or years. 4. Upon the matter in the land, as within his fee and seigniory; as where the tenant by chivalry makes a lease for life, rendering rent, and dies, his heir within age, the guardian shall so avow upon the lessee, *super materiam prædictam in terris prædictis ut infra feodum suum.* And by the third way, the lessor did always avow upon the lessee at the common law. Mich. 47 E. 3, fol. ult. pl. 77.

Nota; If the rent of tenant for years be arrear, the lessor cannot avow upon the termor upon the land, but upon the matter, Hill. 5 H. 7, 11, pl. 2, by Fairfax, and agreed by all the justices. Tenant for years shall do fealty, and the lessor is *dominus pro tempore* by reason of the reversion; and an avowry shall be made upon him as upon the matter. And the different way of pleading manifests this; for at the common law, the way is, *bene advocat captionem averiorum prædictorum in prædicto loco in quo, &c. ut in parcell' præd' mess* **[258]** *eidem le plaintiff in forma prædicta dimiss. super tenementa virtute dimissionis prædict.* But the avowry upon the statute is *in prædicto loco in quo ut parcell' mess. præd. cum reddit' præd' onerat' & obligat',* 2 Co. 27 b. *Bettisworth's case,* Int. 594, 595 and 597. And so is Dyer 257, pl. 11, where it is said, *ut in terris districtioni ipsius l'avowant onerat' & obligat',* is always intended for a rent-charge; but when he avows for a rent, which is due of common right, he ought to avow upon the tenant by the manner.

And so hath the avowant here done.

I will omit to speak of the distress here, by virtue of the contract, admitting it to be out of the statute, and is grounded upon the reservation, as *Foster's case,* 8 Co. 64. As a rent for owelty of partition. A rent confirmed by statute, as *Bellingham's case.*

Resolved. The plaintiff in a replevin may plead nothing in arrear, or any other plea, although he be a stranger and doth not make any title to the land.

[259] TERM. PASCH. 31 CAR. 2. IN THE EXCHEQUER.

HUNT *versus* WOTTON.

Case. It's a rule, that if a statute gives remedy for any thing, it shall be presumed that there was no remedy before at the common law, Stanf. pl. Cor. 2, and the stat. of 43 El. cap. 2 injoins the father to provide for his child, which he was not compellable to do by the common law. Palmer 559. *Besfich* versus *Coggil.*

Trespass *vi & armis.* The plaintiff declares, that the defendant the 14th of April 30 Car. 2 did thrust a woman, named Margaret Hunt, upon his son Henry Hunt, being an infant under the age of discretion, by means whereof his thigh-bone was broke, and the infant was so hurt that it was now despaired of his life, and the plaintiff, was inforced to expend great labour, and divers sums of money to cure him, *ad damnum, &c.* The defendant pleads *non culp.* and found for the plaintiff, and damages 5l.

Sympson Serjeant moved in arrest of judgment, because the plaintiff sustained no wrong, for that he was not compelled to expend any money, or to procure his son's cure.

But Montague, Lord Chief Baron, *totis viribus contra.*

But to me it seems that the action doth not lie, for that the father cannot have the action, it not being laid *per quod servitium amisit,* nor that the son was less capable of procuring a fortune with a wife, &c. but the child himself ought to have brought the action, and he would have recovered the damages. Authorities in point, 3 Cr. 55, *Gray* versus *Jeffrys.* In an action upon the case, the plaintiff counts, that he put his son and heir apparent to the defendant to be his apprentice in the art of a tailor for seven years, and that the plaintiff was seised of lands of the yearly value of 20l. which were to descend to his said son. That the defendant *vi & armis* did assault the said son, and struck him with a spade upon his back, by which he became lame and decrepit, by reason whereof he lost his marriage, and could not marry him as before, *ad damnum* 200l. The defendant demurred; and adjudged for the defendant, because trespass for beating or battery of the son lieth not for the father, but the son only shall have the action, and a father shall not have an action for the loss of the marriage of his son and heir, except when a stranger takes him by force and marries him; but if the son marries [260] himself, or a stranger procures him to marry one, the father hath no remedy, Mich. 1653, Intr. 1653, Rot. 935. *Norton* versus *Jasen,* B. R. Stiles 398. *Action on the case.* The plaintiff counts that the defendant broke his house and assaulted his daughter against his consent, and begot a bastard child on her, *per quod servitium amisit.* The defendant pleads the statute of 21 Jac. of Limitations of Actions. And upon this a special verdict, that the assault was above four years before, and within six years. And resolved, the father could not maintain an action for the assault of his daughter, but only by reason of the loss of her service. And then damages being given for both, it was not well, and therefore a *venire fac. de novo* was awarded; and by the common law the father is not bound to cure his child.

But Montague, Lord Chief Baron, and Atkins Baron, clearly for the plaintiff, and relied upon *Church and Church's case* in B. R. 1656. Where in *assumpsit* the plaintiff declared that whereas the plaintiff had at his own charges buried the defendant's child, the defendant promised to pay him his charges; and though there was no request laid, yet judgment was given for the plaintiff, and Cr. 63, 849 and 881, *Rippon* versus *Norton;* but judgment was afterwards given for the plaintiff.

ROBERT MURREY, GENT. *versus* DOROTHY EYTON, WIDOW, AND ROGER PRICE.

Intr. Hill. 29 & 30 Car. 2. Flint.

Estate. 2 Jones 237. Pollexf. 491. Skin. 95. 2 Show. 104.
Postea 286, 319, 338.

In trespass and ejectment of the demise of William George Richard Earl of Derby made 2 May 29 Car. 2, of one messuage, three watergrist mills, ten acres of land, ten acres of meadow and fifteen acres of pasture in the parish of Hope *alias* Queenhope, for five years from the first day of the said month of May. Upon not guilty pleaded, the jury of the county of Salop being the next English county find a special verdict: viz.

That long before the trespass and ejectment King Richard the Third was seised of the manor of Hope in his demesne as of fee, in right of his Crown, of which the tenements in the declaration are, and time out of mind were parcel. That the said King R. 3 being so seised 17 Sept. 2 R. 3 by his **[261]** letters patents under his Great Seal of England then dated, for the consideration therein mentioned, did give and grant the manor and tenements aforesaid with the appurtenances (amongst other things) to Sir Thomas Stanley, Knight, Lord Stanley, and afterwards Earl of Derby, Sir George Stanley, Knt. Lord L'Estrange, son and heir apparent of the said Thomas Lord Stanley; *habendum* to them the said Thomas Lord Stanley and George Lord L'Estrange, and the heirs male of the body of the said Thomas Lord Stanley for ever, of the said late King by knights service and rent of 50l. yearly, at Easter and Michaelmas by equal portions to be paid. The tenor of which said letters patent follows in these words: viz.

Richardus Dei gratia Rex Angliæ, Scotiæ & Franciæ & Dominus Hiberniæ, Omnibu ad quos præsentes litteræ pervenerint, salutem. Cum non solum generis nobilita sed & justitiæ æquitas omnes provocent & maximè reges & principes homines de s bene meritos præmiis condign. afficere; sciatis igitur quod ob singulare & fidele servitium quod dilecti nostri Thomas Stanley Miles, Dominus Stanley & Georgius Stanley Miles, Dominus L'Estrange filius dicti Thomæ nobis præantea impender. non solum favend' jur. & titulo nostro cujus juris & tituli vigore jam nuper ad Coron. hujus *regni nostri Angliæ Dno. adjuvant pervenimus, verum etiam reprimendo proditiones* & malitias rebel' & proditor. nostr', qui infra idem regnum nostrum perfidam jamdudum commotion. suscitaverant, ac pro bono & fideli servitio nobis & hæredibus nostris Regibus Angliæ per eosdem Thomam & Georgium & hæred. suos pro defensione nostra & regni nostri prædict. contra quoscunque prædict. inimicos & rebelles quoties futur. temporibus opus erint impendend. De gratia nostra speciali dedimus & concessimus ac per præsentes damus & concedimus eisdem Thomæ & Georgio in valor. annuo mille marcarum ultra repris' castrum, manerium & dominium de Hope & Hopedale in March. Walliæ com. Cestr. adjacen. cum suis membris & pertin. universis manerium & villam de Northwich cum pastur. de Overmarsh cum suis pertin. in com. Cestr. ac maneria & dominia de West Lydeford Blakenden Halsbartre als. dict. Halesbear cum suis pertin. in com. Somerset manerium sive dominium de Bereford Sancti Martini cum suis pertin. in com. Wilts. manerium & dominium de Ardington cum pertin. in com. Berks manerium & dominium de Steventon cum membris & pertin' suis in com. Bedd. ac maneria & dominia de Knotting Collesden & Catton cum **[262]** suis pertin. in dicto com. Bedd. & omnia terras & tenementa in Blomeham cum suis pertin. in eodem com. Bedd. quæ nup. fuer. Rogeri Tocots manerium & dominium de Gaddesden magn. cum pertin. in com. Hertford castrum manerium dominium & socum de Kymbalton cum maneriis de Swinshead Hardwick & Tilbrook & omnimod. villis villat. & membris quibuscunque in com. Bunt' ad prædict. dominium de Kymbalton pertin. ac etiam omnia messuagia terr. & tenementa reddit. & servitium in Macclesfeild & Christilton cum pertin. in com. Cestr. quæ fuer. Henr. nuper Ducis Bucks aut alicujus alterius ad ejus usum in dicto com. Cestr. ac manerium de Chorley & Bolton cum pertin. in com. Lanc. ac terr' & tenementa in Brightmead in eodem com. Necnon totum illud messuag. ac omnia terras & tenementa cum pertin. quæ fuer. Roberti

Willingby Militis aut alicujus alterius ad ejus usum in paroch. Sci. Petri juxta Pauls Wharf in Civitate Londin. seu alibi infra eandem civitatem unâ cum omnibus terris tenementis messuag. pratis pascuis pasturis silvis boscis aquis stagnis vivar. molendin. gardin. columbar. reddit. servit. revercon. cur. let. offic. vic. franches. pleg. escaet. libertat. jur. commoditat. quibuscunque necnon feodo milit. advocat. & patronat. ecclesiar. abbat. priorat. hospital. rector. capell. Cant. & al. benefic. escheator. quorumcunque wardis maritagiis scutag. releviis hundred wapentag. fin. amerciamen. forisfactur. feriis mercat. chaseis parcis warren. piscar. wrec. maris Thesaur. invent. waif straif. catall. felon. & fugitivor. catal. utlagat. attinct' convict' & felon. de se retorn. brevium & execution. eorundem necnon omnibus & singulis aliis libertatibus jurisdictionibus franches. quietanc. commoditatibus emolument. & liberis consuetudinibus quibuscunque ad prædict. castra dominia maneria terres tenementa & cætera messuagia ac eorum quodlibet de antiquo pertinen. sive spectan. aut infra eadem castra maneria dominia terras tenementa & cætera præmissa seu eorum aliquod emergen. contingen. provenien. seu antea habit' modo quocunque ac adeo plene & integre sicut aliqua persona vel aliquæ personæ in eisdem vel eorum aliquo habuer. seu usi fuer. quovismodo ante hæc tempora. Habend. & tenend. tenementa omnia & singula castra maneria dominia terras tenementa & cætera præmissa cum omnibus & singulis suis pertin. præfat. Thomæ Stanley & Georgio Stanley ac hæredibus masculis de corpore ipsius Thomæ exeun. imperpetuum de nobis & hæredibus nostris per servitium militare & reddit. quinquaginta librarum annuatim ad Festa Paschæ & Sancti Michælis Archangeli per æquales portiones solvend. concessimus insuper & per præsentes concedimus eisdem **[263]** Thomæ Stanley & Georgio ac hæredibus suis prædict. omnia exit. proficua & revercon. de supradictis castris maner. dominiis terris tenementis & cæteris præmissis cum pertinen. aut de aliqua inde parcell' a Festo Sci' Michaelis Archangeli ult. præterit. provenien. sive crescen. aut nobis quovismodo debit' percipiend. tam per manus receptor. ballivor. firmar. seu al. occupator. eorundem seu alicujus inde parcel. quam per manus nunc escaet' & nuper escaet. separalit. in com. & locis in quibus hujusmodi castra maneria dominia & cætera præmissa separaliter existunt. Et volumus & concedimus quod iidem escaet. & eorum quilibet escaet. qui imposterum erit de eisdem exit' proficuis & proventionibus erga nos & hæred' nostros quiet' & exoner. existunt per præsentes. Et si forsan aliquod eorum castrorum maneriorum dominior. terrarum tenementorum & cæterorum præmissorum aut aliquam inde partem versus ipsos Thomam & Georgium aut eorum alterum seu versus hæred' dicti Thomæ prædict. recuperari sive extra possession. ipsorum Thomæ & Georgii vel eorum alterius aut alicujus hæred' dicti Thomæ prædict. aliquo debito modo evinci seu ipsos aut eorum aliquem inde legitime expelli contigerit tunc nos & hæred' nii. de al' castris maneriis dominiis terris tenementis & possessionibus infra regnum nrum. Angliæ ad valor. annuum eorundem castrorum maneriorum dominior. terrar. tenementor. ac cæterorum præmissorum recuperat' vel evict' eisdem Thomæ & Georgio & hæred' ipsius Thomæ prædict' habend recompensar. faciemus. Et insuper de gratia nra. speciali prædict. damus & concedimus per præsentes omnia & singula præmissa præfat' Thomæ & Georgio absque fine seu feodo magno vel parvo nobis sive ad opus nrum. pro eisdem præmissis vel aliquo præmissor. reddend. solvend. seu faciend. quovismodo. Eo quod expressa mentio de vero valore vel certitudine præmissorum seu eorum alicujus seu de aliis donis vel concessionibus eisdem Thomæ & Georgio vel eorum alteri ante hæc tempora fact' in patentibus minime fact' exist' aut aliquo statuto act' ordinacon. vel restriction. in contrar. fact' edict' sive ordinat' aut aliqua re causa vel materia quacunque non obstant'. In cujus rei testimonium, &c.

By virtue whereof the said Thomas and George did enter into the said tenements, and were thereof seised to them and the heirs male of the body of the said Thomas Earl of Derby, and they being so thereof seised, the said George Lord L'Estrange had issue of his body one Thomas his eldest son, afterwards Earl of Derby: and that afterwards the said **[264]** George Lord L'Estrange died in the life-time of the said earl his father: and that the said earl, his father, afterwards, viz. 1 Jun. 19 H. 7, died seised of the said tenements in his demesne as of fee-tail, viz. to him and the heirs male of his body; by reason whereof the said tenements in the declaration did descend to the said nephew, the said Thomas Earl of Derby, who entered into the said tenements and became seised thereof in his demesne as of fee-tail according to

the limitation in the said letters patent mentioned. And the said Thomas Earl of Derby, being so thereof seised, had issue of his body one Edward his eldest son, afterwards Earl of Derby. That the said Thomas Earl of Derby last mentioned, afterwards, viz. 1 Aug. 13 H. 8, died seised of the said tenements. By reason whereof the said tenements descended to the said Edward then Earl of Derby. That the said Edward entered and became seised thereof in tail to him and the heirs male of his body. That the said Edward had issue Henry afterwards Earl of Derby. That Edward died 24 Octob. 14 Eliz. seised as aforesaid, and that the premisses descended to Henry. That the said Henry had issue Ferdinand, afterwards Earl of Derby, and William Stanley, his second son, afterwards likewise Earl of Derby. Henry 25 Septemb. 35 Eliz. died seised, and the premisses descended to Ferdinand, who entered and had no issue male, but only three daughters, viz. Anne, Frances and Elizabeth. That Ferdinand 16 Apr. 37 Eliz. died in the life of his brother William seised, and so the premisses descended to the said William, who entered. That after the death of Ferdinand, for determination of suits and controversies between the said Earl William and Henry Earl of Huntington and Elizabeth his wife, one of the daughters of the said Ferdinand, Gray Bridges Lord Chandos, and the Lady Anne his wife, another of the daughters of the said Earl Ferdinand, and Sir John Egerton, Knight, then son and heir apparent of Thomas Lord Ellesmere, Lord Chancellor of England, and the Lady Frances his wife, another of the daughters of the said Earl Ferdinand, 18 Novemb. 4 Jac. an Act of Parliament was made of and concerning the said suits and controversies, and estate and title of the honours, castles, manors, lands and tenements of the aforesaid Earl Ferdinand; by which it was enacted as followeth, viz.

In most humble manner beseeching Your Royal Majesty Your Highness loyal, faithful and obedient subjects, William Earl of **[265]** Derby, of the most noble order of the garter knight, Henry Earl of Huntington and the Countess Elizabeth his wife, Gray Bridges, Lord Chandos and the Lady Anne his wife, eldest daughter of Ferdinando late Earl of Derby, Sir John Egerton Knight, son and heir male apparent of the Right Honourable Thomas Lord Ellesmere, Lord Chancellor of England, and the Lady Frances his wife; which said William Earl of Derby is brother and heir male, and the said Ladies Anne, Frances and Elizabeth are daughters and co-heirs of the said Ferdinando, late Earl of Derby, who died without issue male of his body: that whereas after the death of the Earl Ferdinando divers variances, suits and controversies did arise and grow between your said subjects William Earl of Derby, and the said ladies, as well touching the estate, right and title of, in and to the honours, castles, manors, lands, tenements and hereditaments of the said earl, as also touching the filial portions and advancements of and for your said subjects, the said Ladies Anne, Frances and Elizabeth; *for appeasing, ending and determining* of which said variances, suits and controversies, the said William Earl of Derby and other issues male of the said honourable house of Derby, as also the said ladies before any their intermarriages, by and with the advice and consent of the Right Honourable Alice, Countess Dowager of Derby, late wife of the said Ferdinando, and mother of the said ladies; and by and with the advice of other their honourable friends, and of their counsel learned, and officers, did submit themselves to the arbitrement, order and judgment of the Right Honourable Thomas Lord Buckhurst, Lord High Treasurer of England, and now Earl of Dorset, and of the Right Honourable Gilbert Earl of Shrewsbury, the Right Honourable George Earl of Cumberland, deceased, George Lord Hansden, deceased, and of the Right Honourable Sir Robert Cecil Knight, principal secretary to Your Highness, and now Earl of Salisbury, being the honourable and well affected friends, as well of the said William Earl of Derby, and other the issues male descended of that honourable house, as of the said ladies heirs general; which said honourable persons are elected to end the said controversies, having deliberately heard the said parties, and their learned counsel and officers, and such other their loving friends as were authorized to deal therein, and having advisedly heared and considered of their several rights, titles and claims, did by the consent and agreement of all the said parties and their counsel, officers and friends, for the appeasing, ending and extinguishment of all variances, claims, titles and **[266]** controversies then moved and grown, and which then after might arise and grow between the said parties or any of them touching the premisses, agree, order and determine

(amongst other things) that such and so many of the said castles, manors, lands, tenements and hereditaments, late parcel of the possessions and hereditaments of the said Ferdinando, late Earl of Derby, in the towns, hamlets, villages and places hereafter mentioned, and in every or any of them, should be assigned, conveyed and enjoyed unto and by such person and persons, and of, for and during such estate and estates, and with and under such limitations, powers, liberties, declarations and savings, and in such manner and form as hereafter is mentioned, limited and expressed. With which said order and agreement so made by the honourable persons, as well the said William, Earl of Derby, and the Countess Elizabeth his wife, and the rest of the issues male descended from that honourable house of Derby, as also the said Honourable Lady Alice Countess Dowager of Derby, and the said Ladies Elizabeth, Anne and Frances, daughters to the said late Earl Ferdinando before, and until their several marriages, their said husbands and they did and yet do hold themselves well contented and satisfied.

May it therefore please Your Most Excellent Majesty, that it may be enacted, and be it enacted by Your Majesty the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all and every the castles, manors, lands, tenements, possessions, rents, reversions, services and hereditaments with all and singular their appurtenances, late the possession and inheritance of the said Ferdinando, late Earl of Derby, in the towns, hamlets, villages and places hereafter mentioned, and in every or any of them, shall be from henceforth for ever assured and enjoyed unto and by the person and persons hereafter named, of and for such estates and limitations, and with and under such powers, liberties, provisoes, exceptions, declarations and savings, and in such manner and form, as hereafter in this present Act is mentioned, limited and declared; and that the actual and real possession of all and singular the said castles, manors, lands, tenements, possessions, rents, reversions, services and hereditaments shall be by authority of this present Act immediately from henceforth vested, adjudged, deemed and taken to be in the said person and persons hereafter named in possession, remainder and reversion respectively, of, for and during such estate and estates, and with and under such powers, liberties, provisoes, exceptions, declarations and savings, and **[267]** in such manner and form, as hereafter in this present Act is likewise mentioned, declared, limited and expressed.

And afterwards in the same Act of and concerning the manor of Hope it was enacted in these words: viz.

That the said Alice, Countess Dowager of Derby, during her life, and after her decease, the said William Earl of Derby, during his life, and after his decease James, son and heir apparent of the said William Earl of Derby, and the heirs males of his body, and in default of such issue the second, third, fourth, fifth, sixth and seventh sons of the said William Earl of Derby, lawfully begotten, and the heirs male of their and every of their several bodies lawfully begotten, successively and respectively according to the priority of their birth and age one after another; and in default of such issue, Sir Edward Stanley Knight, during his natural life, and after his decease the first, second, third, fourth, fifth, six and seventh sons of the said Sir Edward Stanley lawfully begotten, and the heirs male of their and every of their several bodies lawfully begotten successively and respectively according to the priority of their birth and age one after another; and in default of such issue, Edward Stanley of Bickerstaff Esquire, during his life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said Edward Stanley lawfully begotten, and the heirs male of their and of every of their several bodies lawfully begotten, successively and respectively according to the priority of their birth and age one after another: and in default of such issue James Stanley, brother of the last mentioned Edward, during his life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said James Stanley lawfully begotten, and the heirs male of their and every of their several bodies lawfully begotten, successively and respectively according to the priority of their birth one after another, shall and may have, hold and peaceably and quietly enjoy all and every the manors, messuages, lands, tenements, rents, reversions, services, hereditaments, liberties, franchises and jurisdictions whatsoever, at any time heretofore the inheritance of the said Ferdinando, late Earl of Derby, in Hope and

Hopedale, and elsewhere within the parish of Hope in the said county of Flint, to the manor of Hope belonging or appertaining. And it was farther enacted, that the said William Earl of Derby, Sir Edward Stanley, Edward Stanley and James Stanley successively and respectively in possession to make leases of any of the premisses usually letten, (except the castle of Haward and Greenhalgh, the mansion-house, parks, demesnes of Latham, Knowsley, Newpark, Buscough, Childwal, Pilkington, [268] Hawarden, Greenhalgh, Broughton in Farnes, Bothome Armshead, Withersback, Ebensham *alias* Ensham and Bidston, the mansion-house, Channon Row in Westminster, the college-house in Manchester and the tower in Liverpool within the several counties of Lancaster, Chester, Flint, Westmorland, Oxon and Middlesex for one and twenty years or under, or for one, two or three lives, or for any number of years determinable upon one, two or three lives in possession, and not in reversion, reserving the old and accustomed rent; and power for them to make jointures not exceeding a third part.

That in the said Act there is a proviso in these words:

Provided always, and be it enacted and declared by the authority aforesaid, that Your Most Excellent Majesty, your heirs and successors, and all and every other person and persons, bodies politick and corporate, their heirs and successors, executors, administrators and assigns, and every of them, other than the persons to whom any estate or estates are before limited, or mentioned to be limited, by this present Act, and their heirs shall have, hold, and enjoy all and every such and the same estate and estates, lease and leases, rights, titles, interests, reversions, rents, annuities, pensions, services, tenures, primer seisins, liveries, actions, statutes, bonds, recognizances, debts, extents, executions, judgments, entries, conditions, covenants, warranties, uses, possessions, offices, commons, liberties, easements, profits, commodities, emoluments, claims and demands, as Your Highness, your heirs and successors, or any of them, or other person or persons, bodies politick and corporate, their heirs, successors, executors, administrators or assigns, other than the persons before excepted, to whom any estate or estates is before limited by this Act, now lawfully have or hereafter shall or may lawfully have, or claim of, into, out of, or for any the said castles, manors, lands, tenements, rents, reversions, services and hereditaments, or of, into, out of, or for any of them in such and the same manner and form to all intents, constructions and purposes, as if this present Act had never been had nor made. And your said suppliants, William Earl of Derby, Henry Earl of Huntington, and the Lady Elizabeth his wife, Gray Lord Chandos, and the Lady Anne his wife, and Sir John Egerton, and the Lady Frances his wife, shall and will according to their most bounden duties daily pray for Your Highness long, happy and prosperous reign over us.

That Alice, Countess of Derby, in the Act mentioned, was widow and relict of the said Ferdinand, Earl of Derby, and that the said Sir Edward Stanley Knight, at the making of [269] the said Act was a person, who the tenements aforesaid, next after the death of James the son of the said Earl of Derby, without issue male of his body, by the said letters patent ought to take and have according to the limitation in the same letters patent contained.

That the said Edward Stanley of Bickerstaff in the said Act likewise mentioned, until the making of the said Act, was the person who ought to take and enjoy the said tenements next after the death of the said Sir Edward Stanley, without issue male of his body, according to the limitation of the said letters patent; and that the said James Stanley, brother of the said Edward Stanley of Bickerstaff, was the next person who ought to take and have the said tenements next after the death of his said brother Edward, without issue male of his body, by the limitation of the said letters patent.

That 1 May 1636 the said Alice Countess Dowager of Derby died, that Earl William entered, and was seised *prout lex postulat.*

29 Sept. 1642 Earl William died seised, and James his son entered and became seised *prout lex postulat.*

The said Earl James had issue Charles, afterwards Earl of Derby.

15 Oct. 1651 Earl James died seised and Earl Charles entered.

14 February 1653 the said Earl Charles, and Dorothea Helena his wife, by indenture between them of the first part, Sir Charles Woolseley Knight, Richard

Knightley Esquire, John Twisleton Esquire, John Hewley Esquire, Rowland Jenkes jun. Esquire, and Joshua Sprig of the second part, and Thomas Crachley Esquire, Nicholas Brereton gent. and Roger Griffith gent. of the third part, for 1700l. to the said earl, and 1898l. 10s. to the trustees for selling the said estate by the Parliament, paid by the said earl's appointment, grant, alien, bargain, sell, enfeoff and confirm to the said Charles Woolseley, Richard Knightley, John Twisleton, John Hewley, Rowland Jenkes and Joshua Sprig their heirs and assigns, the said manor of Hope, *alias* Queen Hope; and the said Earl Charles for him and his heirs, doth warrant the premisses to the said lessees and their heirs, against him and his heirs, and that they shall enjoy the same accordingly. And the said Charles Earl of Derby doth constitute the said Thomas Crachley, Nicholas Brereton, and Roger Griffith his attornies jointly and severally to make livery and seisin of the said premisses.

That livery and seisin was executed accordingly, and the tenants of the said manor did attorn thereto.

[270] 10 April 1654. That Charles Earl of Derby and his wife levied a fine of the said premisses at the Great Sessions for the county of Flint, with warranty against all men with proclamations.

The said fine was to the use of the said indenture mentioned.

That the grantees entered and continued in possession from the time of the making the said indenture.

That the defendants at the time when, &c. and still are tenants of the premisses to the said grantees.

21 December 1672, Earl Charles died, leaving issue the lessor of the plaintiff now Earl of Derby, and was at the death of his father at the age of sixteen years, nine months and four days, and no more.

2 February 29 Car. 2, the lessor of the plaintiff entered, and made the lease to the plaintiff *prout* in the declaration.

They find the statute of 34 H. 8, and conclude generally, if for the plaintiff, for the plaintiff, &c.

Levinz for the plaintiff. It is to be taken notice of, that this Act of 4 Jac. in the record doth alter the estate limited by the letters patent; for by the Act it is only limited to the seventh son; but by the letters patent to every other son, and then the remainder over to others.

1. 'Tis not doubted but that the reversion still remains in the Crown.

2. The possession of the feoffees is nothing to the purpose, for though there be fines levied and descents, yet the Statute of Limitations hath no operation but from the death of Earl Charles, which is but about three or four years since. Upon this record are two questions.

1. What effect the fine in 1654, and the feoffment with warranty have, taking the same abstractively from the consideration of the statute of 34 H. 8, cap. 20.

2. What operation the statute of 34 H. 8 hath in this case?

1. As to the feoffment, it is no discontinuance, because the reversion remains in the King. Lit. sect. 625, and Co. Lit. 335 a.

2. As to the warranty in the feoffment and fine, it is of no effect, because it is a lineal warranty, and so cannot bar without assets.

As to the fine, it is no bar by the statute of 32 H. 8, cap. 36, because the last proviso therein excludes all fines levied of lands intailed, where the reversion is in the King, or intailed by Act of Parliament.

[271] But it is objected, that the words at the end of the proviso are, *That every such fine shall be of like force as they were or should have been, if the Act had not been made*; and such estates-tail were barrable by fine by the statute of 4 H. 7.

Resp. The statute takes notice that there were diversities of opinion in that point. Pasch. 19 H. 8, 6, pl. 5. Dyer 2 b. pl. 1, and this statute of 32 H. 8 cures a doubt in case of ordinary persons, but leaves out the fines of lands, whose reversion is in the Crown. And the exception would not have been inserted, had they not barred before.

If we consider how this point stood before this statute, we shall find, Br. Fines de Terr. 121, that such fines did not bind the issue, because no discontinuance. Br. Assurances 6, accordingly; but Dyer 32 a. pl. 1, Englefield Justice said he knew

it by experience, that a fine did bar the issue in tail, though the reversion were in the Crown. But Shelley Justice doubted; and so there was Judge against Judge. 8 Co. 74 a. Such fine did not bar the issue; and so is 6 Co. 55, in *Chandos's case obiter*; and Co. Lit. 372 b. A fine is a bar by 32 H. 8, but not by 34 H. 8, and so there are but opinions in this point, and no judgment. This doubt reached the Parliament, and therefore they thought that the fine was no bar before 34 H. 8. And the conclusion is, that if it was no bar by 4 H. 7, it was now by 32 H. 8, and then came the statute of 34 H. 8, which made an end of the question; for by the opinion of all it is now no bar.

Then we must consider, whether this Act of 4 Jac. alters the use, and here it will be objected,

1. Here is no gift of the King, but of the Parliament; for 1. Alice is let in before Count William. 2. Count William hath now but an estate for his life, and afterwards to seven of his sons successively; but all the other of his sons are excluded, and Sir Edward Stanley is let in in their place.

Resp. This is a gift of the King within the intent and meaning of the statute of 34 H. 8, for these reasons.

1. There is no more estate given by this Act of 4 Jac. than by the letters patent of 2 R. 3, but all the estates granted are within the compass of the heirs males of the body of Thomas first Earl of Derby.

2. The Parliament did not intend to give any thing, but to make firm an agreement between the parties.

[272] 3. The limitations to Earl William for life, with the remainder to James in tail male is not any bounty, or augmentation of the estate which was given by the letters patent. The Act hath taken away from Earl William, but not added any thing.

4. If Earl William had had twenty sons, this Act doth not exclude them, but others are let in; for the saving extends to them after the determination of the new particular estates, and the old estate-tail supplies the other sons; and the Act did not intend to make several donors, viz. the King as to some part, and the Act as to other part.

5. The proviso is, saving to the King, his heirs and successors, such, and the same estate, &c. as they now have; and how shall the tenure be saved, if the Act must be the donor?

6. This is a case concerning the exposition of an Act of Parliament, which ought to be as favourably construed as a will.

Now let us examine the objections.

Object. 1. The estate of Countess Alice is a new estate.

Resp. 1. 'Tis possible she hath but what she had in right of dower.

2. This agreement shall be construed to be pursuant to her dower.

3. But be it what it may be, she is dead, and so is no prejudice.

Object. 2. The estate of Count William is altered; for now he hath only an estate for life, the remainder to his issues in tail male.

Resp. That is no gift, but a deprivation of a gift. And if a man have three horses in his stable, and a man takes away two of them, he cannot be said to give the third, which he took not away.

Object. 3. Here is a gift to Count James, for he had nothing before during the life of Count William his father.

Resp. 1. This Act hath not one word of giving in it, but that they shall hold and enjoy.

2. Here the meaning was not to make a gift, but in pursuance of an agreement between the parties to settle the estate; and so it is a distribution of the lands amongst the family. And this Act confirms the agreement, as many Acts do confirm an agreement of inclosures.

There is no substantial alteration; for tenant in tail by a gift from the Crown is restrained from alienation to prejudice his issue.

[273] *Object.* But tenant in tail, where the reversion is in the Crown, may prejudice his issue; as Co. Litt. 373 a. *Stratford* versus *Dover*; as if he be disseised, and the disseisor levy a fine, and five years pass.

Resp. 3 Cro. 595, reports this case, and it is Judge against Judge; and 612, the judgment was given upon point of pleading, and not upon this point. Moor 467, pl. 665, reporting this case says, that the issue shall be bound.

Object. Count William hath but an estate for his life, for there is power for him to make leases for lives, which needeth not if it had been an estate tail.

Resp. Abundans cautela non nocet, as the saving of the reversion to the King, which was by this Act taken out of him.

Who is the donor here? for the donee by rules of law ought to hold of the donor by owelty of services, which cannot be here.

Object. Chudleigh's case, the Parliament may be the donor.

Resp. It may be so in case of a fee-simple, but not in case of an estate-tail.

The Parliament is no corporation, at least not fixt, and therefore cannot be donor.

The Earl of Derby could not be donor, because he cannot reserve an estate for life to himself, and not part with the reversion; and so I pray judgment for the plaintiff.

Holt for defendant. The only question is, whether the fine of 1659, bar the estate-tail? or whether the statute of 34 H. 8. restrains the same?

The meaning of the statute of 34 H. 8, appears by the recital in the preamble, viz. *Whereas the King and his progenitors had granted lands to several persons in tail, to the intent that the recompence for their service should not only be a benefit to their own persons, but a continuing profit to the heirs of their bodies, whereby they should have in special memory the profit they receive by their service, and be thereby encouraged to the like service to their sovereign.*

By which it appears that the lands in question since 4 Jac. are now in the same, but this fine bars the estate-tail.

1. This estate is created by 4 Jac. and is a new estate, and not such an estate as is within 34 H. 8. for that extends to lands settled, and to be settled by the gift of the Crown. And if such a donee of the gift of the Crown had before that statute levied a fine, it had barred the issue. This **[274]** is not an estate derived out of the Crown, nor grounded upon such considerations as are mentioned in the statute.

2. 'Tis not merely a reversion in the Crown which makes the estate-tail not to be barred; for if a man purchaseth an estate-tail from the Crown, it is not within this statute; but a fine will bar the issues notwithstanding this statute.

3. 'Tis out of the words of the statute in the manner of the creation of the estate; for it is not created by the King, but by the Parliament. This Act hath always received strict construction, and therefore an estate made by the King, when he was not King, is out of this statute, Co. Lit. 372. And an Act of Parliament is an extraordinary way to settle an estate.

4. From the consideration of this Act of 4 Jac. wherein there is a proviso, *that tenant for life shall have power to make leases or jointures;* but no provision for tenant in tail so to do; which shews that the Parliament intended, that tenant in tail could do it, as it is limited by this Act, which could not be done by 34 H. 8.

Object. This new estate in James is the same estate as by the letters patent.

Resp. It cannot be the same, for it would defeat the whole Act.

The Act hath made these alterations.

1. The estate for life to Alice, which cannot be dower because not mentioned, and hath a continuance only during the estate-tail.

2. Count William hath an estate for life only, whereas he had before an estate-tail.

3. All the issues of Count William would have had an estate by descent, by the letters patent, but now they take by purchase. In a *formedon* they cannot declare upon the letters patent, but upon this Act.

Object. There ought to be donor and donee in every estate-tail.

Resp. An Act of Parliament may create an estate without a donor.

Object. The saving is to all persons *præter* the person except, &c.

Resp. The eighth son, &c. may be saved within this proviso; but the seven sons are in of another estate.

[275] *Object.* Construction of an Act of Parliament ought to be according to equity.

Resp. This Act of 34 H. 8 ought not to be favourably construed, because contrary

to equity and reason of the common law, and restrains alienation. Keilway 96 a. pl. 6. Lit. sect. 360. So the statute of Westm. 2, cap. 1, is to be taken strictly for the same reason, Co. 2 Inst. 335, and therefore it is said, that a fine *ipso jure sit nullus*, yet it is a discontinuance. And so he prayed judgment for the defendant. *Post.*

WILLIAM SCOT *versus* KNAPTON. DEBT. ERROR.

Error.

In debt upon the statutes of 1 Eliz. cap. 3, and 23 Eliz. cap. 1, for absenting from church for eleven months. Upon *nil debet* pleaded, judgment was given in B. R. And now the defendant there brought a writ of error. And it was objected by the counsel for the defendant in the writ of error, that such a writ of error did not lie within the statute of 27 Eliz. cap. 8, because it is an action *tam quam;* and the words of the statute are (*other than where the Queen shall be party*) and here the King is party. But resolved, the writ doth well lie, because the King is not properly party, though he is to have part of the penalty.

26 FEBR. 1678.

Felony.

London Ss. Jur', &c. quod Abrahamus Chissers nuper de London' labor' quinto die Februarii anno, &c. tricesimo primo vi & armis, &c. apud London' videlicet in parochia Sancti Sepulchri in ward' de Faringdon extra London' præd' duo collar' ornament' panicilium viril' cum temol' ornat', Anglice vocat' *mens laced crevats*, valor septem solidor' de bonis & catallis cujusdam Annæ Charteris spinster adtunc & ibidem invent' adtunc & ibidem felonice furat' fuit cepit & asportavit contra pacem dicti domini Regis nunc Coron' & dignitat' suas, &c.

Upon a special verdict the jury find, that on the day, and at the place in the indictment mentioned, Abraham Chisser came to the shop of Anne Charteris spinster in the said indictment likewise named, and asked for to see two crevats in the indictment mentioned, which she shewed to him, and delivered them into his hands, and thereupon he asked the price of them, to which **[276]** she answered 7s. whereupon the said Abraham Chissers offered her 3s. and immediately run out of the said shop, and took away the said goods openly in her sight; but whether this be felony, or not, is the question. And if it shall be adjudged felony, we find him guilty; and that the goods were of the value of 7s. and that he had no goods or chattels, &c. But if it be not adjudged felony, we find him not guilty, nor that he fled for the same.

And I am of opinion, that this act of Chisser is felony; for that, 1. He shall be said to have taken these goods *felleo animo;* for the act subsequent, viz. *his running away with them*, explains his intent precedent; as the suing a replevin to get the horse of another man's, to which he hath no title, is felony, because *in fraudem legis*, Co. 3 Inst. 108. So if an officer cometh to a man, and telleth him that he is outlawed, when the officer knoweth the contrary to be true, and by colour thereof, takes his goods, it is felony. Dalton's Office of Sheriffs, cap. 121, fol. 489. And the case of one Far, in which I myself was a counsel, was thus; *Far knowing one Mrs. Steneer living in St. Martin's Lane in Middlesex to have considerable quantity of goods in her house, procured an affidavit to be filed in the Common Pleas, of the due delivery of a declaration, in an action of ejectione firmæ, in which he was lessor, though he had no title, and thereupon got judgment, and took out an habere facias possessionem for the house, directed to the Sheriff of Middlesex, and procured him to make a warrant to a bailiff to execute the writ, who with Far came to the house, turned Mrs. Steneer out of possession thereof, and seised upon the goods of a great value, and converted them to his own use, and upon complaint made by Mrs. Steneer to Sir Robert Hide, then Lord Chief Justice of B. R. Far was apprehended by his warrant, and indicted at Justice-Hall in the Old Baily, and found guilty, and hanged; for that he used the colour of an action of ejectment, and the process thereupon to execute his felonious 'ntent, in fraudem legis.*

2. Although these goods were delivered to Chisser by the owner, yet they were

not out of her possession by such delivery, till the property should be altered by the perfection of the contract, which was but inchoated and never perfected between the parties; and when Chisser run away with the goods, it was as if he had taken them up, lying in the shop, and run away with them. *Vide* Hill. 21 H. 7, 14, pl. 21, Bracton says, *Furtum est tractatio rei alienæ frandulenta,* **[277]** *animo furandi, invito illo cujus res illa fuerit.* Stanford's Pleas of the Crown, 25 a.

SAMUEL DODD, CLERK, *versus* RALPH INGLETON.

Tithes. 2 Danv. Ab. 596, p. 8.

The plaintiff being Vicar of Chigwel in Essex, exhibited his English bill in the Exchequer Chamber against the defendant for small tithes, and amongst the rest for tithe milk; and upon the hearing a question arose, whether the defendant shall pay the tenth part of the milk of his cows every meal, or only every tenth meal? And it was decreed that he should pay every tenth meal intire to the plaintiff; for otherwise the plaintiff must be forced to keep a servant for that service of collecting the milk only, and perhaps the tithe would not amount to a pint a day. The next question was, whether *de jure* (there being no custom one way or other) the parishioner ought to send the tithe milk to the vicar to his house, or that the vicar ought to fetch it from the parishioner? And now 22 May 1679, the vicar brought a civilian, one Doctor Raynes, to argue, whose argument was as follows. By the *jus commune ecclesiasticum* which is the canon law, all tithe ought to be brought home to the parson; and the law is grounded upon the Scripture. Malac. 3, 10. *Bring ye all the tithes into the store-house;* and St. Jerome gives the rule so; and Linwood l. 3, tit. 16, De Decimis cap. Quia Quidam, Verbo Colligendis, pag. 168. *Colonus de jure tenetur non solum decimas hujusmodi colligere & coacervare, sed etiam in horreum sacerdotis afferre.* And this is certain for predial tithes. And so says Speculator, it is for wines. And although there be no express mention of milk, and that milk is here in England reckoned amongst minute tithes; yet in other countries it is a predial tithe.

2. All tithes ought to be paid so soon as they may be fit for the parson to receive them; so calves at such an age, and other things, as the matter will bear. Now 'twill be very inconvenient if the milk which *de jure* is tithable every meal, shall be sent for by the parson twice a day, and every time may not be a pint.

3. In the manner of tithing, that which *magis expedit ecclesiæ,* is to be observed, then it is more decent for the parishioner to bring, than the parson to fetch his tithes. Where the law is silent, the custom of the places adjacent prevails. **[278]** Now here, all the neighbour vicars have their milk brought home to them.

Upon hearing this argument the Court thought fit for the plaintiff, if he saw cause, to insert all his parishioners, or as many of them as he pleased into his bill; and upon their answers the Court would deliver their opinion, because of ascertaining the way of paying tithe milk quite through the parish, to prevent multiplication of suits; but if the plaintiff shall not think fit so to do, the Court adjourned this cause till Michaelmas-term to give their opinions; and afterwards, viz. 10 November 1679, we all agreed that the tithe milk ought to be carried by the parishioners. My opinion was, that it should be delivered at the vicarage-house, because where there is no custom the common law prevails; but my Lord Chief Baron and the other two Barons agreed, that it should be delivered in the church-porch, because the neighbouring parishes did so; but that appeared not in the pleadings, but so it was decreed.

JOHN LISLE *versus* JOHN GREY ESQUIRE, THOMAS OGLE AND ROBERT MANNERS.
EJECTMENT. NORTHUMBERLAND.

Trin. 22 Car. 2, Rot. 141, B. R. In a writ of error in the Exchequer Chamber

Uses. 2 Lev. 223. Pollexf. 582. 2 Jon. 114. 2 Show. 6. *Postea* 302, 315.

The plaintiff declares of the demise of William Lisle of four messuages, two hundred acres of land, two hundred acres of meadow, two hundred acres of pasture,

and three hundred acres of moor in Acton in the parish of Felton. Upon not guilty pleaded, the jury gave a special verdict,

That before the trespass and ejectment, one John Lisle was seised in fee of the tenements in question; and so being thereof seised 15 August 15 Car. 1, an indenture was made between the said John Lisle of the one part, John Robson and Thomas Lorain of the other part, and inrolled duly within six months in the Court of Chancery, according to the form of the statute. The tenor whereof followeth in these words, viz.

[279] This indenture made the fifteenth day of August in the fifteenth year of the reign of our Sovereign Lord Charles, by the grace of God, King of England, Scotland, France and Ireland, defender of the faith, &c. between John Lisle of Old Felton *alias* Little Felton in the county of Northumberland, gent. of the one part, and John Robson clerk, one of the prebendaries of the Cathedral Church of Durham, and Thomas Lorain of Kirkharle in the county of Northumberland gent. of the other part, witnesseth, that the said John Lisle for the settling and establishing of all the messuages, farms, lands, tenements, and all other the hereditaments hereafter mentioned to be, remain and continue in the blood of the said John Lisle in such manner and sort as hereafter is herein and hereby limited and expressed, so long as it shall please Almighty God to continue the same; and for and in consideration of the natural love and affection which he beareth unto those, unto whom the estates hereafter are limited; and for the advancement of Edward Lisle his son, and others of the blood hereafter-mentioned, he the said John Lisle doth hereby, for him and his heirs, covenant, grant and agree to and with the said John Robson and Thomas Lorain and their heirs, that he the said John Lisle and his heirs shall and will from henceforth stand and continue seised of and in all that whole messuage and tenements, called Felton *alias* Little Felton, within the parish of Felton in the said county of Northumberland, late parcel of the possessions of the monastery of Brentburn in the said county of Northumberland, together with all and singular the appurtenances and premisses to the same belonging, or being accounted, accepted, reputed or taken to be part, parcel or member thereof, or therewith, or heretofore used, occupied, possessed or enjoyed as part, parcel or member thereof; and all that the manor and lordship of Acton *alias* Ackton in the said county of Northumberland, commonly called and known by the name of the north and south parts of the town of Acton aforesaid, together with all and singular tofts, crofts, woods, underwoods, mines, quarries, lands, meadows, feedings, commons and common of pasture; and all and singular the appurtenances whatsoever to the said manor or lordship of Acton *alias* Ackton belonging or appertaining, or therewith used, occupied or enjoyed as part, parcel or member thereof, together with two closes called or known by the names of the Middle-Wood Closes; and also one messuage late in the tenure or occupation of one Robert Car, or his assigns, **[280]** with their and every of their appurtenances to the same belonging or in any wise appertaining, or therewith used, occupied or enjoyed as part, parcel or member thereof, with all other the said John Lisle his lands, tenements and hereditaments whatsoever, with the appurtenances in the county of Northumberland aforesaid, and to and for the uses, intents and purposes hereafter limited, and to and for no other use, intent or purpose whatsoever, that is to say, to and for the use and behoof of the said John Lisle, for and during the term of his natural life, without impeachment of and for any manner of waste, and after his decease, to and for the use and behoof of the said Edward Lisle, for and during the term of his natural life, and after his decease, to and for the use and behoof of the first son of the said Edward Lisle lawfully to be begotten, and to the use and behoof of the heirs males of the body of the first son lawfully to be begotten; and for default of such issue, to the use and behoof of the second son of the said Edward Lisle lawfully to be begotten, and the heirs males of the body of the said second son lawfully to be begotten; and for default of such issue, to the use and behoof of the third son of the body of the said Edward Lisle lawfully to be begotten, and the heirs males of the body of the said third son lawfully to be begotten; and for default of such issue, to the use and behoof of the fourth son of the body of the said Edward Lisle lawfully to be begotten, and the heirs males of the body of the said fourth son lawfully to be begotten; and so severally and respectively to every of the heirs male of the body of the said Edward

Lisle lawfully to be begotten, and the heirs males of the body of such heirs males lawfully to be begotten, according to their ages and seniorities; and for default of such issue, to the use and behoof of William Lisle of Warkeworth in the said county of Northumberland gent. for and during the term of his natural life, and after his decease, to the use and behoof of the first son of the body of the said William Lisle lawfully to be begotten, and the heirs male of the body of the said first son lawfully to be begotten; and for default of such issue, to the use and behoof of the second son of the body of the said William Lisle lawfully to be begotten, and the heirs male of the body of the said second son lawfully to be begotten; and for default of such issue, to the use and behoof of the third son of the said William Lisle lawfully to be begotten, and the heirs male of the body of the said third son lawfully to be begotten; and for default of such issue, to the use and behoof of the fourth son of the body of the said William Lisle lawfully to be begotten, **[281]** and the heirs male of the body of the said fourth son lawfully to be begotten; and so severally and respectively to every of the heirs male of the body of the said William Lisle lawfully to be begotten, and the heirs males of the bodies of such heirs males lawfully to be begotten, according to their ages and seniorities; and for default of such issue, to the use and behoof of the right heirs of the said Edward Lisle for ever. *Provided always*, and it is hereby declared by and between all the parties to these presents; and the said John Lisle party to these presents, for him and his heirs, doth covenant, grant and agree to and with the said John Robson and Thomas Lorain and their heirs; that if it shall happen the said Edward Lisle, son of the said John Lisle, party to these presents, do die without issue male of his body lawfully begotten, that then the said John Lisle, party to these presents, and his heirs shall and will stand seised of all and singular the manor, lands, tenements and hereditaments aforesaid, with their and every of their appurtenances, to the use, intent and purpose, that they shall and will raise and levy out of the rents, issues and profits thereof, the several sums of 100l. a-piece for each and every of the daughters of the said Edward Lisle, to be paid after the same be so levied, to the eldest first, and so in order, according to their several ages and seniorities. *Provided always*, that if the said John Lisle, party to these presents, shall and do at any time hereafter during his life-time, declare unto the said John Robson and Thomas Lorain, or either of them, that he is intended to alter and revoke any use, trust, clause or limitation in or to these presents, by his writing indented by him sealed and delivered in the presence of two or more sufficient witnesses, that then such addition, alteration or revocation by him so made, shall stand and be good and effectual in law to all intents and purposes; any thing herein contained to the contrary in any wise notwithstanding.

By virtue whereof, and of the statute for transferring uses into possession, the said John Lisle became seised of the tenements aforesaid in his demesne as of freehold, for term of his life, remainder as is before limited, and so being seised had issue Edward Lisle his eldest son.

That the said John Lisle 1 March 17 Car. 1, died so seised; after whose death the said Edward entered and became thereof seised in his demesne as of freehold, for his life, the remainder as aforesaid, and so being thereof seised, the said Edward had issue only a daughter still alive.

[282] That the said Edward Lisle 30 September 1694, made this indenture following in these words:

This indenture made the 30th day of September 1694, between Edward Lisle of Acton in the county of Northumberland gent. of the one part, and Thomas Forster of Etherston in the said county of Northumberland, John Forster, second son of Sir Mathew Forster of Etherston aforesaid in the aforesaid county, gent. of the other part, witnesseth, that the said Edward Lisle for divers especial and good causes and considerations him thereunto moving, hath given, granted, bargained, sold, aliened, infeoffed and confirmed, and by these presents doth freely and fully give, grant, bargain, sell, alien, infeoff and confirm unto the said Thomas Forster and John Forster, their heirs and assigns, all that messuage, tenement or farm called and known by the name of Old Felton, situate, lying and being in Little Felton in the parish of New Felton in the said county of Northumberland, within the tenure or occupation of the said Edward Lisle or his assigns, and all that the town, township or manor of Acton

alias Ackton with the appurtenances, containing as well all that part of the said manor called the south part of the town, township or manor of Acton, as that part which is called by the north part of the town, township or manor of Ackton in the said county of Northumberland, and all and singular houses, edifices, buildings, barns, stables, byers, backsides, outhouses, gardens, orchards, meadows, feedings, pastures, leasows, commons and common of pasture, woods, underwoods, mines, quarries, easements, profits, commodities and emoluments whatsoever to the said messuage, tenement or farm, and to the said town, township or manor, or either of them belonging or appertaining, or with the same or any part thereof, now or at any time heretofore held, used, occupied and enjoyed as part, parcel or member of the said messuage, tenement or farm, or of the said town, township or manor, or either of them, or of any part of them, or either of them, together with all and singular the writings, charters, evidences, escripts, escrowls, deeds, transcripts of fines, exemplifications of records and muniments whatsoever, of or concerning the aforesaid premisses, or part thereof (amongst other things,) all which said writings, charters, evidences, escripts, escrowls, deeds, transcripts of fines, exemplifications of records and muniments, the said Edward Lisle doth for him, his heirs, executors and administrators, covenant, grant and agree to and with the said Thomas Forster and **[283]** John Forster, and their heirs, that he the said Edward Lisle, and his heirs, shall and will, at and upon the ensealing and delivery hereof, deliver, or cause to be delivered to the said Thomas Forster and John Forster, and their heirs, undefaced and uncancelled, to have and hold the said messuage, tenement or farm, &c. unto the said Thomas Forster and John Forster, their heirs and assigns for ever. And farther, he the said Edward Lisle and his heirs, the said messuage, &c. to the said Thomas Forster and John Forster their heirs and assigns, against all persons whatsoever will for ever warrant and defend by these presents.

That the said last mentioned indenture was executed by livery and seisin.

That in Hilary term 1649 a common recovery was suffered of the premisses, wherein Ralph Forster gent. was demandant, the said Thomas Forster and John Forster tenants, and the said Edward Lisle vouchee, and vouched the common vouchee.

That the said Edward Lisle died 1 May 1674, without any issue but his said daughter.

That by and at the death of the said Edward Lisle, son of the said John Lisle, all the estates and remainders in the indenture aforesaid, bearing date 15 August 15 Car. 1, limited, and which preceded the limitation to William Lisle, named in the said indenture and now lessor of the plaintiff, did end and determine.

That the said William Lisle was cousin of the whole blood of the said John Lisle.

That the said William Lisle after the death of the said Edward Lisle, 20 January 28 Car. 2, did enter upon the possession of the said John Grey, Thomas Ogle and Robert Manners, and became seised *prout lex postulat*, and made the lease to the plaintiff, who entered and was possessed until the defendants ejected him. And if for the plaintiff, for the plaintiff, &c.

Judgment was given in B. R. for the plaintiff; and now the defendant brings a writ of error.

Pollexfen for the plaintiff in the writ of error.

The questions are two, 1. Whether by the conveyance of 15 August 15 Car. 1 Edward Lisle have an estate-tail?

2. If he hath not, then whether the plaintiff hath any title considering the proviso?

[284] *As to the first*, The case is no more but this.

Lands are limited to the use of Edward Lisle for his life, the remainder to his first, second, third and fourth sons successively, and the heirs male of their respective bodies; and so severally and respectively to every of the heirs male of the body of the said Edward, and the heirs male of the body of such heirs male, according to their ages and seniorities, the remainder to William Lisle, &c. Edward suffers a recovery, and dies without issue male.

And I conceive that Edward had an estate-tail, and so the recovery well suffered to the use of the Forsters and their heirs.

It is agreed on all hands, that where an estate is limited to a man for life, and

afterwards to the heirs of his body, the heirs are in by discent and not by purchase, Co. upon Lit. 22 b. 1 Co. 104 a. 11 Co. 79 b. *Lewis Bowle's case*, which is in effect the same with this in question.

Object. Here it is to the heirs male of the body of Edward, and the heirs male of the body of such heir male.

Resp. The addition of those words make no alteration, but are only words of abundance, and are comprehended within the first words, and are of the same nature; and so is *Shellie's case.*

'Tis not like to *Archer's case*, for there the limitation is to the heir in the singular number.

Object. The words are relative, and so severally and respectively to every of the heirs male of the body of Edward.

Resp. We are upon the construction of a deed, and not of a will, and therefore rules in limitation of estates ought to be here observed.

The word (*heirs*) is a term of art in the law, and hath an established sense; and Littleton says, it is the sole word which passeth an inheritance.

There are certain words which in the law are appropriate to some particular purpose, Coke upon Littleton 9 a. And this word (*heirs*) is so appropriate to an estate of inheritance, 1 Co. 103 b. *Shellie's case.* From which we may infer, that we cannot alter the legal signification of the word (*heirs*) and construe it to signify sons or issue.

Object. This is a conveyance by way of use, which may be construed with equal favour as a will.

Resp. Uses are now reduced to the rules of the common law. 1 Co. 87 b. *Corbet's case.* Winch. 60. 1 Rol. Abr. 837, R. pl. 1 and 2, tit. Estate. A feoffment to the use of A. and his issues male of his body, makes not an estate-tail, for want of the word *heirs.*

[285] And there is no case to be found in law, where the word (*heirs*) is taken for issue or son; and in this case should heir be taken for issue or son, here would be a very great alteration in point of limitation, for the fifth son must take by name of son.

1. The word (*so*) alters not the case; and if the interpretation of a deed should be as of a will, many suits would be upheld by reason of the incertainty of the law in such cases.

2. The operation of the proviso is out of doors, because it is found in the verdict, that all the estates precedent to the estate of William Lisle are determined.

Levinz for the defendant in the writ of error. Edward hath but an estate for life, because, 1. 'Tis a conveyance by way of use which was originally but a trust, and an equitable thing, and therefore ought to be favourably construed.

2. The intent of the father was plainly contrary; for why should he limit no farther than to his fourth son? and it was not intended that Edward should have any other estate but for life in possession, because power is provided for him to raise portions for his daughters, which need not have been if he have an estate-tail, for he could do it by a common recovery.

3. 'Tis not a limitation to the heirs male only, but to every of them, according to their seniority.

4. 'Tis to the heirs male of those heirs male. And so prays judgment for the defendant. *Adjournatur. Post.*

[286] TERM. TRIN. 31 CAR. 2, 1679.

MURREY *versus* EYTON. *Antea* 260.

Estate. 2 Jon. 237. Pollexf. 491. Skin. 95. 2 Show. 104. *Postea* 319, 338.

Pollexfen for the plaintiff. The estates limited by the Act of 4 Jac. are the same estates in substance with what were limited by the letters patent, and vary only in circumstances, and therefore Ferdinando was seised in tail under the patent, and Alice intitled to dower under him.

The first alteration objected is the limitation to Alice for her life.

Resp. That may consist with the estate in the patent, for it is but for her life, and

it is but a third part, which is equivalent to the dower she should have by the estate in the patent.

The second alteration is, that Count William hath an estate-tail by the patent, but now by the Act he hath but an estate for life, with remainders to his sons in tail.

Resp. By the first estate he had no other advantage than he hath by the estate for life, and therefore there is no substantial alteration.

The third alteration is, that here are by the Act limitations to other persons, viz. Edward Stanley, &c.

Resp. Those other persons were to have succeeded by the patent.

Object. The proviso to make leases and jointures.

Resp. As to the power to make leases, tenant in tail could have made such leases before. And as to the power to make jointures, it is to be only of the third part of what he shall be in possession, and so is no more than dower.

Object. Coke on Litt. 372 b. A recovery suffered by tenant in tail, where the reversion was in the Crown, barred the estate-tail before the statute of 34 H. 8, cap. 20, and so it was agreed in 33 H. 8, as it is Br. tit. Tail 41. 40 Ass. pl. 36.

Resp. The Lord Brook, who was made Chief Justice 2 Mar. and was either a Judge, or very near it, and at the height of his practice in 38 H. 8, about which time the case is cited **[287]** by the Lord Coke, is of another opinion. Br. Assurances 6. Fines levie de Terres 121, and he lived nearer the making the statutes of 32 H. 8, and 34 H. 8. So is 1 Anders. 46, pl. 118. And by the penning of the statute of 34 H. 8 it appears that no notice is taken therein of any fine, but only of a recovery, which shews that a fine extends not to an estate-tail where the reversion is in the King.

Serjeant Weston for the defendant. The estate is totally altered by the Act of Parliament, for now the estate created by that Act is drawn out of the estate-tail which was created by the letters patent, and not out of the reversion in the Crown, and Count William had a reversion in him expectant upon this new estate. And an estate-tail is capable to have another estate drawn out of it, either by wrong or by right, which may out-last the old estate. Tenant in tail bargains and sells; it is a good estate to last till the issue enters. And whatsoever thing may be done where the reversion is in a common person, the same thing may be done by Act of Parliament in case of a King.

Object. If here be a new estate, who is the donor? Not the Act of Parliament, because a Parliament is no corporation, and so cannot be said to be donor.

Resp. An Act of Parliament may be donor by way of giving a penal judgment, as in case of forfeitures. 2. By way of execution of an agreement, and either the Act is donor, and tenant in tail is donor proportionably, as in the Statute of Uses; and here William is the donor.

Object. The old and new estate came both into one person, viz. Count Charles, and so he could not alien the one without the other.

Resp. It is all one as if the estates had been in divers persons, and Charles here had power over the new estate-tail by fine, feoffment, &c. but not over the old estate-tail.

Object. This is *petitio principii*, for whether he hath any power over either of the estates is the question.

Resp. The estate granted by Charles shall arise out of the estate which is most mediate to the gift, viz. the estate-tail, and not out of the reversion in the Crown which is the old reversion.

The statute of 34 H. 8 being discharged by the Act of 4 Jac. the lands became alienable at all times afterwards, as *Dumport's case*, where a condition which restrains alienation is once dispensed with, is for ever after destroyed.

[288] 14 Car. 2, *Gardiner's case*, upon a special verdict, King H. 8 gives to Michael Stanhope and his wife, and the heirs of their bodies, certain lands, Michael dies, the lands descend to Thomas Stanhope, his son and heir, who petitions the Queen to grant the reversion to some persons in fee, to the intent the said Thomas Stanhope may make a lease for 99 years by way of mortgage, and enters into a recognizance to the Queen, conditioned that nothing shall be done whilst the reversion is out of the Crown, prejudicial to the Queen; the Queen conveys the reversion to the Lord Burleigh and

Sir Walter Mildmay in fee. Thomas Stanhope makes the lease, then suffers a common recovery; the said Lord Burleigh and Walter Mildmay reconvey to the Queen. The questions were 1. If the grant to the Lord Burleigh and Sir Walter Mildmay was void, for the Queen was deceived in her grant; and resolved the grant was good, and the Queen not deceived. 2. Whether the Queen being in by the re-grant, Sir Stanhope, the son of Thomas, was now restrained from aliening: and resolved he was not, because the force of the statute of 34 H. 8 was discharged. *Et adjournatur. Post.*

PLAYER *versus* VERE.

By-law. 1 Danv. Ab. 734, p. 5. *Antiqua civitas.* 1 Vent. 21. 1 Sid. 284. 2 Keb. 27, 490, 501. *Postea* 324. Custom to order carts.

The defendant being sued in London brings an *habeas corpus* directed to the mayor, aldermen and citizens of the said city, who make this return, viz.

The City of London is, and hath been time out of mind an ancient city, and that the mayor and commonalty and citizens of the said city are, and time out of mind have been a body politick and corporate, and time out of mind have been known by the name of the citizens of the City of London, barons of the, &c.

And that in the same city there is, and time out of mind hath been a custom used and approved of, viz.

That the Mayor and Commonalty and Citizens of the City of London by themselves and such other person or persons, as by the Mayor and Aldermen of the City of London aforesaid for the time being, by the assent of the commons of the same city have been appointed, have and have had right to order and dispose of carrs, carts, carrooms, carters and carmen, and of all other person and persons whatsoever working any carrs or cart within the City of London and liberties thereof according to the custom there.

[289] And that there is, and hath been time out of mind a custom, that if any custom be defective, or that there shall be any thing in the city of new-emerging, where before there was no remedy, the mayor and aldermen with the assent of the commonalty may appoint, and have appointed and ordained fit and convenient remedy and agreeable to reason for the profit of the citizens of the same city and other the subjects of the King thither resorting, when and as often as they should think fit, so as such ordinance were profitable for the King and his people, & *bonæ fidei conson'* and reasonable.

That the said customs are confirmed by Parliament in the seventh year of King R. 2.

That in a common council held 2 April 1677. It was enacted, as followeth.

For the better and more regular ordering and disposing of all carrs, carts, carrooms, carters and carmen, and all other persons whatsoever that shall hereafter work any carr or carts within this city or the liberties thereof for hire, be it enacted and ordained by the right honourable the lord mayor, aldermen and commons in common council assembled, and by the authority of the same, that one Act of Common Council made in the mayoralty of Sir John Lawrence Knight, for the government of carrs, carts, carrooms, carters and carmen, and every clause, article and thing therein contained, be from henceforth repealed; and the same is hereby repealed and made void to all intents and purposes. And be it farther enacted and declared by the authority aforesaid, that the President and Governors of Christ's Hospital shall have the rule, oversight and government of all such carrs, carts, carters and carmen, and of all other persons whatsoever, that do or shall hereafter work or use any carrs or carts within the City of London, or the liberties thereof, for hire, according to the rules, directions and provisions in this present Act mentioned and comprised. And the present trade of this city being seriously considered, and to the end that all the streets and lanes of this city may not be pestered with carrs or carts, and His Majesty's liege people may have free passage by coach or otherwise through the said streets and lanes: Be it enacted, that no more than 420 carts shall be allowed or permitted to work for hire from one place to another within this city or the liberties thereof, and that each of

them shall be made known by having the city arms upon the shaft of every such cart, in a peace of brass, with the number upon it, and that 17s. 4d. per annum [290] and no more shall be received and paid for a carroom, and 20s. and no more, or greater fine, upon any admittance or alienation of a carroom, which 17s. 4d. per annum, and 20s. aforesaid, is to be wholly applied towards the relief and maintenance of the poor orphans harboured and to be harboured in the said Christ's Hospital. And that if any person or persons shall presume to work any carrs or carts within the said city and liberties for hire by himself or servant, not being duly allowed as aforesaid, such person or persons for every time so offending shall forfeit and pay the sum of 13s 4d. to be recovered, received or obtained as is hereafter mentioned.

And be it farther enacted by the authority aforesaid, that there shall not be hereafter any car, cart or cars permitted or allowed, to any wharf, wharfingers, woodmongers or retailers in fuel, or kept or worked by any wharfinger or any retailer or retailers in fuel after the 24th day of June next. But such car, cart or cars as are part of the said number of 420 cars licensed by the said president and governors which are allowed the carriage of all wood, coals and other fuel within the same city and liberties thereof at such rates, and in all other respects, as other goods and commodities are used to be carried, and not otherwise. And if any wharfinger, woodmonger or other retailer in fuel, shall presume to keep and work any cart or car contrary to the true meaning hereof, such person and persons for every time so offending shall forfeit and pay for the first offence the sum of 13s. 4d. to be recovered and obtained as is hereafter mentioned, and for the second and every other offence afterwards, double the said sum of 13s. 4d. to be also levied as is hereafter expressed.

Provided nevertheless, that it shall and may be lawful for every person and persons with his and their own, or with any other car, cart or cars, to bring out of the country to the said city, or to fetch from the said city into the country any coals, fuel or other goods, wares and merchandizes. And that it shall be lawful for every retailer of fuel to bring home to his or their own houses or wharfs all manner of fuel by and with his and their own, or with any other car, carts or cars.

And be it farther enacted, that such as have any carroom or carrooms duly licensed and allowed as aforesaid, shall not directly nor indirectly let them out for hire to be worked by any others at any time hereafter without the approbation and allowance of the said Presidents and Governors of Christ's Hospital [291] for the time being first obtained, and attested in writing under the said president's hand; to the end that none may be admitted to work any car, but such as should be found of civil carriage and able, and meet for that employment, upon pain that every person so offending therein shall forfeit the sum of 10s. a day for every day he shall let to hire the said car, to be recovered as is hereafter mentioned; and that the prices of carriage may be made moderate as well for the people as the carmen, it is enacted, that forthwith this present year and hereafter always from time to time, as often as occasion shall require, reasonable rates and prices of carriages within this city and liberties shall be set and appointed by the Court of Aldermen, they calling to their assistance such of the commons as they shall think fit for their information therein. And the said prices to be printed and set upon posts in publick places, and a copy thereof to be always carried about by every respective carman for the satisfaction of all persons that shall desire to see the same. And if any carman shall demand and take more than according to such rates and prices so to be set down, such person and persons so offending shall forfeit and pay for every such offence the sum of 10s. to be had and recovered as is hereafter mentioned. It is hereby farther enacted, that if any person or persons authorized to work any car or cars by himself or servant shall neglect or refuse duly to pay the said yearly rent of 17s. 4d. a year to the said president and governors, for the uses aforesaid for every the said car and cars, as is before mentioned, the carroom that is the licence of such person or persons to work such car or cars be suspended, and such person or persons be disabled to work any longer by virtue of the same licence, until he or they shall conform to the payment of the said duty of 17s. 4d. respectively. And if any person or persons, for the cause before mentioned being so disabled, shall presume before conformity after such disallowance to use or work any car or cars either by him or themselves, or by his or their servant or servants, agent or agents,

then every such person and persons shall respectively forfeit and lose the sum of 13s. 4d. for every time they shall so work, to be recovered and applied as is hereafter mentioned.

And lastly it is enacted, that all penalties, pains and forfeitures in and by this Act before limited and appointed, shall and may be levied by distress of the goods of the person so offending in the said city to be found or recovered by action of debt, bill or information in the name of the Chamberlain of this city for the time being, in His Majesty's Court holden before **[292]** the lord mayor and aldermen of the said city in the chamber of the Guildhall of the City of London, and after recovery thereof, one moiety after charges deducted shall be to the informer, and the other moiety to the poor of Christ's Hospital in London, to be employed for and towards their relief. In all which suits to be brought by this Act, the Chamberlain shall, in case he do recover, be allowed his ordinary costs and charges to be expended in and for recovery of all such forfeitures against the offender and offenders. And in case upon a trial the verdict shall pass for the defendant, or in case the party shall be nonsuit or discontinue his suit, in every such case the defendant shall also recover his reasonable costs.

Provided always, and be it enacted by the authority aforesaid, that no person or persons hereafter to be employed in taking care for the putting of this Act in execution, as a streetman or other officer, shall be allowed to have any carroom within the City of London or the liberties thereof; any thing in this Act, or any other law, usage or custom of this city, to the contrary in any wife notwithstanding.

They farther certify, that before the coming of the writ of *habeas corpus*, the defendant was taken in the said city, and imprisoned in the custody of the sheriffs thereof by virtue of an original bill of debt upon demand of 13s. 4d. against him 2 Novemb. 29 Car. 2, upon the said Act before the mayor and aldermen in the chamber of the Guildhall of the said city, according to the custom of the said city, which said original bill doth still there depend undetermined.

Thompson for the defendant. That here ought no *procedendo* to be granted, but that the defendant may be discharged from the action. This writ is a *habeas corpus* to remove a cause out of an Inferior Court, and if it appears that the plaintiff hath not cause of action, or that this Court hath jurisdiction of the cause, no *procedendo* ought to be granted.

I hold, 1. This by-law is unreasonable and void, and not warrantable by the custom.

2. The defendant is not within the penalty of it.

3. This Court is well possessed of the cause.

As to the first, By this custom alledged, the mayor and aldermen have no power to restrain the number of carts, or to impose fines.

All by-laws to restrain liberty or trade are void. 11 Co. 53.

The Taylors of Ipswich case, Moor 576, pl. 796. *Davenant* versus *Hardies*, 1 Roll. Abr. 364 a. pl. 6.

[293] M. 29 Eliz. B. R. A by-law in London, that none should sell sand which was not taken out of the Thames, resolved void. And there was a by-law 42 Eliz. to this very purpose adjudged void, save only that here men may carry their own goods. 1 Roll Abr. 364, pl. 5, *Pain* versus *Haughton*, and 24 Car. 2, B. R. *Player* versus *Bradnox*. This custom was returned upon a *habeas corpus*, and no *procedendo* allowed.

This by-law hinders the woodmonger from following their trades; for they must use one of the 420 cars; and by the same reason that they may appoint 420, they may appoint but 20, or more or less, and may impose what fine they please, and what rent, &c. They may as well restrain brewers, tallow-chandlers, hackney-coachmen.

Object. Respect ought to be had to the City of London.

Resp. 'Tis true, but they are not to make by-laws prejudicial to the people.

As to the 2d, Admitting this by-law to be good, yet this defendant is not within the penalty thereof, for that it binds none but freemen, citizens and inhabitants, and it doth not appear that he is a freeman, citizen or inhabitant. 1 Bulst. 11, *Franklin* versus *Green*. In the case of the butchers, the plaintiff hath not set forth the custom, but declares upon the by-law as upon an Act of Parliament.

As to the 3*d*, This Court is possessed of the cause. There is a difference where a *habeas corpus* is to remove a cause grounded upon a custom which cannot be taken notice of in this Court, as for calling a woman whore, &c. and where this Court hath cognizance, as in this case; for an action of debt will lie here upon a by-law made in any place.

Object. This action is for a duty under 40s. and so not suable here by the statute of Gloucester cap. 8.

Resp. That statute extends not to this Court, for the words of the writ upon the statute are, that pleas *vi & armis* cannot be sued *in minori Curia quam coram nobis vel alibi coram justiciariis nostris ad mandatum nostrum, &c.* Regist. Orig. 111 b. F. N. B. 46 & 47, and so the Court of Exchequer is excluded.

Sir George Geoffreys Recorder of London *contra.* He first answers the objections made to the return.

1. *Object.* That it is not alleged, that the defendant is a citizen, freeman or inhabitant.

Resp. This objection was made to the return of the by-law concerning the Eastland company, and ruled that 'twas well enough.

[294] 2. As to the setting forth of the custom in the declaration, it need not, because the citizens are bound to take notice thereof.

3. This Court is not possessed of the cause, because this duty is to be sued for in Guildhall, and not here or elsewhere.

Though the by-law may be nought for the fine, it may be good for the rent; for a by-law may be good for one part and bad for another. As to the number, if they cannot be restrained, the streets would be pestered. And by-laws of the like nature in London have been here or in the other Courts allowed, as, *that none but freeman shall exercise a trade in any shop*, and so is such a by-law good in any petty corporation, 8 Co. 121, *Wagoner's case.* And it shall not be presumed that the magistrates will do wrong. Regist. 105. The custom of Rippon, *that none should exercise the trade of a dyer without the licence of the Archbishop of York, lord of the said town.* 34 H. 6. Andrew Deveene was committed for exercising the trade of a common broker, not being licensed and sworn; he brought an *habeas corpus*, and was remanded to London: the Archbishop of Canterbury was then Chancellor, and adjudged it to be a good by-law.

Lib. Dunthorn fol. 237, in Guildhall, a book which is a repertory of the records in Guildhall. There is the by-law for the brokers, and they pay 40s. annually at this day, and ever since they have been licensed.

H. 14 & 15 Car. 2, C. B. debt by the Chamberlain against one Hutchins upon this by-law, and there were two justices against two, but afterwards a *procedendo* was granted, and the Lord Chief Justice took notice in that case of one *Barker's case*, 8 Car. 1, *for licensing porters.*

Object. 1 Roll. Abr. 364, *Pain* versus *Haughton.*

Resp. That case is not so strong as this, because it was in an action of trespass, and so more strict than upon a return, and there was a particular advantage to particular persons.

Mich. 1656, in C. B. *Osburn's case*, after many arguments difference was agreed between by-laws made by virtue of a custom, and where they are made by virtue of a charter; and here this by-law is founded upon custom, and a *procedendo* was there granted, and so is 2 Cro. 597, *Broad's case*, custom is stronger than a charter. Moor 403. A by-law to restrain the liberty of hawkers in London good for that reason.

An act of common council may be good in part, and void in part. *Adjournatur. Post.*

[295] JEREMY GUY *versus* WILLIAM DORMER.

Hill. 29 Car. 2. Warr.

Revocation.

Trespass and ejectment of a demise of Robert Dormer made 1 Septemb. 29 Car. 2, by indenture, of five messuages, 300 acres of land, 100 acres of meadow,

and 400 acres of pasture with the appurtenances in Granborough, Woolescot, Walcot and Willowby, and of all tithes of grain and hay arising by the premisses from the last of August then last past seven years. Upon not guilty pleaded, the jury find a special verdict, viz.

That one William Dormer Esquire was seised of the lands and tenements in the declaration mentioned in his demesne as of fee: and so being seised, the said William 25 and 26 Septemb. 7 Car. 2, by his indentures of lease and release conveyed the same to William Moor and John Carter, and their heirs, to the uses in the same mentioned.

The tenor of which indenture of release followeth in these words:

This indenture made the 26th day of September in the year of our Lord 1655, between William Dormer of Templeton in the county of Berks esquire of the one part, and William Moor of the Middle-Temple London Esquire, and John Carter, second son of Ancel Carter, citizen and grocer of London, of the other part. Whereas the said William Dormer by his indenture bearing date the day before the date of these presents made between the said William Dormer of the one part, and the said William Moor and John Carter of the other part, hath for the consideration therein mentioned granted, bargained and sold unto the said William Moor and John Carter all those several and inclosed arable meadow and pasture grounds, lying and being in the parish, lordship, hamlets or precincts of Granburrough, Woolescot and Walcot in the county of Warwick, and hereafter particularly mentioned, that is to say, all that several and inclosed pasture or pasture ground called or known by the name of Braddimer's Close, abutting upon Willoughby field, and also all that several and inclosed pasture or pasture ground called or known by the name of Turnchil, which two closes are containing by estimation 165 acres, be they more or less, **[296]** whereof forty of the said acres are or were in the possession of John Frandon, and also all that one other several and inclosed pasture or pasture ground wherein the shepherd's house now standeth, adjoining to the said ground called Swinehill, being divided with an hedge called Course Hadens Hedge, containing by estimation 128 acres, be it more or less; also one other close adjoining to the said last mentioned pasture, and adjoining also to Dunchurch field, containing by estimation 26 acres and two rods, be it more or less; and also three other several and other inclosed closes or pasture grounds, lying betwixt Onely grounds, the Grange and London highway, containing by estimation 135 acres, be the same more or less; and also all hedges, ditches, fences, mounds, freeboards, ways, passages, privileges, profits, commodities, emoluments and hereditaments whatsoever to the said several and inclosed arable meadow and pasture grounds, and to other the before mentioned premisses, or to any of them belonging, or in any wise appertaining, or to or with them, or any of them, with their and every of their appurtenances, and the reversion and reversions, remainder and remainders of all and singular the before mentioned bargained premisses, and of every part and parcel of them, and every of them, and all rents and services reserved upon any demise, lease or grant, demises, leases or grants heretofore made of the same bargained premisses, or of any of them, or of any part or parcel of them, or of any of them; and also all the estate, right, title, interest, claim and demand whatsoever of him the said William Dormer, of, in or to the before mentioned granted premisses, or of, in or to every or any part or parcel of them, or any of them; and all and all manner of profits and commodities whatsoever coming, growing, arising or renewing, or to be had in, of, upon or forth of the high meadow and Ashil in Woolescot, Walcot and Willowby in the said county of Warwick, Mickmeadow and the common greens and the lands leading to and from the said greens in Woolescot and Walcot aforesaid, and of, in, upon and forth of all and every the lands, tenements, meadows and hereditaments of him the said William Dormer, lying and being in the common fields of Willowby aforesaid, and of, in, upon or forth of all, every or any part or parcel thereof, the house or homestall now or lately in the occupation of John Frandon being in Woolescot aforesaid only excepted and foreprized; to have and to hold the same unto the said William Moor and John Carter, their executors or assigns, for the term of one year from the day before the said **[297]** recited indenture next ensuing, and fully to be compleat and ended, as by the

said recited indenture it doth and may appear; by force whereof the said William Moor and John Carter are actually possessed of the premisses. Now this indenture witnesseth, that the said William Dormer, for conveying and assuring the several pasture grounds and meadows, lands, tenements, hereditaments and premisses hereafter mentioned and declared, and for the good love and affection he hath and beareth to Frances his wife, and for her better maintenance and sustentation, and for the natural love and affection, which he beareth unto Robert Dormer, nephew of the said William Dormer, and for divers other good causes and considerations him the said William Dormer in this behalf especially moving, hath granted, released and confirmed, and by these presents doth grant, release and confirm unto the said William Moor and John Carter, their heirs and assigns, all and singular the said several inclosed pastures and pasture grounds, meadows, lands, tenements, hereditaments and premisses bargained and sold, or mentioned, meant or intended to be bargained and sold, in and by the said recited indenture, and every part and parcel thereof, with their and every of their rights, members and appurtenances whatsoever, and the reversion and reversions, remainder and remainders together with the rents and profits of all and singular the recited premisses, and all the estate, right, title, interest, claim and demand whatsoever of him the said William Dormer of, in or to the said several and inclosed pastures and pasture grounds, meadows, lands, tenements and premisses, and of, in and to every part and parcel of the same, except before excepted; to have and to hold all and singular the said several and inclosed pastures and pasture grounds, lands, tenements, hereditaments and premisses, and every part and parcel of them, and every of them, with their and every of their rights, members and appurtenances, unto the said William Moor and John Carter, their heirs and assigns for ever; upon trust and confidence nevertheless in them the said William Moor and John Carter, their heirs and assigns reposed, and to the uses, intents and purposes hereafter in these presents expressed, limited and declared, that is to say, to the intent and purpose, that they the said William Moor and John Carter, and the survivor of them, and the heirs of the survivor of them shall permit and suffer the said William Dormer for and during the term of his natural life, from time to time to receive and take all the rents, issues and profits of all the said several inclosed pastures, meadows, lands, tenements, **[298]** rents, hereditaments and premisses to the sole and proper use of him the said William Dormer and his assigns; and after the decease of the said William Dormer, then to permit and suffer the said Frances, now wife of the said William Dormer, and her heirs for and during the term of her natural life from time to time to receive, perceive and take all the rents, issues and profits of all the said several and inclosed pastures, meadows, lands, tenements, rents, hereditaments and premisses to the sole and proper use and behoof of her the said Frances and her assigns; upon this farther trust and confidence, that after the decease of the said Frances now wife of the said William Dormer, they the said William Moor and John Carter and their heirs, and the survivor of them, and his heirs, shall stand seised of all and singular the said several and inclosed pasture grounds, meadows, lands, tenements, hereditaments and premisses, to the use and behoof of the said Robert Dormer, and of his heirs and assigns for ever, and to and for no other use, intent or purpose whatsoever. And lastly it is covenanted and agreed, and it is the true intent and meaning of these presents, that if the said William Dormer shall at any time hereafter, by any writing subscribed and sealed by him in the presence of two or more credible witnesses, in express words, signify and declare his intention to revoke or make void these presents, or the estate and use herein or hereby limited and appointed unto the said William Moor and John Carter and their heirs, of or in the premisses or any part thereof, that then and from thenceforth touching such of the said lands and premisses, whereof such declarations shall be so made, the use and estate by these presents limited and granted shall cease, determine and be utterly void; any thing in these presents contained to the contrary in any wise notwithstanding.

In witness whereof, &c.

The jury farther find that it was indorsed upon the said indenture thus:

Memorandum, That it is covenanted, concluded and agreed between all the parties to these presents, before the ensealing hereof, that immediately after the deceases of

the within named William Dormer and Frances Dormer, and before the limitations of the uses therein limited, shall be any whit profitable or beneficial, that the within named William Moor and John Carter shall be farther trusted, that they and the survivor of them, and the heir of the survivor of them, shall permit and suffer Jane Herbert, now wife of James Herbert, niece to the within named William Dormer, to receive and take all the **[299]** issues and profits of the within granted premisses, for and during the term of five years from the deceases of the within named William and Frances Dormer, upon this confidence and trust nevertheless, that the said Jane Herbert shall detain and keep the said issues and profits until Jane Herbert, god-daughter to the within named William Dormer, arrive to the age of fifteen years, and in case the said god-daughter dies before the said time, and the said Jane Herbert the mother survives, then the said sums of money so raised to be to her sole profit, use and benefit; and with this farther trust, that at the said age of fifteen years of the said god-daughter, she shall deliver and be accountable for all the issues and profits to the said Jane, the god-daughter, for her sole benefit and use.

The jury farther find, that 9 April 20 Car. 2, the said William Dormer made his last will and testament in writing signed and sealed in the presence of two credible witnesses, by which he did give and devise as followeth:

I do give all my lands in Wooscot *alias* Walcot or Granborough in the county of Warwick, with all their rents, rights and profits thereunto belonging, unto my nephew William Dormer and his heirs for ever, that is, in manner and form following, provided always, and my will and meaning is, that my well beloved wife Frances Dormer shall first enjoy it immediately after my decease for the full term of her natural life, and that immediately after the decease of my said wife, then my will and meaning is, that my god-daughter Mrs. Jane Herbert shall enjoy it with all the profits and commodities thereunto belonging, during the term of five years, beginning from the day of my aforesaid wife's decease; and in case she die, then to Dorothy Herbert, sister to the said Jane Herbert, shall enjoy the aforesaid five years of the aforesaid lands; and in case the said Dorothy die before she shall receive the aforesaid five years, then my will and meaning is, that my niece Jane Herbert, mother to the aforesaid Jane and Dorothy, shall enjoy all the rents and profits of the aforesaid lands in Wooscot *alias* Walcot or Granborough in the county of Warwick, for the term of five years, beginning from the day of my wife's decease, and after the expiration of the aforesaid five years, then my will and meaning is, that my nephew, William Dormer, second son to my brother Sir Robert Dormer, shall have the inheritance to himself and to his heirs for ever. *Item*, Whereas there is a suit at this time between my two nephews concerning 2000l. given by my brother Sir Robert Dormer, to his younger son William Dormer, by virtue of a **[300]** codicil made by his father, and signed by himself in his life-time, which codicil one Mr. Lane, a lawyer of the Inner Temple, and myself perused, as being trusted by the said Sir Robert Dormer for the aforesaid William, during his minority, by virtue of which codicil we found therein specified to be given to his son William Dormer 2000l. which sum, after the decease of my brother Sir Robert Dormer, was by myself demanded of my nephew Robert Dormer, when he would pay it us in? Who answered, *that he hoped he might as well keep it as any other, paying use for it.* Upon which answer Mr. Lane and myself were content he should, and so it rested for that time, but myself going presently into France and leaving the whole business to Mr. Lane, who dying before I came back into England, and not having registered the aforesaid codicil, which as appeareth is now lost, only a copy thereof appears taken by a scrivener, which it seemeth is not sufficient for the recovering the aforesaid sum of 2000l. so that my nephew William Dormer is likely to lose his right; therefore in consideration of this I think myself bound in conscience to see him satisfied out of my own estate for our omission and great oversight of not having registered the said original. This I have written to shew how that I justify to the whole world in this my last will and testament, that there was such a codicil, wherein my brother Sir Robert Dormer gave to his son, William Dormer, 2000l. and that his brother, Robert Dormer never denied payment thereof till now since his marriage, and my last coming out of England. *Item*, My will and meaning therefore is, that I do make my nephew William Dormer sole heir to my whole estate, provided he doth observe the conditions before mentioned in this my last will. In witness, &c.

That the said William Dormer, the uncle, in November 20 Car. 2, died.

That the said Robert Dormer, lessor of the plaintiff, is nephew and heir of the said William the uncle, and the same person named in the said will.

That William the defendant is nephew of the said William the uncle, and the same person named in his said will.

That the term of five years expired in May 29 Car. 2.

That the said William Dormer the defendant, afterwards entered into the said tenement, and became seised, *prout lex postulat.*

[301] That the said Robert Dormer, 1 Jun. 29 Car. 2, entered, and 1 Septemb. 29 Car. 2, made the lease to the plaintiff *prout*, who became possessed until ejected. And the jury say, that the tenements in the declaration and the tenements in the indentures of 25 and 26 Septemb. 7 Car. 2, and also in the said will dated 9 April 20 Car. 2, are the same. And that the said William Dormer, now defendant, and William Dormer, the nephew, named in the said will, are the same. And the said William Dormer, now defendant, nephew of the said William Dormer the testator, did observe and fulfil all the agreements in the said will mentioned, and that the said Frances Dormer died in Apr. 22 Car. 2. And if upon the whole matter the devise be a revocation of the uses in the indenture, they find for the defendant, otherwise for the plaintiff.

West for the plaintiff. That the will is no revocation of the uses, because the words (*by express words*) exclude all implicit revocations; for every revocation must pursue the power, for an estate at common law could not be undone without an entry, Coke upon Litt. 237 a. and 10 Co. 144, *Scroop's case*, and Hob. 312, *Tibbot* versus *Lee*, come not to this case, nor *Frampton's case*, Moor 736.

Serjeant Croke for the defendant. The interpretation of powers of revocation have been always favourable, because estates of inheritance depend thereupon. Here the will is a revocation, because when two acts cannot consist, the later is a revocation of the former. In some things the donor or feoffor shall bind a power to circumstances, as for a deed to be executed before three witnesses, &c. But where there is only a general expression, the later act shall satisfy those general words.

As for authorities, 1 Cr. 472. Jones 392, *Snape* versus *Turton*, *Scroop's case*, and *Frampton's case*, and Hob. *Tibbot* versus *Lee*, Latch 24, *Harding* versus *Warner*. Power of revocation upon tender of rings, *ipso declarante*, that he intended to make void the uses. There were two against two. Noy 79. Jones 134. Palmer 429. 2 Roll. Rep. 393.

Judgment was afterwards given, that the power of revocation was well executed.

[302] LISLE *versus* GREY. ANTEA 278.

Uses. Pollexf. 582. 2 Jon. 114. 2 Lev. 223. 2 Show. 6. *Postea* 315.

Serjeant Mainard for the plaintiff in the writ of error. The words, *And so severally and respectively to every of the heirs male of the body of the said Edward Lisle*, cannot be intended to the sons as purchasers, but the words ought to be construed according to the rules of law.

Holt for the defendant much to the same purpose with Sir Creswel Levinz.

North Chief Justice. Heir male is the description of the person, and the word *so* is intended onwards, and not in like manner. *Adjournatur. Vide post.*

RALPH DUTTON ESQUIRE, AND GRIZIL HIS WIFE, PLAINTIFFS; NEVIL POOL ESQUIRE, DEFENDANT.

In B. R. Hill. 28 & 29 Car. 2, Rot. 1123.

Assumpsit. 1 Danv. Ab. 64, p. 3. 1 Vent. 319, 332. 2 Lev. 210. 2 Jones 102. 3 Keb. 786, 814, 830, 836.

In trespass upon the case. The plaintiffs declare, that whereas Sir Edward Pool Knight, father of the said Grizil was possessed and lawfully interessed of and in certain

timber-trees growing in a certain park called Oaksey-Park in Wiltshire, 1 May 26 Car. 2, intended to cut down and sell the same to raise portions for his children, of which said intention the said defendant having notice, he the said defendant then at Sherborn in the county of Gloucester, in consideration that the said Sir Edward at the defendant's special instance and request would forbear cutting the said trees, did promise the said Sir Edward, that he the said defendant would well and faithfully pay to the said Grizil 1000l. And the plaintiffs in fact say, that the said Sir Edward after the making the said promise did not cut any of the said trees, and yet the defendant did not pay the said Grizil whilst she was sole, nor the said Sir Ralph and Grizil, or either of them after their marriage, the said 1000l. though thereunto requested, *ad damnum* 1000l. Upon *non assumpsit* pleaded, and verdict for the plaintiff, and damages 1000l. and judgment, the defendant brings a writ of error, and assigns the general error.

[303] Holt for the plaintiff in the writ of error. The promise is made to Sir Edward Pool, and the action is brought by Grizil and her husband, to whom the payment was agreed to be made, which ought not to be. 3 Cro. 369, *Jordan* versus *Jordan*, 619 and 652. *Levet* versus *Hawes*, 849 and 881. *Rippon* versus *Norton*, Roll. Abr. 1, 31, pl. 6 and 30, pl. 3, *Archdale's case*. A promise to pay money to the attorney of A. the action may be brought by A. or his attorney. Latch. 206, *Legat's case*.

Pollexfen for the defendant in the writ of error. The action is maintainable by the party to whom the promise was made, or to the *cestuy que use*, the promise was indifferently, Roll. Abr. 1, 31 Z. pl. 8, *Oldham* versus *Bateman*, 269, *Starkey* versus *Mills*, and of this opinion were all the justices and Barons; and judgment was affirmed. 2 Co. 47 a. pl. 175, *Sprat* versus *Agar*, M. 1658, B. R.

KNIGHT *versus* PEACHY AND JOHN FREEMAN.

Covenant. 1 Vent. 329. 2 Jon. 109.

Error to reverse a judgment in B. R. in an action of covenant, wherein the plaintiff declares against the defendants as surviving executors of Michael Knight deceased; for that whereas one Peter Wood was seised of a toft, &c. in London, in fee, whereon a messuage stood, called the Tallowchandler, 4 March 22 Car. 2, demised by indenture the same to one William Ginger, from Lady-Day then following, for 51 years, who entered and became possessed; that the said William Ginger, 1 Sept. 22 Car. 2, built a new messuage upon the said toft, and 8 Sept. 22 Car. 2, by indenture demised the said messuage, &c. to John Web, from Michaelmas following, for twenty-one years, at 28l. rent sterling; and the said John Web, for himself, his executors, administrators and assigns did covenant to pay the rent, and to repair the premisses, and entered and became possessed; and 1 December 23 Car. 2, granted and assigned the said premisses to the said Michael Knight, and all his estate and term therein, who entered and became possessed; and 2 Dec. 24 Car. 2, made his will, and the defendants and one Thomas Read deceased, his executors, and died. That the defendants took upon them the execution of the said will, and entered, and became possessed. That the said William Ginger by indenture dated 20 June 25 Car. 2, granted all the premisses, **[304]** and all his estate therein to the said William Peachy the plaintiff, to which grant the defendants, &c. did attorn, by reason whereof the plaintiff became possessed of the reversion of the said messuage for the residue of the said twenty-one years. That the said Thomas Read died 1 March 1673, and 84l. for three years, ending at Michaelmas last, was behind, and some repairs wanting; and so the defendants have broken their covenant *ad damnum* 200l.

The defendants plead, that after the making the said indenture of demise and grant, and assignment by the said John Web to the said Michael Knight, and after the said grant and assignment to the plaintiff, and before any part of the rent of 48l. was behind, viz. 10 October 25 Car. 2, the defendants assigned the premisses to one Evan Powel, of which the plaintiff had notice. The plaintiff replies, that the said assignment was made by fraud and covin between the said defendants and the said Evan Powel, to defraud the said plaintiff of the rent aforesaid. To which replication the defendants demurred, and judgment was given in B. R. for the plaintiff; and the defendants brought a writ of error, and assigned the general error.

And Serjeant Weston for the plaintiff in the writ of error. That cannot be said to be by fraud, which the law allows to be done; and here the assignees are not restrained from assigning, and therefore the assignment cannot be said to be by fraud generally; but some particular fraud ought to have been alledged as perception of rents, continuance in possession, &c. For in all cases where the thing stands indifferent to be fraudulent or not, there fraud cannot be pleaded generally, but the same must be set forth in particular. Plowd. 46 b. Mich. 9 H. 6, 41, cited there.

Pollexfen and Holt for the defendant in the writ of error. If fraud cannot be generally assigned here, a landlord can never be sure of his rent, for he cannot tell upon what terms his lessee assigns the tenements.

In case of a recovery by default, fraud may be generally alledged, as in *Wimbish and Talbois's case*, Plowd. 47, but if after a verdict, there it must be specially alledged; and *Tresham's case*, 9 Co. 110 a. the resolution there is direct for this case, and afterwards the parties agreed.

[305] BAMBRIDGE *versus* BATES, CUSHEE AND DATE. MIDDLESEX.

Trespass. *Postea* 328, 337.

Trespass for breaking the plaintiff's house at the parish of St. Mary Matfellon, *alias* White-chappel, and taking away his goods, and names them, *ad damnum* 150l. The defendants plead not guilty, and the jury find a special verdict, viz.

That by an Act of Parliament 12 Car. 2, cap. 23, 'twas enacted, that from and after the 25th day of December 1660, there shall be throughout Your Majesty's kingdoms of England, dominion of Wales, and town of Berwick upon Tweed, raised, levied, collected and paid unto Your Majesty, during your life, for beer, ale, cider, and other liquors herein after mentioned, the several rates, impositions, duties and charges therein after expressed, and in manner and form in the said Act following, viz. that all common brewers of beer and ale shall once in every week, and all inn-keepers, alehouse-keepers, victuallers, and other retailers of beer, ale, cider, perry, metheglin, strong-water, brewing, making or retailing the same, shall once in every month make true and particular entries at the office of excise, within the limits of which the said commodities and manufactures are made, of all beer, ale, perry, cider, metheglin, strong-water, or other the liquors, aforesaid, which they or any of them shall brew, make or retail in that week or month respectively, as aforesaid; and that all such common brewers who do not once a week make due and particular entries, shall forfeit 5l. and that every such inn-keeper who doth not make true and particular entries once a month, 5l. And that every alehouse-keeper, victualler, and other retailer, who doth not once a month make due and particular entries, shall forfeit 20s. And that every common brewer who shall not pay, and clear off within a week after he made his entry, or ought to have made his entry, as aforesaid, shall pay double the value of the duty; and that every inn-keeper, alehouse-keeper, victualler, or other retailer who shall not pay and clear off within a month after he made his entry, or ought to have made his entry, as aforesaid, shall pay double the value of the duty; the said respective forfeitures to be levied upon their goods and chattels in such manner and form as hereafter in this Act is **[306]** ordained and directed; and that all forfeitures and offences made and committed against this Act, or any clause or article therein contained, shall be heard, adjudged and determined by such person and persons, and in such manner and form, as hereafter in and by this Act is directed and appointed, that is to say, all such forfeitures and offences made and committed within the immediate limits of the chief office in London shall be heard, adjudged and determined by the said chief commissioners and governors of excise appointed by His Majesty, or the major part of them, or by the commissioners for appeals and regulating of this duty, or the major part of them in case of appeal, and not otherwise; and all such forfeitures and offences made and committed within all or any of the counties, cities, towns or places within this kingdom, or dominion thereof, shall be heard and determined by any two or more of the justices of the peace residing near to the place where such forfeitures shall be made, or offence committed; and in case of neglect or

refusal of such justices of the peace by the space of fourteen days next after complaint made and notice thereof given to the offender, then the sub-commissioners, or the major part of them, appointed for any such city, county, town or place, shall, and are hereby empowered to hear and determine the same: and if the party find himself aggrieved by the judgment given by the said sub-commissioners, he shall or may appeal to the justices of the peace at the next Quarter-Sessions, who are hereby empowered and authorized to hear and determine the same, whose judgment therein shall be final, which said commissioners for appeals, and regulating this duty, and the chief commissioners for excise and all justices of peace and sub-commissioners aforesaid, respectively, are hereby authorized and strictly enjoined and required, upon any complaint or information exhibited and brought of any such forfeiture made, or offence committed contrary to this Act, to summon the party accused, and upon his appearance, or contempt, to proceed to the examination of the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible witnesses (which oath they or any two or more of them have hereby power to administer) to give judgment and sentence according as in and by this Act is before ordained and directed, and to award and issue out warrants under their hands for the levying of such forfeitures, penalties and fines, as by this Act are imposed for any such offence committed upon the goods and chattels of the **[307]** offender, and to cause sale to be made of the said goods and chattels, if they shall not be redeemed within fourteen days, rendering to the party the overplus if any be, and for want of sufficient distress to imprison the party offending till satisfaction be made, and that all parts of the Cities of London and Westminster, with the borough of Southwark, and the several suburbs thereof, and parishes within the weekly bills of mortality, shall be under the immediate care, inspection and management of the said office, and that if any person or persons shall at any time be sued or prosecuted for any thing by him or them done or executed in pursuance of this Act, he or they shall and may plead the general issue, and give this Act in evidence for his defence, and if upon a trial the verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs be non-suited, then such defendant or defendants shall have double costs to him or them awarded against such plaintiff or plaintiffs.

That this Act was confirmed 13 Car. 2, cap. 7.

That 22 & 23 Car. 2, cap. 5, it was enacted as followeth, viz.

That from and after the 24th day of June 1671 there shall be throughout Your Majesty's kingdom of England, dominion of Wales, and town of Berwick upon Tweed, raised, levied, collected and paid unto your Majesty, your heirs and successors, during the space and term of six years, from the 24th day of June aforesaid, and no longer, for beer, ale, cider, and other liquors herein after expressed by way of excise, over and above all other duties, charges and impositions by any former Act and Acts, set and imposed in manner and form following, that is to say, *inter alia*, for every gallon of low wines of the first extraction, made of any kind of imported wine or cider, or other materials imported, to be paid by the maker or seller. 2. And that every the common brewers and retailers of ale and beer, and all and every other person and persons liable to and chargeable with the pain of any excise, or new impost upon beer, ale, or other exciseable liquors, by virtue of any former law of excise now in force, shall also be liable to, and charged with the payment of the additional rates and duties hereby imposed, which said additional rates and duties shall be collected, levied and paid in the same manner; and the same persons liable to, and chargeable with the pain thereof, shall, in case of neglect or default of entry or payment, or in case of any other neglect or offence **[308]** tending to defraud His Majesty, or any of his officers, farmers or collectors of the duties or rates hereby imposed, be also subject to the like proceedings, judgments and executions, and shall likewise incur the same penalties, fines and forfeitures as he or they, his or their heirs and executors or administrators should or might have been subject to, or ought to have incurred for the non-payment of any former duty of excise, or for the like offence committed against any former law of excise now in force; and that all forfeitures and offences made and committed against this Act, or any clause, article or sentence herein contained, and all appeals, shall be heard, adjudged and determined by such person and persons

and in such manner and form, as the like forfeitures and offences against the former laws of excise are thereby appointed to be heard and determined, and not otherwise; and moreover, that all commissioners, sub-commissioners of excise, all commissioners of appeals, justices of peace, constables, and other officers and ministers whatsoever, shall have, use, and exercise the same jurisdiction, power and authority, whether it be judicial or ministerial for the better ordering, collecting, levying and securing the duties, and the additional rates and duties hereby imposed, as he or they could have had, used or exercised for the better ordering, collecting, levying or securing any former rates or duties of excise whatsoever; and that all fines, penalties and forfeitures, which shall be incurred by reason of any offence committed against this Act, shall be employed, one moiety thereof to the use of the King's Majesty, his heirs and successors, another moiety thereof to him or them that shall or will inform or sue for the same; and also, that if any person or persons shall at any time be sued or prosecuted for any thing by him done in pursuance or execution of this Act, he and they shall and may plead the general issue, and give this Act in evidence for their defence; and if upon trial a verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs be nonsuited, then every such defendant or defendants shall recover his or their double costs.

That by another Act of Parliament 29 Car. 2, it is enacted, that from and after the 24th day of June 1677 there shall be throughout Your Majesty's kingdoms of England, dominion of Wales, and town of Berwick upon Tweed, raised, levied, collected and paid unto your Majesty, your heirs and successors, during the space and term of three years, from the 24th day of June aforesaid, and no longer, for beer, ale, **[309]** cider and other liquors herein after expressed by way of excise, over and above all other duties, charges and impositions by any former Act or Acts set or imposed in manner and form following, viz. (*inter alia*) for every gallon of low wines of the first extraction, made of any kind of imported wine or cider, or other materials imported, to be paid by the maker or seller. 2. And that the several rates and duties of excise upon beer, ale and other liquors, shall be raised, levied, collected and paid upon your Majesty, your heirs and successors, during the space and term of three years, as aforesaid, and no longer, in the same manner and form, and by such rules, means and ways, and under such penalties and forfeitures, as are contained, mentioned, expressed and directed in the before cited Act of Parliament of 22 and 23 Car. 2. That the plaintiff at the time of the trespass, and for 3 years before was, and continued a common distiller of strong-waters at Wapping in Middlesex, within the jurisdiction of the chief commissioners of excise, and during all the time aforesaid, did exercise the art and mystery of a distiller of strong-waters, and did extract a certain low wine of the first extraction. That one William Hall, gent. within the time aforesaid, viz. 2 Nov. 29 Car. 2, at the principal capital office of excise, in the parish of Saint Peter the Poor in London, did exhibit before the chief commissioners and governors of the excise, an information as well for the King as for himself, that the plaintiff being a distiller and maker of strong-waters, and of low wines within the jurisdiction of the said office, between 23 August 29 Car. 2, and 24 September following, being one month, made 5880 gallons of low wines of the first extraction of cider, or other materials imported, and did not pay the excise due for the same, contrary to the form of the statute in such case made and provided. To which information the plaintiff appeared, and pleaded not guilty. And so far it proceeded, that 13 November 29 Car. 2, the commissioners proceeded to the examination of the matter aforesaid, and thereupon it did appear by the oath of credible witnesses, that the plaintiff had within the time aforesaid made 5880 gallons of low wines of the first extraction of materials imported, and had not paid the excise due for the same; and thereupon the said commissioners did adjudge that the plaintiff should forfeit 98l. being double the value of the said low wines, to be levied of his goods and chattels.

[310] That 18 December 29 Car. 2, the said commissioners, at the prosecution of the said William Hall, made their warrant to the defendants, being messengers belonging to the said office, reciting the judgment aforesaid, and by which the said commissioners did authorize and require the defendants, in His Majesty's name, immediately to enter into the plaintiff's house and distillatory, and to levy, by way of distress, the said sum of 98l. of the goods and chattels of the plaintiff, and the same goods to be disposed according to the said Act.

That the defendants pursuant to the said warrant, 10 Jan. mentioned in the declaration, did enter into the plaintiff's house, and did take the goods in the declaration mentioned, for the said 98l. and that the same are not sufficient to answer the said sum of 98l.

That there are dregs of sugar, called molasses, made beyond sea, which are brought into England.

That there are molasses which are made in England.

That the low wines, in the information and judgment specified, were extracted from the molasses, which were extracted and made in England from sugar imported from beyond the seas, and divers other English materials.

That the sugars, from which the molasses of which the said low wines were extracted, were ten times of more value than the rest of the materials which were used by separation of the aforesaid molasses from the sugar aforesaid.

That the molasses can never be made sugar again.

That the plaintiff in making the said low wines doth usually add seven hogsheads of wash, in which are put one quarter of malt, and twelve hogsheads of water to produce the extract of 200 gallons of low wines.

That the principal spirit of that extraction is produced from the molasses. But whether upon the whole matter the defendants be guilty or no, the jurors *ignorant, & petunt advisamentum Curiæ.*

Williams for the plaintiff. The question is, whether molasses be an imported material within the statute of 29 Car. 2.

1. This Act is intituled a free gift of the Commons in Parliament, without any recompence moving from the Crown, and therefore ought to be expounded beneficially for the people.

[311] 2. 'Tis a new charge and imposition upon the subject, and odious to the people by way of excise.

3. 'Tis found that molasses made in England is used in making of low wines, and 'tis found that this low wine is made of these molasses.

The Act distinguishes between low wines made of foreign molasses, and wine made of English materials.

No low wine is made of English material alone.

Materials here are intended immediate materials, viz. the molasses which are English.

Object. Materials shall be such as comprehend the principal part in value.

Resp. The bulky part is the materials, and not the value; and here the lump is the quarter of malt; as English cloths are so called if they be made of English cloth, though there be French lace upon them of double the value.

And the material cause is that which is immediate, as cloth is the material cause of a garment, not the wool.

And 'twill be a hard construction to put upon the trade of distillers, who are numerous; and yet the whole rent reserved upon the duty from them to the farmers is but 50l. per annum, which would be 5000l. if they should be said imported materials, and 'twould not be worth their labour, if so, and multitudes would be undone.

Ward for the defendant. There are two questions.

1. If an action of trespass will lie against the officers, because they acted by authority from the commissioners of excise, who have jurisdiction of the cause, and ought not to be questioned here?

2. Whether the duty be due here to the King.

1. It doth not lie, 8 Co. *Dr. Bonham's case*, 10 Co. the case of the Marshalsey. And when a man acts as Judge, he is not questionable. 1 Cr. 341, *Pidgeon's case.* And the plaintiff ought to have brought his appeal, and not an action of trespass.

Object. Mich. 19 Car. 2, *Terry* versus *Huntington.*

Resp. The question there was, whether the liquors were strong-waters perfectly made? And the jury found against the fact, and so the commissioners had not jurisdiction.

To the 2d. Here is a duty due for these low wines.

[312] 1. They are made of materials imported, viz. dregs of sugar and lees of wine, which are not English, and though English materials are added, that alters not the case, because 'tis found, that all the English ingredients together, without these materials, would not have made these low wines, *& ubi major pars ibi totum.* In the case of alnage, which is only for woollen cloth; yet resolved that linsey woolsey pays alnage, though but part wool.

Upon the statute of tillage, the major part gives the denomination, when prices of corn exceed such a value; the common price regulates that statute.

Croon's case, information upon the statute of 22 Car. 2, the last clause thereof, which says, that all wines remaining in store shall pay the duty. The defendant there imported wines in 1666, and so the wines were not remaining in store, because imported before the Act; and yet resolved that they shall pay; and so agreed in a writ of error by Hales and Vaughan. *St. Hill's case*, importation of wheat meal was within the Statute of Tillage.

As to the reservation of the rent to be but 50l. 'tis not found in the verdict. *Adjournatur. Post.*

Memorandum, In September 1679, Francis Barrel Serjeant at Law, who had been a reader of the Middle Temple, died in Kent.

Memorandum, October 22, Sir William Jones, Knight, Attorney General, surrendered up his patent, and I took the acknowledgment thereof; and so the place of Attorney General became void, by leave from His Majesty. And afterwards about October 25, Sir Creswel Levinz, Knight, was made Attorney General.

By the stat. of 26 H. 8, cap. 3, the revenue of the first-fruits and tenths of the clergy was granted to the Crown, and the several bishops were thereby appointed collectors thereof in their respective dioceses. The auditor was to make up their respective accounts, which were by him transmitted into the office of the pipe, according to the course of the Exchequer, where the bishop had his *quietus est*, and where all accountants accountable in the Exchequer have their **[313]** *quietus est* at this day. But the auditor was not thereby enjoined to give the bishop a duplicate of his account; and it was needless then, because he had his *quietus est* from the pipe, without fee or other reward for the same.

By the statute of 32 H. 8, cap. 45, that course was altered, and a Court of First Fruits and Tenths was erected, consisting of a chancellor, treasurer, attorney, and two auditors, who were to make up the accounts of that revenue, and being fairly ingrossed, were to remain in the same Court as the King's records, and not transmitted into the pipe: but no *quietus est* or duplicate of his account was thereby enjoined to be made and given to the bishops.

By the statute of 7 E. 6, cap. 1, the auditors were enjoined to make forth and give duplicates of their accounts at the reasonable request and cost of the accountant, wherein the bishops were included, and accordingly the practice has gone ever since the beginning of Queen Elizabeth; and I never heard it was disputed by any until the Archbishop of York, when Bishop of Carlisle, was pleased to call his duplicate of his account, a *quietus est*, and so would pay nothing for it.

Queen Mary by virtue of an Act of Parliament made in the second session in the first year of her reign, cap. 10, by her letters patent dissolves the said Court of First-fruits, and then creates a new office and officer, viz. the remembrancer of the first-fruits and tenths, who was to take all compositions, and to enter all accounts, and to make out all process against non-solvents, and all proceedings therein, to be under the survey of the Court of Exchequer.

In the second and third year of Philip and Mary, the clergy were exonerated from payment of first-fruits and tenths.

In the first year of Queen Elizabeth, cap. 4, the payment of first-fruits and tenths was restored to the Crown, and all things concerning the same that remained untaken away the eighth of August in the second and third year of the said Philip and Mary,

were then restored and settled under the survey and government of the Exchequer, but the Court **[314]** of First-fruits was not revived, for that was dissolved before the said eighth of August, and the remembrancer being then established, continues to this day in every degree, sort or condition, as it was at or before the eighth of August in the said second and third year of Philip and Mary, at which time the clergy were exonerated from payment of first-fruits and tenths.

The archbishop requires Auditor Bridges to examine, state and pass his accounts for the year 1675, 1676, and 1677, according to the method I conceive he has sent up, which is not pursuant to the auditor's trust, and would be prejudicial to the King to the loss of all arrears owing by the incumbents; for in his state no arrears of the clergy are continued in charge. Not understanding the true nature of those accounts, in that they relate not barely and simply to the bishops receipts and payments, but to the whole revenue of the respective dioceses, each incumbent is thereby charged and discharged. And if no arrears be continued in charge upon the incumbents, they all, or any of them may plead the account made out in the bishop's name (when entered upon record) for their discharge.

[315] TERM. MICH. 31 CAR. 2. IN THE EXCHEQUER CHAMBER.

JOHN LISLE *versus* JOHN GREY. ERROR OUT OF B. R.
EJECTMENT. NORTHUMBERLAND.

Uses. Pollexf. 582. 2 Jones 114. 2 Lev. 223. 2 Show. 6. *Antea* 278, 302.

The plaintiff declares of the demise of William Lisle of four messuages, twenty acres of land, two hundred acres of meadow, two hundred acres of pasture, and three hundred acres of moor in Acton, in the parish of Felton. Upon not guilty pleaded, the jury find a special verdict.

That one John Lisle was seised in fee of the tenements in question, and so seised 15 August 15 Car. 1, by indenture between himself of the one part, and John Robson, and others, of the other part, for settling the premisses in his blood; and in consideration of the natural love and affection to those to whom the estates afterwards are limited, and for the advancement of his son Edward Lisle, covenants to stand seised, to the use of himself for his life without impeachment of waste, the remainder to the use of the said Edward Lisle for his life, the remainder to the use of the first son of the said Edward, and the heirs male of his body, so to the second, third and fourth sons, and so severally and respectively to every of the heirs male of the body of the said Edward Lisle, lawfully to be begotten, and the heirs male of the body of such heirs male lawfully to be begotten, according to their ages and seniorities, and for default of such issue, to the use of William Lisle of Warkworth, gent. for his life, and after his decease, to the use of his first son in tail male, and so to his other sons, the remainder to the right heirs of the covenantor.

Provided, that if it shall happen the said Edward Lisle to die without issue male of his body lawfully begotten, then the said covenantor and his heirs shall stand seised, to the use, intent and purpose that they shall raise out of the profits the several sums of 100l. a-piece for each and every of the **[316]** daughters of the said Edward Lisle, to be paid to the eldest first, and so in order according to their several ages; and the said John Lisle had issue Edward his eldest son.

1 Mar. 17 Car. 1, John Lisle died so seised.

Edward had issue only a daughter still alive.

30 September 1649, Edward made a feoffment to the use of Thomas and John Forster, and their heirs, with warranty against all men.

Hill. 1649, a recovery was suffered wherein Ralph Forster was demandant, the said Thomas and John Forster tenants, and the said Lisle vouchee, and he vouched over the common vouchee.

1 May 1674 Edward Lisle died without any issue, but his daughter; that at his death all the estates limited by the indenture of 15 August 15 Car. 1, preceding the

limitation to William Lisle named in the said indenture, and now lessor of the plaintiff, did end and determine.

The said William Lisle was cousin of the whole blood of the said John Lisle.

20 January 28 Car. 2, William Lisle entered upon the possession of the defendants, and made the lease to the plaintiff, who entered and was possessed until the defendants ejected him. And if for the plaintiff, for the plaintiff, &c.

And judgment was given in B. R. for the plaintiff, and now the defendants bring a writ of error.

And I conceive judgment ought to be reversed.

The single question in this case will be (for I do not think the proviso which appoints the daughters portions will make any doubt, because 'tis found in the verdict, that all estates precedent to William Lisle's estate determined upon the death of Edward) what estate Edward Lisle had by virtue of the indenture of 15 August 15 Car. 1, for if he had but an estate for life, then the judgment ought to be affirmed; but if he had an estate-tail, then the judgment ought to be reversed; and I hold that he had an estate-tail.

There are but three arguments that I can find, that can be urged why he should have but an estate for life, viz.

1. The intent of the covenantor.
2. That the word (*heirs*) here must be taken for sons or issues.
3. That heirs male here must take by way of a springing use.

[317] 1. *As to the first.* That it was the intent of the covenanter, that the heirs male of Edward should take by purchase, seems apparent.

1. From these words, so, viz. as the four sons, so every other heir male have it.
2. Severally and respectively as they become in being.
3. Why should but four sons be named, had not the covenantor intended that every other son should take by the subsequent words?
4. It's provided, that Edward shall have power to make provision for the daughters, which needed not have been, if the covenantor intended an estate-tail.
5. To the heirs male of such heirs male, had been needless.
6. To the heir male according to their seniority.

All which do shew that it was the intent of the covenantor to have Edward to be but tenant for life, and his sons to take as purchasers; notwithstanding which intent, yet if such intent cannot consist with the rules of law, the limitation will be void, and therefore a grant of lands by deed executed by livery and seisin to A. for ever is but an estate for life, though the feoffor intended otherwise. Doct. & Stud. lib. 1, cap. 24, fol. 39 b. So a gift by deed to a man and his heirs for twenty years shall go to the executors. Lit. sect. 740. Doct. & Stud. lib. 2, cap. 20, f. 93 b. So a feoffment to A. upon condition that if he pay not B. a certain sum, B. shall enter, yet B. cannot enter.

And this holds as well in case of a use, as at the common law; for before the statute 27 H. 8 after uses had gained the reputation of inheritances descendible, the common law directed the descent of them, and therefore there was *possessio fratris* of a use, as well as of land. 5 E. 4, 7. 4 Co. 22 a.

Uses are now reduced to the rules of the common law. 1 Co. 87 b. *Corbet's case*, 6 Co. 34, *Fitzwilliams's case.*

A feoffment to the use of A. and his issues male of his body makes not an estate-tail. Roll. Abr. tit. Estate 837, R. pl. 1 and 2.

And therefore in our case it being expressly against the rule of law, that where the ancestor takes an estate for life, and afterwards the land is limited to him and the heirs of his body (*heirs*) shall be a word of limitation. 1 Co. 104 a. *Shellie's case.* These words shall not be construed according to the intent of the party, but according to the rule of law, **[318]** and so Edward shall be in of an estate-tail executed by virtue of these words.

Heir not taken for issue.

2. *As to the second argument.* Where this limitation is to the heirs male, that is, to his (issues) male, and so as much as (sons).

True it is, in the Scripture phrase 'tis sometimes so taken, as, *This is the heir, let us*

kill him; and St. Paul, *The heir whilst he is a child is under tutors and governors, and differeth not from a servant.*

But in our law 'tis never taken so, no not in a will.

In *Foster and Ramsey's case*, Mich. 1657, B. R. the case was to this purpose, thus: Sir Robert Ramsey had issue four sons, Robert, Nicholas, John and George; Robert being an alien had only daughters; Nicholas had issue Patrick; John by his will gives his land to the heir of his brother Nicholas in fee, Nicholas being then alive. Resolved, Patrick the son did not take; and yet in common parlance the eldest son is called heir. 2. It might amount to a description of the person, and to enure as an executory devise, viz. to the heir of my brother Nicholas. 1. To the person who shall be heir at the death of my brother Nicholas; and yet resolved *ut supra:* for the proper use of the word *heir*, is to make an inheritance. 1 Co. 103 b. *Shelly's case.* And should the word *heir* be otherwise taken, and only as a description of the person, it would make strange alteration, especially in wills.

Now if this word cannot be taken for son or issue in a will, much less in a deed, which is contrived by learned advice.

The third and last argument is, That this estate may enure to the heirs male by way of springing use; as thus, to the heirs male of Edward, that is, to such others as shall be his heirs male of his body, when they shall have a capacity so to take; and in the mean time the use to sleep in the covenantor; and so was *Pibus and Mitford's case* in B. R. 25 Car. 2, B. R. where the case was thus. Upon a special verdict in ejectment, Michael Mitford was seised in fee, and had issue two sons, viz. Robert by his first wife, and Ralph by his second wife, whose name was Jane, and so being seised by indenture covenants to stand seised, after the date of the said indenture, *to the use of the heirs male of his body begotten on the body of his said wife Jane, with a* **[319]** *remainder to his own right heirs.* And the question was, whether any estate did accrue to the son by the second wife? And adjudged that there did by way of a springing use.

But I think there is good reason for that case, and yet not for the case in question. For in that case, 'tis true the covenantor had all the estate in him at and after the time of the covenant, but it cannot be said that he had an estate for life, or any other particular estate, and so 'tis not within the rule of *Shellie's case.* But in our case Edward Lisle was seised for life (and so the verdict expresly finds it) and so within the rule of *Shellie's case* directly.

And if this construction should be made, I cannot see in what case the rule in *Shellie's case* will hold; for all may be interpreted as springing uses, and to lie *in gremio legis* till there be a son. And I take the rule in *Shellie's case* to be a positive law, of which there can no reason be given, but is a land-mark by which other cases are bounded; and such are many rules in our law, as why a fine should not be reversed for non-age of the conusor but by inspection during the non-age; and yet in a common recovery 'tis otherwise; so life and death are to be tried by jury, yet the life of the husband, *in a writ of dower, is to be tried by witnesses.*

But upon the whole matter, I take this case to be the same with *Lewis Bowles's case*, and that here Edward had an estate-tail; and so judgment ought to be reversed.

MURRAY *versus* EYTON. ANTEA 260, 286.

Estate. 2 Jon. 237. Pollexf. 491. Skin. 95. 2 Show. 104. *Postea* 338.

Saunders for the plaintiff. The sole question depends upon the fine and conveyance levied and made by Charles Earl of Derby; and in this case there are two points.

1. Whether the Private Act of Parliament of 4 Jac. hath altered the estate-tail granted by the letters patent of 2 R. 3, and hath made it another estate, or hath altered it in some accidents.

2. Admitting that the estate be altered, whether this new estate be restrained from alienation, by 32 H. 8, cap. 36.

It appears upon the verdict, that Earl Charles received 1700l. for the sale of the

land. But the land is of the value of 2000l. per annum, and the purchasers have reimbursed themselves at least 40000l.

[320] Before I shall speak to the first point, I premise, 1. That the reversion of the Crown continues as it was at the time of the making of the letters patent. 2. If this Act of 4 Jac. had not been made, the first estate-tail could not have been barred. 3. If the estate-tail is not barred, then neither the feoffment nor fine have made any discontinuance, Co. Lit. 355 a.

And that the Act of 4 Jac. hath not altered the first estate-tail, I shall prove, by answering some objections already made, and then produce reasons.

1. *Object.* The first estate had no power to make jointures to the wives of them, or the wives of their eldest estates, which this estate hath.

Resp. It doth appear, that 'twas the intent that only a third part should be so disposed, which was no more than they should have for dower; and some of the lands are restrained from that privilege.

2. *Object.* By the letters patent every of the grantees was tenant in tail, and might commit waste; but so cannot tenant for life by this Act.

Resp. The omission of that privilege doth not alter the estate; for if the King gives land upon condition, that the grantee shall not commit waste, and afterwards an Act of Parliament is made which releases that condition, that doth not alter the estate. So *e contra*, if an Act of Parliament shall take away the privilege of committing waste, it doth not alter the estate.

3. *Object.* By the letters patent the lands are to be holden by service of chivalry, and now here will be no tenure.

Resp. The tenure doth not alter the estate, because 'tis but a collateral accident.

4. *Object.* By the letters patent there was an intire estate given; but here are several estates, for life, and estates-tail, which are not intire.

Resp. These estates are all the same in quantity, which they would have been without the Act, and it's the same estate as to duration; for whatsoever estates are here made, arise out of the estate tail, and the reversion is not touched, and that was the intent of the Act, as appears by the saving; for the enacting part is, that the several persons shall have the several estates under the savings following. And this Private Act hath cut that, which was but one intire estate, into several pieces; and Co. Lit. 372 b. The third observation there is, **[321]** that if the King keeps the reversion, none of the mesne estates can be barred; and so in *Stafford's case.*

Object. If the heir shall bring a *formedon*, he must count upon this Act of 4 Jac. and therefore the estate arises by that Act, which is the donor.

Resp. The heir need not here bring a *formedon*, but may enter: but if he will admit himself out of possession, he shall not count upon the Act only, but upon the letters patent and the Act also; for suppose the first intail be spent, the King must count upon the letters patent in a *formedon* in *reverter.* This Act is not the donor, but the Crown; for the Parliament cannot give, but by virtue of the legislative power estates may be settled or changed, as in this case.

There are some things to be observed, by which the intent of the Act appears, that the estate-tail should not be altered, wherein there are remainders to several persons, in order, that (whereas before there was some dispute who were first to take) all persons might be satisfied with the order in this Act prescribed concerning the same.

1. In the saving, there is livery and primer seisin reserved to the Crown, as if the Act had not been made, which could not be if the estates were new.

2. Power to make jointures for life, had an eye to the first estate-tail, for there is a power to bind the issue, but not the remainders; and so of leases; but the King should not be bound.

The intent of the Parliament was to make a settlement in the family, and not to give the parties power to alien, for they intended by the saving to preserve the lands from alienation, as if the Act had never been made.

As to the second point. That this estate is preserved by the statute of 32 H. 8, cap. 36. By the statute of 4 H. 7, cap. 24, and before 32 H. 8, cap. 36, a fine did not bar an ordinary estate-tail. True it is, that Co. Lit. 372 is contrary, and that it did

bar; but it is but his opinion, and he cites no authority for it, and there are other authorities against his opinion. The statute of 32 H. 8 says, that there was diversity of interpretation and expounding of that statute, whether such fine should bar the issues in tail; and so it appears by the book of 19 H. 8, 6, which says, that the words of the Act of 4 H. 7, are satisfied by barring the issues of tenant in fee-simple; and the issues in tail, though in some measure privies, **[322]** yet they claim paramount the fine. And general words in an Act of Parliament do not comprehend an estate-tail, as in the case of *premunire*, Co. Lit. 130 a. 11 Co. 63, *Dr. Foster's case.*

Between 4 H. 7, and 26 H. 8, were between forty and fifty years, and yet all that time no estate-tail was forfeited for treason. Now what reason had the Judges to construe the general words of 4 H. 7, that a fine shall bind as well privies as strangers, that the issues shall be bound by a voluntary act of the tenant in tail, and yet that he shall not forfeit his estate for treason, which is the highest offence? The words of Westm. 2 are, that he shall not have *potestatem alienandi*, and that *finis ipso jure sit nullus.* That a fine was no bar to the issues in tail between 4 H. 7, and 32 H. 8, and Br. Assurances 6. 19 H. 8, 6. Amongst the Judges who were of another opinion was Brook himself, which shews that either the reporter was mistaken, or my Lord Brook had retracted his opinion, which was ten years after the writing his Abridgment, and 1 Anderson 46, pl. 118.

Observations out of the statute of 32 H. 8. itself.

1. There was diversity of opinions in this point.

2. The words are, *Be it enacted* (*not declared*) so it is a constitutive, not a declarative Act, it is *introductivum novi juris*, *non declarativum veteris*, that fines shall bar an estate-tail.

3. That the fines heretofore levied shall be a bar to the estate-tail, which shews that the statute of 4 H. 7 was too feeble to do it.

4. The third proviso, that the Act shall not extend to such fines as were then in suit, by which it appears that there were recoveries of lands in tail of which fines had been levied.

5. The words of the statute are, that this Act shall not extend to fines of lands, whereof the reversion is in the King, but that every such fine shall be of like force as it was or should be, if the Act had not been made. Observe the statute of 34 H. 8 recites, that there was a great mischief by this doubt for a recovery, but not by a fine, which shews that fines were not used in such cases.

Serjeant Maynard for the defendant. The estate-tail is not extinguished, but altered. The points are,

1. Whether here is any estate within 34 H. 8.

2. Before 34 H. 8, a recovery did bar the issue in tail, in case of an adversary writ; but the question was of writs by consent. *Vide* 10 Co. 43 b. That a common recovery barred in all cases.

[323] By this Act of 4 Jac. the first estate-tail is clearly barred, and consequently the clog upon it that it could not be barred, is gone; and Earl Charles or his son shall not claim under the old intail; so that the question now will be, whether the estates created by 4 Jac. shall be within the statute of 34 H. 8. And I hold that they are not, because those estates do not issue out of the reversion belonging to the Crown, but only out of the old intail. When a third estate is to be raised out of the other two, it shall be said to come out of each of them, according to their respective capacities to grant or pass the same. *Treport's case.* If the King and the Earl of Derby had joined in a fine to raise an estate-tail, the earl had been the donor. An Act of Parliament adds strength to an estate, but is directed by the law. 8 Co. *Barrington's case.*

Object. It is an estate created by Parliament, and that is the donor.

Resp. William tenant in tail is the donor. 2 Co. 15 and 16.

The reason why a common recovery did bar the issue, was not because it was a common assurance; but because at the common law every recovery was a bar. And though the Statute of Westm. 2, cap. 1, is, that tenant in tail shall not alien *neq; per factum nec feoffamentum*, and a recovery is not named; yet in the same Parliament cap. 4. If tenant in tail lose by default, he shall have a *quod ei deforceat*, which shews that recovery did bind before that statute; and at this day a common recovery bars a

tenant in fee-simple, though there be no tenant of the freehold, and so was 12 E. 4, *Taltarum's case.* And when a recovery is had, it doth not appear to the Court but that it was grounded upon good right; and it is incident to an estate-tail to be barred by common recovery. *Portington's case.*

To the second point, Whether a fine would bar the issue before the statute of 32 H. 8. There is no resolution in the case of 19 H. 8, 6, but Dyer 32 seems to make it a bar, and had not the law been so, the statute of 32 H. 8 would not have respected fines that had been past, for it would have been unjust to alter estates past, contrary to what the law was taken to be at the time of the passing them.

Object. Notley's case cited in *Stafford's case,* 8 Co. 78 a.

Resp. There is no such case to be found; but there is a case, 3 Cro. 595 and 612, *Stratfield* versus *Dover;* where disseisor of tenant in tail, the reversion being in the Crown, levied a fine and barred the issue; but it is said there, **[324]** that the case went off upon point of pleading, (but seems contrary, 1 Cro. 430, by Jones Justice): but the Lord Hob. 332 and 333, taking notice of *Notley's case* says, that to comprehend fines within 34 H. 8, by the words, *any other thing,* was an oblique and indirect strain, and therefore all is granted upon Cro. 395. *Adjournatur.*

PLAYER *versus* VERE. ANTEA 288.

By-law. 1 Danv. Abr. 734, p. 5. 1 Sid. 284. 1 Vent. 21. 2 Keb. 27, 490, 501.

Sir Robert Sawyer *contra. Object.* This by-law restrains trade.

Resp. All customs and by-laws do restrain trade one way or other, as 5 Co. *The Chamberlain of London's case,* and 8 Co. *Waggoner's case;* but this is not a trade, but an employment; as porters and coal-meters, &c. which are within the disposition of the city.

Object. This power is to be exercised by deputy.

Resp. The exercise of power in all great bodies ought to be delegated; and it is impossible otherwise to have it executed.

Object. Taylors of Ipswich's case, and 1 Roll. Abr. 364. Moor 576.

Resp. Those were orders to restrain trade by virtue of letters patent; but here is general custom to make by-laws.

The case of Pain and Houghton was upon this particular custom.

As to the penalty, it is common to every by-law; for what may be prohibited, may be prohibited upon a penalty. 1 Roll. Abr. 365, pl. 9, *Edward's case.*

But if the by-law be naught for the fine, it may be good as to the other part of it. In every disposal of the places of corn-porters and coal-meters, a reasonable fine is reserved.

Consider the employment and the persons, and it will be thought reasonable that a strictness should be used more than ordinary.

Object. The defendant is not within the custom, because he is alledged to be a citizen. 1 Bulst. 11, *Green's case.*

Resp. There was a private company of butchers, and not like this case, which is of all the city, where by-laws will bind strangers, as the custom of foreign bought and foreign sold; sale of an horse by an inn-keeper for his meat, &c.

[325] *Object.* 23 and 24 Car. 2, in this Court, *Player* versus *Dean;* and in 24 Car. 2, R. *Player* v. *Bradnex.*

Resp. The objection was made in *Dean's case* by Hale Chief Justice, that that by-law was not for hire; and so it went off; and 22 Car. 2, in C. B. *Player* versus *Hutchins.* The Court was divided.

But admit that there is no such custom, or that it be doubtful, yet it is more agreeable to justice to grant a *procedendo,* because otherwise there would be a failure of justice, because there is no other remedy to restrain these cars, which will, when without number, annoy the streets; and if a *procedendo* be granted, then upon the trial, the custom may be controverted, and found specially.

Here Player cannot proceed in this Court, because the action here must be brought in the name of the mayor, commonalty and citizens; but this by-law orders the action to be brought in the mayor's Court by the Chamberlain, and for this cause

a *procedendo* was granted in *Wilford's case*, Moor 403, pl. 538, so for calling a woman whore. 2 Roll. Abr. 69. 1 Cro. 486. *Adjournatur ad proximam Cur.*

Afterwards it was argued for the defendant, that this case differs from all cases of by-laws made by other corporations, in this, that we shall presume *primo intuitu*, that this by-law is good, until it shall be found upon examination defective, because it is not a by-law made by a private company for managing their particular affairs. Nor 2dly, by a corporation made up and consisting of a small number of men. Nor 3dly, by men obscurely educated and skilful only in trade and not in laws.

But a by-law made by the body of the great and most famous City of London; a city known, where England is not; a city which is well skilled not only in trade of all sorts, but in learning likewise.

And by-laws of this nature made by the whole city, are made not only by the lord mayor and aldermen, but also by the common council representing all other the citizens, attended and assisted with the recorder, counsel at law, and very many others learned and well read, not only in the laws of this kingdom, but in all other human learning.

So that he that will suddenly censure such a by-law without well weighing it, and strictly comparing it with the rules, whereby all by-laws are to be examined, will undertake a great task, and with much difficulty (if at all) obtain a justification from knowing men.

[326] And as Sir Francis Moor says in his argument of *Davenant and Hardie's case* 583, *All by-laws are accommodated to the utility and advantage of the place.* And so a by-law made in Newcastle may be good for that place, which may not serve for London or Norwich.

So I make no question but that this by-law hath been found in the main of it, so far as to order the carts and carmen, a most advantageous law for the city: for, considering the humour of such men, the populousness of the place, the quality of persons there inhabiting, and thither resorting, and the occasions of stopping the streets and lanes, which though much amended of late, yet narrow enough for the passengers, some such law is very fit to prevail in this city.

And the rather for that this is not a trade, but an employment; and therefore where it is objected, that the city may as well restrain brewers, taverns, tallow-chandlers, &c.

I answer, There is not the same reason, for they are trades to which men are bound apprentices, and to take away their trade is to take away their livelihood.

Nor 2dly, That the oversight is committed to another corporation, for I cannot see, why it may not be as well managed by them, nay better than by others.

Object. What if the president will not grant a licence?

Resp. 'Tis not to be presumed when we consider what great trust he is in already, that he should falsify it in so small a matter. 2dly, The same objection may be made to the clerk of the inrolments in Chancery, or any officer of any Court of Justice. And if an action of the case will not lie here, yet an equivalent remedy may be had, for upon an address to the mayor and aldermen there will be provision in such case. So that so far I shall not doubt of the validity of this by-law.

That which sticks with me is, that part of it from whence arises this very controversy, which is, *that* 17*s.* 4*d. per annum, and no more, shall be received and paid for a carroom, and* 20*s. and no more, or greater fine, upon any admittance or alienation of a carroom, which* 17*s.* 4*d. per annum, and* 20*s. aforesaid, is wholly to be applied towards the relief and maintenance of the poor orphans harboured and to be harboured in Christ's Hospital; and if he shall work without licence he shall forfeit* 13*s.* 4*d.*

In all privileges either by prescription or patent to make by-laws, there is this clause either expressed or implied, that they be *ad utilitatem Regis & populi, bonæ fidei congrua, & rationi consona, & dummodo non sint in præjudicium populi*, as **[327]** we may see in *Waggoner's case*, 8 Co. 121 b. and *Davenant and Hardie's case*, Moor 576, and many others.

Now it is said to be *ad utilitatem* of the people when there is *quid pro quo.*

8 Co. 125, Sir George Farmer prescribes to have a common bakehouse in Tocester, and that all the inhabitants should bake there: but then he lays in his prescription,

that that bakehouse was sufficient to bake all the bread for the inhabitants and passengers. So 11 H. 4, 86 b.

Mich. 1657, in B. R. Intr. Hill. 1656, Rot. 1335, *Allot* versus *Jackson*. An action upon the case for not grinding at his mill, where he prescribes for mulcture, as Sir George Farmer did for his bakehouse; and resolved, he must aver that his mill was sufficient to grind all the corn, and that he was bound so to do; and a case was there cited to be adjudged Pasch. 43 Eliz. in B. R. *Gooby* versus *Knight*, the case of the town-chandler of Canterbury.

Mich. 5 Jac. in B. R. *Pincocke* versus *Sanders*. Upon evidence, a custom that the corporation of Gravesend have used to maintain a barge for transporting passengers from thence to London, and that till that barge be full, none can carry passengers without licence. Roll. Abr. 561, pl. 2. 2 Brownl. 177. And this is the reason of murage, pontage, toll travers and other tolls.

There are mutual advantages, and the duty is but equivalent to the profit. And so was *Blackwell-Hall's case*, 5 Co. 62 b. the penny for hallage was to pay for the labour of the searcher.

And the monies due upon measuring of cloth so far as to answer the charge and the profit of the people was agreed to be good, 11 H. 4, 86 b. though no judgment was therein given.

Now examine whether this be so or no.

1. Here is no compulsion for the carmen; so that my goods may be burnt, and I cannot force a carman to carry them away.

2. Here is 17s. per annum and 20s. fine; for what? for the use of the poor of Christ's-hospital.

This hath no respect to the overseeing of the carts, the streetmen and others are to be provided for otherwise, and so not like the case of Blackwell-Hall. So that I take this to be a pure imposition with regard to the thing in question. And there might have been as well 17l. per annum, and 20l. fine as this that is imposed; though perhaps the circumstances of persons be more considered in this. But that will not alter the case.

[328] And I do not find any by-law of this nature in any place. The case of Andrew Deveen of restriction of brokers hath been cited, but that was to restrain the office, but not to reserve a rent or fine. And though it be said that 40s. per annum is now paid, it may not be by that by-law.

I find this case (as hath been cited) 1 Roll. Abr. 364, *Payn* versus *Haughton*, there adjudged a monopoly; and yet there no rent or fine reserved. As to the case in C. B. *Hutchin's case*, the Court was divided.

And afterwards *termino Hillar.* 31 & 32 *Car.* 2, adjudged by the whole Court, *nemine contradicente*, that the by-law was not good by reason of the fine and rent, but in all things else very good; and so a *procedendo* was denied. *Vid.* 2 Roll. Rep. 413, *Kete* versus *Michel*.

BAMBRIDGE *versus* BATES AND OTHERS. ANTEA 305.

Trespass. *Postea* 337. Just. Inst. l. 2, tit. 1, § *cum ex aliena*. Minsing. 118.

Wallop for the plaintiff. This molasses is neither within the words of the Act. 2. Nor can it consist with the grounds of philosophy. 3. Nor grounds of law.

As to the first. If the molasses is not at all imported, the necessary consequence will be, that it is not a material imported; but if it was at all imported, it must be either when the sugar was imported, or before, or since; but it could not be when the sugar was imported, being not *in esse*, but was made of sugar here in England, and therefore it could not be made a material here imported.

Suppose there should be a prohibition that no molasses should be imported, and a man imports sugar of which molasses is afterwards made, this should not be within the prohibition.

As to the 2d, Molasses differs essentially from sugar; for what does not partake of the same specifick form differs essentially, but molasses doth not partake of the same specifick form with sugar; *ergo, &c.*

Now there is in this making of molasses a separation of parts, and consequently a new specifick form, as cheese, butter, &c. are produced by separation of parts, and do specifically differ from milk.

When it appears further by the verdict, that the English materials are contributory to this prohibition, and it cannot be said, that molasses is the fæces of sugar, since fæces **[329]** are only of liquid things, neither can they be compared to the lees of wine; for sugar after twenty years standing would never produce lees. And the verdict does not find that it is made of sugar, but a separation and extraction from it. For the sweetness may arise from the English materials. And suppose corn should be brought from beyond sea, the liquor arising therefrom by extraction would not be an imported material. So rose-water from roses imported.

As to the third, From the grounds of law, molasses cannot be said to be a material imported. 1. Not according to the rule of law, *forma dat esse*, and *mutata forma mutatur substantia.*

The ancient Roman lawyers before Justinian, as to the question of property, had two several sects, viz. one of *Sabinus*, and the other of *Proculus;* but afterwards, it was agreed amongst the civilians, *that in all cases where this new form may be reduced to the former state, the property remains to him who hath the old substance, but otherwise not.* Now here molasses cannot be reduced to sugar again. And with this agrees Hill. 16 H. 7, 16, pl. 6. Moor 19, pl. 67. Leather cut into shoes may be retaken, but not wool made into cloth, or milk made into cheese, *res corruptæ & transformatæ abesse videntur.* A thing arising from the parts is not any of the parts. Here all the materials are not foreign and imported.

As to the value, it is not material, but the quantity is as to the abstraction. Here is no proportion of the molasses found in the verdict in making the low wines.

2. It is not within the Act of Parliament. There is no such maxim, as *not to recede from the letter of the Act, if consisting with the law.*

The Acts of Excise discourage foreign trade, and encourage home made manufactures.

2. The Acts charge only foreign commodities, or things made beyond sea. The book of rates says, that molasses is a home manufacture.

These Acts are penal, and therefore ought to be taken in the plain and not strained sense; and therefore 39 Eliz. cap. 15, which takes away clergy from one who takes money, &c. out of an house in the day-time, extends not to an accessary. 1 Cr. 473, *Evans and Finch's case.* So the statute of 1 Jac. against stabbing doth not extend to a stabbing, upon a previous restraint of the offender by the party killed, *Buckner's case,* **[330]** Mich. 1655, B. R. So the statute of 13 Eliz. cap. 20. doth not extend to a covenant to enjoy.

Where a statute mentions particular matters, and afterwards concludes in general words, the general words shall be referred to things of the same nature, as *The Archbishop of Canterbury's case*, 2 Co. *other means.* So the Statute of Burglary: so here, *other materials* shall be intended materials of the same nature. These general words have a good effect, for new foreign molasses are included. But if this molasses should be included, why not low wines made of grapes or apples imported? *Generalis clausula non porrigitur ad ea quæ generaliter sunt comprehensa, Bonham's case.* Wine or cider made here of grapes or apples imported are not within this law, *qui nimis emunyit, elicit sanguinem.* And so I conclude for the plaintiff.

Sawyer *contra.* This Act is not penal, but only to enlarge the King's revenue, and so ought to be expounded liberally.

The verdict finds that molasses is fæces of sugar, and lees of wine cannot be made wine again, so wine made vinegar; but he said little more to the purpose. *Et adjournatur. Vide post.*

JOHN JAMES *versus* WILLIAM RICHARDSON. MIDD.

Devise. 2 Danv. Ab. 515, p. 7. Eq. Ab. 214, p. 11. 1 Vent. 334. 2 Vent. 311. 2 Lev. 232. 2 Jones 99. Pollexf. 457. Carth. 154. Skin. 205. 3 Keb. 832. Comb. 153. Poph. 21.

Ejectment in a writ of error. The plaintiff declares of the demise of George Durdant 10 Octob. 28 Car. 2 at Stanes, of 20 acres of land, 20 acres of meadow and 20 acres of pasture in Stanes for five years from Michaelmas before. Upon not guilty pleaded, the jury find a special verdict, viz.

Henry Wicks Esquire in his life-time 6 *Junii* 1657 was seised in his demesne as of fee of the premisses in the declaration; and so being seised the same day and year made his last will and testament in writing, and thereby did devise to one John Higden and Joan his wife, being niece of the said Henry, and to the heirs of the body of the said John upon the body of the said Joan begotten and to be begotten, all his messuages, stables, coach-houses, lands, tenements and hereditaments in Covent-Garden and Vinegar-Yard in the parish of St. Martin in the Fields, and St. Paul Covent-Garden in the county of Middlesex. And farther the said Henry Wicks by the same will devised the said premisses in the declaration as follows, viz. *Item*, I **[331]** give and bequeath unto my cousin John Higden and his heirs, during the life only of Robert Durdant, my kinsman, eldest son of my nephew Andrew Durdant deceased, all those my messuages, lands, tenements and hereditaments in Stanes and Stanwel in the county of Middlesex, upon this trust and confidence, that he the said John Higden and his heirs shall permit and suffer him the said Robert Durdant from time to time, during the time of his life, to have, receive and take the rents and profits thereof, which shall yearly grow due and payable for the said last mentioned premisses, he the said Robert committing no waste upon the same, and so as he the said Robert Durdant after my decease, and within one month after request to be made to him, shall make and execute to the said John Higden and his wife, and the heirs between them, as aforesaid, such good and sufficient release, conveyance and assurance in law of the said messuages, lands and premisses by me to them devised, as aforesaid, in St. Martins in the Fields, and St. Paul Covent-Garden, as to them or any of them, their or any of their counsel learned in the law shall be reasonably devised or advised and required, to the end that he the said John Higden and his wife, and their children, may enjoy the same free from the claim of the said Robert Durdant; and from and after the decease of the said Robert Durdant, then I do give and devise the said last mentioned lands and premisses in Stanes and Stanwel unto the heirs males of the body of him the said Robert Durdant, now living, and to such other heirs male or female, as he shall hereafter happen to have of his body. And for want of such heirs, then to the use and behoof of my cousin Gideon Durdant, and the heirs of his body; and for want of such heirs, the same to be and remain to the right heirs of me the said Henry Wicks.

The said Henry Wicks died seised; George Durdant lessor of the plaintiff, at the time of the making of the said will, and at the death of the said Henry Wicks was the only son and heir male apparent of the said Robert Durdant of the body of the said Robert Durdant begotten. And the said Robert never had any son besides the said George. And that the said George was the godson and nephew of the said Henry Wicks the devisor.

After the death of the said Henry Wicks, the devisor, the said John Higden by virtue of the said devise entered into the said premisses contained in the said declaration, and became seised thereof in his demesne as of freehold, for the **[332]** life of the said Robert Durdant. He so being thereof seised 26 *Martii* 14 *Car.* 2, in consideration of 365l. paid to him and the said Robert Durdant by one Abraham Spore, he did infeoff the said Abraham Spore and his heirs, to the use of the said Abraham and his heirs, and in Easter term 14 Car. 2 levied a fine without proclamations with warranty against him and his heirs; and Robert Durdant joined in the said fine with like warranty. That the said fine was to the use of the said Abraham Spore and his heirs, by virtue of which said feoffment and fine the said Abraham Spore became seised in his demesne as of fee, *prout lex postulat;* and being so seised 9 *Julii* 14 *Car.* 2, by his indenture then

dated and made between him of the one part, and the said William Richardson of the other part, the said Abraham Spore for 5s. demised the premisses for six months to the said William Richardson, and by an indenture dated the day following, released to him the said William Richardson and his heirs to the use of him and his heirs for a competent sum of money. By virtue whereof the said William Richardson became seised in fee, *prout lex postulat.* 1 *Maii* 20 Car. 2, Robert Durdant died, and that at the time of his death the said George Durdant was under age, viz. but 15 years old. That 1 Octob. 28 Car. 2, George Durdant, lessor of the plaintiff, entered upon the possession of the said William Richardson, and made the lease to the plaintffi.

And if for the plaintiff, for the plaintiff, &c.

Judgment was given in B. R. for the plaintiff, and now the defendant brings a writ of error.

Saunders for the plaintiff in the writ of error. The case upon the record, as to our purpose, is no more but this: Henry Wicks being seised in fee devises to John Higden and his heirs, during the life of Robert Durdant, the remainder to the heirs male of Robert Durdant now living. And the question is, whether George Durdant, the only son of the said Robert, shall take in remainder during the life of his father? And I hold that this remainder is a contingent remainder, and not vested during the life of his father. The words (*now living*) would have a description of the person, as the statute of 25 E. 3, cap. 2, of Treason, to kill the King, Queen, or their eldest son and heir.

Resp. It is not treason to conspire the death of their heir, but eldest son.

Object. Quare filiam & hæredem rapuit.

[333] *Resp.* If the writ were now to be framed, it would be otherwise; but there is a description of the person, but no person is described only by the name of the heir, but some addition is made to it, for *non est hæres viventis.*

Object. Heirs male now living.

Resp. Now living shall not be referred to heirs male, because there can be no such person during the life of Robert, but *now living* shall be referred to Robert as *proximus antecedens.*

But admit that heirs male now living should be a description of the person, yet here is no such person capable to take in the life of the father. If this were a remainder vested, it should be either by legal construction, or because wills are favoured in law.

Object. The words here shew the intent of the testator.

Resp. This construction cannot consist with the intention of the testator, for he did not intend that George should have an estate during the life of his father, or for life only. And the word *heir* may be intended the description of a person, but not when it is in the plural number. And if George shall take here by remainder vested, he shall take only for life, which was never intended. On the other side, the whole will is sensibly penned; for there is a devise to Higden during the life of Robert Durdant, remainder to the heirs of him, which shews his intent, that his heirs shall take as purchasers. And this construction agrees with Littleton, sect. 30, where an estate is limited to the heirs of the body of the father, it is an estate-tail, and the word *heirs* makes an inheritance, Co. Lit. 9, but *heir* makes but an estate for life. 1 Co. 63, *Archer's case*, 1 Roll. Abr. 832. Devise to a feme and her heir, 2 Cr. 313. Moor 593, *Clark* versus *Day*, 2 Roll. Abr. 253, *Pause* verfus *Lowdal.*

Object. What estate shall the heirs of Robert have?

Resp. Heir in the singular number doth not make an inheritance, and here is no limitation to the females.

George cannot take as heir in the life of his father, for what if his father were attainted of felony or treason, George could never take.

Now living shall be construed to such as shall be heir to Robert Durdant, and now living, *vide Archer's case*, and Hob. 29, *Counden* versus *Clark*, and 2 Leon. 70, *Challoner* versus *Bowyer.*

[334] And to construe this will otherwise is to remove an ancient land-mark of the law, which is, that when the ancestor takes an estate for life, the word *heirs* is a word of limitation, but otherwise, it is a word of purchase. Adjourned, and Hill. 31 & 32 Car. 2, judgment was reversed, *nemine contradicente præter Atkins Justice del Common Bank.*

THE COMMISSIONERS OF DELEGATES AT SERJEANTS-INN. DECEMB. 9, 1679.

Will.

George Stonywel 2 Septemb. 1679 makes his will in writing and makes Elizabeth, his wife, his executrix, and gives all the *residuum* of his estate, after some legacies paid, to her; Elizabeth dies in his life-time, viz. 5 Septemb. 1679, and George the testator, having notice of the death of his wife, makes a nuncupative codicil dated 6 Septemb. 1679, and gives to George Robinson all which he had given to his wife, and dies 13 Septemb. 1679, and the single question was, whether this nuncupative codicil be allowable notwithstanding the statute of Frauds and Perjuries, 29 Car. 2. The words whereof are, *That no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.* And resolved by Sir Hugh Wyndham Justice, myself and several civilians joined with us in the commission, that as this case is, the nuncupative codicil is good; for by the death of Elizabeth before the testator, the devise of *residuum* became totally void, and so there was no will, *quatenus* as to that part. And so the nuncupative codicil was *quasi* a new will for so much, and was no alteration of the will as to so much, because there was no such will, its operation being determined.

And whereas it was objected, that by the same reason, if any part of a will in writing shall be made by force or fraud, the thing so given and specified in such part may be devised by a nuncupative codicil, and so the will altered contrary to the words of the statute. We answered, that if such part of a will were so obtained, it was no part of the will, and so **[335]** such codicil would be no alteration of what was not; but would be an original will for so much. So if A. be possessed of an estate of 1000l. and by will in writing gives 500l. of it to B. he may give the residue by a nuncupative will, so as he do not alter the executor.

PAWLET'S CASE.

Devise. 2 Danv. Ab. 528, p. 9. Evidence.

Amos Pawlet 2 Feb. 1649 makes his will in writing, and gives a legacy to his niece, in these words: *I do ordain and give to my dear niece Florence Roll second daughter of my brother Denis Roll Esquire, the sum of* 500l. *which my sister, the Lady Cholmeley hath now in her hands of mine, as by her bond made to me and my heirs appears:* and makes no executor, and dies in Octob. 1669. About ten years before his death the Lady Cholmeley paid to him the 500l and whether this legacy is due is the question; and we resolved, that the legacy was due, though the security was altered; because it is a pure legacy, neither *legatum nominis* nor *legatum debiti;* and the words are only to shew that he meant the legacy should be as certain to her as he could make it. And the councel for the legatee cited Digest. de Legatis quidam Testament. 96, and also *Theobal and Wynn's case* lately adjudged, where a devise was of a legacy out of debts due in several counties, and they were called in before the testator's death, and yet the legacy remained good. And Hill. 1671, *Squib* versus *Chichely*, where the Lady Verney gave legacies out of monies then out at interest, and called in before the testator's death. And a difference was taken between a legacy *in numerat.* and a specifick legacy; for in the first case the legacy will remain, though the debt *ex quo* be paid in; but the specifick legacy may be lost by being altered. *Vide* Godb. 91, *Johnson's case.*

Nota; At a commission of review in the case between *Bray and Whitelage* concerning the will of Mr. George Bray of Lincoln's Inn, who gave thereby all his estate to a woman he kept, and made her his sole executrix, and waived his only brother, Mr. Lodowick Bray. It was said by Justice Ellys, that it was resolved by the whole Court of B. R. in the case of Dutton upon a trial at Bar concerning his will forged by Mr. Colt, **[336]** that depositions taken in *Chancery in perpetuam rei memoriam* upon a

bill for that purpose exhibited, cannot be given in evidence at a trial at law, unless there be an answer put in and produced; and so he said, he hath known it several times resolved both in B. R. and C. B.

EKINS *versus* SMITH. IN THE EXCHEQUER.

Trover.

Adjudged by the whole Court, that if goods be condemned by the Court, and proclaimed as forfeited, the property is altered, so as no action of trespass or trover will lie by the proprietor against the person that seizeth them.

[337] TERM. HILL. 31 & 32 CAR. 2. IN THE EXCHEQUER.

BAMBRIDGE *versus* BATES & AL. ANTEA 305, 328.

Trespass.

Letchmere for the plaintiff. Here is not any special conclusion by the jury, viz. whether the low wines are made of foreign materials? But as this record is, 1. Here is no colour for the Court to give judgment for the defendant. 2. Here is colour to give judgment for the plaintiff. 1. For that they find that the jury find that the plaintiff was *communis distillator aquarum fortium* for a year before; but they do not find that he made low wines of foreign materials, and so that which they find is a thing immaterial. 2. They find that Hall did exhibit an information, and the plea and judgment, *prout per recordum apparet*, but do not find that the contents of that information were true. 3. They find that there is molasses made beyond sea, and also in England; but they do not find who made them. 4. They find that molasses is made *ex fœcibus saccari*, but they do not find that the plaintiff made the low wines *ex fœcibus saccari*.

And for this very cause in *Terry and Huntington's case* it was adjudged naught, in Hill. 1668, in this Court.

In the case of bankrupts, although the commissioners have sole authority to adjudge a man bankrupt, yet in an action the jury must find whether he was a bankrupt or no, and not barely by the adjucation of the commissioners.

'Tis so in case of a plea, 2 Roll. Rep. 40. In an avowry for an amerciament in a leet, it is not sufficient to say *præsentatum fuit* at the leet, that the plaintiff did such an act, but he must aver the thing, and not rely upon the presentment.

2. Here is ground to give judgment for the plaintiff, because it is expressly found that the defendant took away his goods.

[338] The first Act which gave liberty to a defendant to plead the general issue was 7 Jac. c. 5, for by the common law every man was bound to plead duly, and not to justify by virtue thereof after he had pleaded not guilty; but that is, that he may give such special matter in evidence, as being pleaded, had been a good and sufficient matter in law to have discharged the defendant of the trespass or other matter laid to his charge, and so he would have given every thing in evidence.

And the statute of 23 H. 8, cap. 5, concerning sewers, says, that in an avowry the avowant may justify the taking, &c. by virtue of the commission of sewers, without alledging the matter specially.

But in this case at Bar, upon the general issue pleaded, the special matter cannot be given in evidence; for though by the Act of 12 Car. 2, that Act may be given in evidence, and so 22 Car. 2, yet it is not said so in the Act of 29 Car. 2.

Memorandum, The 7th day of February I was made Judge of the Common Bench 1679, 32 Car. 2.

Memorandum, The 29th day of April I was made Judge of the King's Bench 1680, 32 Car. 2.

ROBERT MURREY GENT. PLAINTIFF, *versus* DOROTHY EYTON WIDOW, AND ROGER PRICE, DEFENDANTS.

In trespass and ejectment. Intr. Hill. 29 & 30 Car. 2. In officio placitorum.

Estate. 2 Jones 237. Pollexf. 491. Skin. 95. 2 Show. 104. *Antea* 260, 286, 319.

The plaintiff declares of the demise of William-George-Richard Earl of Derby made 2 May 29 Car. 2, of one messuage, three water-grist mills, ten acres of land, ten acres of meadow, and fifteen acres of pasture in the parish of Hope *alias* Queenhope for five years, from the first day of the said month of May. Upon not guilty pleaded, the jury find a special verdict, viz.

That long before the trespass and ejectment, King Richard the Third was seised of the manor of Hope in his demesne as of fee in right of his Crown, of which the tenements are parcel.

[339] That the said King being so seised 17 September 2 R. 3, by his letters patent under his Great Seal of England, granted the said manor and tenements (*inter alia*) to Sir Thomas Stanley Knight, Lord Stanley, and afterwards Earl of Derby, and Sir George Stanley Knight, Lord Lestrange son and heir apparent of the said Thomas Lord Stanley, and the heirs male of the body of the said Thomas Lord Stanley for ever, by knights service, and 50l per annum.

The words of which letters patent begin thus:

Cum non solum generis nobilitas, sed & justitiæ æquitas omnes provocent, & maxime reges & principes, homines de se bene meritos præmiis condignis afficere, sciatis igitur, quod ob singulare & fidele servitium quod dilecti nostri Thomas Stanley Miles Dominus Stanley & Georgius Stanley Miles Dominus Lestrange filius dicti Thomæ nobis præantea impender' non solum savendo juri & titulo nostro, cujus juris & tituli vigore jam nuper ad Coronam hujus regni nostri Angliæ Domino adjuvante pervenimus, verumetiam reprimendo proditiones & militias rebell. & proditorum nostrorum qui infra idem regnum nostrum perfidam jamdudum commotionem suscitaverant ac pro bono & fideli servitio nobis & hæredibus nostris Regibus Angliæ per eosdem Thomam & Georgium & hæred. suos pro defensione nostra & regni nostri præd. contra quoscunq; proditores inimicos & rebelles quoties futuris temporibus opus erit impendend. De gratia nostra speciali dedimus & concessimus, &c.

That by virtue thereof the said Thomas and George did enter, and were thereof seised to them and the heirs male of the body of Thomas.

That George had issue Thomas, afterwards Earl of Derby and died in the life of the said earl his father.

1 June 19 H. 7. Thomas the father died seised, by reason whereof Thomas the grandson became seised in tail.

The said Thomas had issue Edward, afterwards Earl of Derby.

1 August 13 H. 8. Thomas last mentioned died seised, and Edward became seised; Edward had issue Henry afterwards Earl of Derby.

24 October 14 Eliz. Edward died seised, and Henry became seised.

[340] Henry had issue Ferdinando, afterwards Earl of Derby and William Stanley his second son afterwards likewise Earl of Derby.

25 September 35 Eliz. Henry died seised.

Ferdinando entered, and had no issue male but only three daughters, viz. Anne, Frances and Elizabeth.

16 April 37 Eliz. Ferdinando died seised in the life of his brother William, and so the premisses descended to him, who entered.

That after the death of Ferdinando, an Act of Parliament 4 Jac. was made for determining differences as followeth, viz.

In most humble manner beseeching Your Royal Majesty, Your Highness loyal, faithful and obedient subjects, William Earl of Derby of the most noble order of the garter, knight Henry Earl of Huntingdon, and the Countess Elizabeth his wife, Gray

Bridges, Lord Chandos, and the Lady Anne his wife, eldest daughter of Ferdinando late Earl of Derby, Sir John Egerton Knight, son and heir male apparent of the Right Honourable Thomas Lord Ellesmere, Lord Chancellor of England, and the Lady Frances his wife, which said William Earl of Derby is brother and heir male, and the said Ladies Anne, Frances and Elizabeth are daughters and co-heirs of the said Ferdinando late Earl of Derby, who died without issue male of his body.

That whereas after the death of the said Earl Ferdinand divers variances, suits and controversies did arise and grow between your said subjects William Earl of Derby, and the said ladies, as well touching the estate, right and title of, in and to the honours, castles, manors, lands, tenements and hereditaments of the said earl, as also touching the filial portions and advancements of and for your said subjects, the said Ladies Anne, Frances and Elizabeth; for appeasing, ending and determining of which said variances, suits and controversies, the said William Earl of Derby, and other issues males of the said honourable house of Derby, as also the said ladies, before any their inter-marriages, by and with the advice and consent of the Right Honourable Alice Countess Dowager of Derby, late wife of the said Ferdinand, and mother of the said ladies, and by and with the advice of other their honourable friends, and of their counsel learned, and officers, did submit themselves to the arbitrement, order and judgment of the Right Honourable Thomas Lord Buckhurst, Lord High Treasurer of England, and now Earl of Dorset, **[341]** and of the Right Honourable Guibert Earl of Shrewsbury, the Right Honourable George Earl of Cumberland deceased, George Lord Hunsdon deceased, and of the Right Honourable Sir Robert Cecil Knight, principal secretary to Your Highness, and now Earl of Salisbury, being the honourable well affected friends, as well of the said William Earl of Derby, and other the issues male descended of that honourable house, as of the said ladies heirs general, which said honourable persons are elected to end the said controversies, having deliberately heard the said parties and their learned counsel and officers, and such other their loving friends as were authorized to deal therein, and having advisedly heard and considered of their several rights, titles and claims, did by the consent and agreement of all the said parties and their counsel, officers and friends, for the appeasing, ending and extinguishment of all variances, claims, titles and controversies then moved and grown, and which then after might arise and grow between the said parties, or any of them touching the premisses, agree, order and determine (amongst other things) that such and so many of the said castles, manors, lands, tenements and hereditaments late parcel of the possessions and hereditaments of the said Ferdinand, late Earl of Derby in the towns, hamlets, villages hereafter mentioned, and in every or any of them, should be assigned, conveyed and enjoyed unto, and by such person and persons, and of, for and during such estate and estates, and with and under such limitations, power, liberties, declarations and savings, and in such manner and form as hereafter is mentioned, limited and expressed; with which said order and agreement so made by the honourable persons, as well the said William Earl of Derby, and the Countess Elizabeth his wife, and the rest of the issues male descended from that honourable house of Derby, as also the said Honourable Lady Alice Countess Dowager of Derby, and the said Ladies Elizabeth, Anne and Frances daughters to the said late Earl Ferdinand, before and until their several marriages, their said husbands, and they did, and yet do hold themselves well contented and satisfied.

May it therefore please Your Most Excellent Majesty, that it may be enacted, and be it enacted by Your Majesty, the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all and every the castle, manors, lands, &c. late the possession and inheritance of the said Ferdinand late Earl of **[342]** Derby, in the towns, hamlets, villages and places hereaftermentioned, shall be from henceforth for ever assured and enjoyed unto, and by the persons hereafternamed of and for such estates and limitations, and with and under such powers, liberties, provisoes, exceptions, declarations and savings as afterwards expressed, and that the actual and real possession of all and singular the said castles, manors, lands, &c. shall be by authority of this present Act, immediately from henceforth vested, &c. in the persons hereafter named in possession, remainder and reversion respectively for such estates, and with and under such powers and savings as is hereafter expressed.

And afterwards in the same Act concerning the manor of Hope, it is enacted,

That the said Alice Countess Dowager of Derby during her life, and after her decease, the said William Earl of Derby during his life, and after his decease, James son and heir apparent of the said William Earl of Derby, and the heirs male of his body, and in default of such issue, the second, third, fourth, fifth, sixth and seventh sons of the said William Earl of Derby lawfully begotten, and the heirs male of their and every of their several bodies, lawfully begotten, successively and respectively, according to the priority of their birth and age, one after another; and in default of such issue, Sir Edward Stanley, Knight, during his natural life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said Sir Edward Stanley, and the heirs male of their several bodies successively; and in default of such issue, Edward Stanley of Bickerstaff Esq; during his life, and after his decease the first, second, third, fourth, fifth, sixth and seventh sons of the said Edward Stanley and the heirs male of their bodies, severally and successively, and so James Stanley (brother of the said Edward) and his seven sons, shall and may have, hold and peaceably and quietly enjoy the said manor of Hope, and all hereditaments in the parish of Hope.

And that the said William Earl of Derby, Sir Edward Stanley, Edward and James Stanley successively in possession to make leases for twenty-one years or under, or for one, two or three lives, or for any number of years determinable upon one, two or three lives, in possession, and not in reversion, reserving the old and accustomed rent.

A power for them to make jointures not exceeding a third part.

[343] Provided always, and be it enacted and declared by the authority aforesaid, that Your Most Excellent Majesty, your heirs and successors, and all and every other person and persons, bodies politick and corporate, their heirs and successors, executors, administrators and assigns, and every of them, other than the persons to whom any estate or estates are before limited or mentioned to be limited by this present Act, and their heirs, shall have, hold and enjoy all and every such and the same estate and estates, lease and leases, rights, titles, interests, reversions, rents, annuities, pensions, services, tenures, primer-seisins, liveries, actions, statutes, bonds, recognizances, debts, executions, judgments, entries, conditions, covenants, warranties, uses, possessions, offices, commons, liberties, easements, profits, commodities, emoluments, claims and demands as Your Highness, your heirs and successors, or any of them, or any other person or persons, bodies politick or corporate, their heirs, successors, executors, administrators or assigns, other than the persons before excepted to whom any estate or estates is before limited by this Act, now lawfully have, or hereafter shall or may lawfully have or claim of, into, out of, or for any the said castles, manors, lands, &c. in such and the same manner and form, to all intents, constructions and purposes, as if this present Act had never been had or made.

That Alice Countess of Derby was widow and relict of the said Earl Ferdinand.

That the said Sir Edward Stanley Knight, at the making of the said Act, was a person who ought to have the said lands after the death of the said James, son of the said William Earl of Derby, without issue male of his body, by virtue of the said letters patent.

That the said Edward Stanley of Bickerstaff, was next to take after the issue male of the said Sir Edward.

That the said James was next after his brother Edward and his issue.

1 May 1636, Alice died.

Earl William entered and was seised *prout lex.*

29 September 1642, Earl William died seised, and James his son entered and became seised *prout lex.*

The said Earl James had issue Charles, afterwards Earl of Derby.

15 October 1651, Earl James died seised, and Earl Charles entered.

[344] 14 February 1653, the said Earl Charles and Dorothea Helena his wife, by indenture tripartite between them of the first part, Sir Charles Woolesly, Richard Knightley, John Twistleton, John Hewley, Rowland Jewkes and Joshua Sprig of the second part, and Thomas Crachley, Nicholas Brereton and Roger Griffith of the third part, for 1700l. to the said earl, and 1898l. 10s. to the trustees for selling the

said estate by the Parliament, paid by the said earl's appointment, grant the said manor of Hope to the said Sir Charles Woolesly, Richard Knightley, John Twisleton, John Hewley, Rowland Jewkes and Joshua Sprig, and their heirs, with warranty against the said earl and his heirs, executed by livery.

10 April 1654, the said earl and his wife levied a fine at the Great Sessions, with a general warranty to the uses in the indenture.

That the grantees entered and continued in possession from the time of the making the said indenture, and that the defendants are still tenants to the grantees.

21 December 1672, Earl Charles died, leaving issue the lessor of the plaintiff, then of the age of sixteen years, nine months and four days, and no more.

2 February 29 Car. 2, Earl William-George Richard made the lease *prout.*

They find the statute of 34 H. 8, cap. 20, and conclude generally.

Before I come to the main points of the case, I shall only mention what hath been, or (at least) ought to be allowed on both sides, viz.

1. That the consideration paid for this land by the feoffees of Charles Earl of Derby is not material one way or other.

2. The reversion continues in the Crown, notwithstanding the fine, feoffment or Act of Parliament.

3. If this Act of 4 Jac. had not been made, the first estate-tail could not have been barred.

4. If the estate-tail is not barred, neither the feoffment nor fine made any discontinuance; for Littleton says, sect. 625, that none can discontinue an estate-tail, unless he discontinue the reversion; and therefore if the tenant in tail infeoff the donor, it is no discontinuance of the entail.

[345] 5. The warranty contained in the fine of 1654 doth no prejudice to the estate of the issue of Charles, because 'tis a lineal warranty, and there is no assets found.

These things being premised, there are but two points to be spoke unto.

1. What effect the fine in 1654 hath, taking it abstractively from the statute of 34 H. 8, cap. 20.

2. What influence the statute of 34 H. 8 hath in this case.

As to the first. The case is no more but this, tenant in tail, the reversion in the Crown, after the statute of 4 H. 7, cap. 24, and before 34 H. 8 levies a fine *come ceo, &c.* with proclamations, and hath issue and dies, whether his issue be by this fine barred?

And as to this point, I do conceive, that if the statute of 4 H. 7 will not enable the operation of the fine to bar the issues, the statute of 32 H. 8, cap. 36, will not, because there is a proviso in that statute, that the same shall not extend to fines levied of lands granted to the conusor or his ancestors in tail, by letters patent from the Crown, the reversion whereof at the time of the levying the said fine being in the Crown; but that every such fine shall be of like force as they were or should have been, if the said Act had never been had or made.

So that now I must consider what power tenant in tail had to bar his issues by the statute of 4 H. 7.

And I am of opinion, that the issues were not barred by such fine, by the statute of 4 H. 7.

To prove this, 1. It will not be denied, but that a fine levied before 4 H. 7 would not have barred the issues. It would have been a discontinuance, but not a bar. *Ipso jure sit nullus,* viz. it shall not bind the right, but prevent the entry. Co. 2 Inst. 336. For the Statute of Westm. 2, de Donis, reciting the form of fees-simple conditional, which are now estates-tail; and the mischiefs, that the feoffees after issue had power to alien, and to disinherit the issues, and to prevent the possibility of reverter to the donor, which was totally against the intent, and therefore *durum videbatur, i.e. iniquum,* says the Lord Hob. 336. That statute ordains, *quod non habeant illi, quibus tenementum sic fuerit datum, potestatem alienandi;* and that if any fine shall be levied, *ipso jure sit nullus.* The matter mentioned in this statute was so **[346]** plausible, that it wrought much upon the minds of men, insomuch as they were so far

from finding out of ways to alien, that they thought themselves bound in conscience, as well as by the words of the statute, not to alien, as we may see in Doctor & Student in his first book. And Littleton says, 362, that a condition to restrain tenant in tail from aliening farther than for his own life, is good; for that such farther alienation amounting to a discontinuance is contrary to good right, sect. 363. And though the project of Justice Rickil in the time of R. 2, and of Thirning in the time of H. 5, took no effect, yet afterwards many conveyances to uses to make perpetuities were contrived, and never judicially examined till the time of Queen Elizabeth.

About five years after, viz. 18 E. 1, was the Stat. of Modus Levandi Fines made, which says, that a fine levied shall bar parties and privies, by which word, *privies*, is meant only privies in blood, and not privies in estate, says the Lord Coke 2 Inst. 516. And whereas the words of that Act are, *And all other people of the world*, yet do they not abrogate the Statute of Westm. 2, which provided for preservation of estates-tail, fol. 517. And the issue in tail claims not from his ancestor in privity of blood or estate, but *per formam doni*, and therefore not concerned in such fine, unless by estoppel, so as not to plead *qd' partes finis nihil habuerunt*. For before 26 H. 8, though tenant in tail were attainted of treason, his issue should inherit, for the legal blood was not corrupted. And Littleton says, that if tenant in tail infeoff his son within age and die, the issue in tail shall be remitted, being (as the Lord Hobart says, fol. 71) a kind of third person, by the intent of the Statute of Westm. 2, though Fitz. Remitter 13 be of a contrary opinion.

The statute of 27 E. 1, de Finibus Levatis doth take away the heir, either in fee or tail from pleading *quod partes finis nihil habuer'*. But that was not in respect of the estate-tail; but by reason of the natural blood between the heir and ancestor; and 'twas only in respect to fines, that they should be an estoppel to such pleas.

Then the statute of Non-Claim 34 E. 3, cap. 16, reaches not to issues in tail, because they were not concerned in claims.

Then comes the statute of 4 H. 7, which says, that after the ingrossing of every fine to be levied in C. B. of any lands, the same shall be openly and solemnly read and proclaimed; and the same to be a final end, and conclude privies and strangers.

[347] Now no reason appears why privies in 4 H. 7 shall include issues in tail, more than in 18 E. 1.

As to the objection, that if it had not been for the saving, all estates-tail, remainders, and all others had been barred; I answer, I cannot see any more reason for that, than why estates-tail should not be within the Statute of Præmunire; the words whereof are, *that all the lands shall be forfeited to the King*. And yet in *Trudgin's case*, Pasch. 21 Eliz. Co. 3 Inst. 126, it was resolved, that tenant in tail shall forfeit only during his life; for, by the word *forfeit*, shall be intended only such lands as he may lawfully forfeit; so here, a fine levied of lands, *i.e.* of such lands of which a fine might by law be levied; but of lands intailed, the fine *ipso jure sit nullus*, says, Westm. 2. And the Court ought not before the statute of 4 H. 7 to take a fine of tenant in tail, Mich. 22 E. 3, 18 b. pl. 84. And if there was tenant in tail, in reversion expectant upon an estate for life, tenant for life ought not in a *quid juris clamat* to attorn; for 'twas a good plea, that the conusor was tenant in tail. Trin. 2 E. 3, 23, pl. 8. Trin. 37 H. 6, 33 a. pl. 19. Mich. 2 E. 2, Fitz. Age, 77. 1 Roll Abr. 188 B. pl. 16. Mich. 48 E. 3, 23 a. pl. 7. Co. Lit. 318 a. and 3 Co. 86 a.

The Lord Hobart in his argument of *Mackwilliam's case*, says, that there was a great fight between intails and fines: how far fines had operation upon them, was very doubtful, Jones 39. And the very statute of 32 H. 8 says, that by diversity of interpretation and expounding of 4 H. 7 it had been and then was doubted, and called in question, whether fines levied according to 4 H. 7 by tenant in tail, should bind the issues, and by reason thereof divers debates, controversies, suits and troubles were begun and moved; and very certainly so it was; for Pasch. 19 H. 8, 6, pl. 5, Dyer 2 b. the very point came in question, and before all the justices at Serjeants-Inn, there were three one way, and five the other; and Brook was one of the five who held that the fine should bar. And yet he himself in his Abridgment, tit. Assurances 6, & Fines de Terres 121, seems to be of opinion, that such fine did not bar; for he says, that if tenant in tail, the reversion in the Crown, levies a fine with

proclamations, the issues are barred by 32 H. 8. Now that statute left the validity of the fine to what it was before. But Br. Tail 41 is, that a recovery barred the issues before 34 H. 8, as the Lord Coke cites Brook, Co. Lit. 372 b. and says it was so adjudged 28 H. 8. But the book in Brook's Abridgment names **[348]** no time; by which it appears that the Lord Brook had retracted his opinion, or the reporter was mistaken. And as Dr. Pollexfen well observed, Brook was made Chief Justice of C. B. 2 Mar. and was either a Judge, or at the height of his practice in 38 H. 8, about which time he was of the opinion cited by the Lord Coke, and he lived near the making of the statute of 32 H. 8, and so might better know the construction of it. His Abridgment was published 16 Eliz. after his death, Co. Epist. ad 9 Rep. He likewise cites Dyer 52, but there is no such case; and he cites Plowd. 555, and 'tis very true that Manwood *arguendo* says as much.

My Lord Coke says likewise in the same place; and in 2 Inst. 516 and 517. that if tenant in tail after 4 H. 7 had levied a fine, by virtue of that statute, and 32 H. 8, it had barred his issues; and so doth the Lord Hobart in the argument of *Mackwillium's case* 332, but not 4 H. 7 alone; and fol. 346, he seems that alone could not do it; so that when I read their books I cannot but give very great reverence to them; but I must acknowledge myself unable to understand them, or how the law came to be so, and therefore I leave them to their own opinions with all due respect.

Object. The Lord Hobart 332 cites Pasch. 28 H. 8. That a fine by tenant in tail, the reversion in the Crown, bound the issues by 4 H. 7.

Resp. The very case intended by the Lord Hobart as is most probable, because of the same term and year as in Dyer 32 a. pl. 1. And there the question was demanded of the Justices of C. B. by Say a counsellor of Lincolns-Inn, upon what occasion it appears not. So it may be extrajudicially, and for his own satisfaction, without any cause depending; but here the justices seemed to hold that the issue were barred; and Inglefield said he knew it by experience, but Shelley doubted, and so there was Judge against Judge.

I will not mention *The Lord Stafford's case*, 8 Co. 74 a. and 6 Co. 55 a. *Seignior Chandos's case*, which have been cited at the Bar, that such fine will not bar, because those cases were after 34 H. 8.

But I think Dr. Denshal, who read upon 4 H. 7 a very great while ago, may be cited, who holds that tenant in tail is out of the statute of 4 H. 7, as you may see fol. 11 and 12.

The observation made by Dr. Saunders at the Bar is not to be omitted, viz. that between 4 H. 7 and 26 H. 8 there were almost fifty years, and yet in all that time no estate-**[349]**-tail was ever forfeited for treason. And what reason had the Judges to construe the general words of 4 H. 7 that a fine should bind as well privies or strangers, that the issues shall be bound by a voluntary act of tenant in tail, and yet that he shall not forfeit his estate for treason, which is the highest offence?

Add to this, that St. Germin in his book called Doctor & Stud. written 23 H. 8, and commended by the Lord Coke in his Epistle to his 9th Rep. when he examines the question how common recoveries of lands intailed might stand with conscience, lib. 1, cap. 26, fol. 41, never mentions fines, and certainly he would not have omitted them had they been used to have been then levied of intailed lands; for issues were as much prejudiced by them as by common recoveries. 1. From the penning of the Act of 32 H. 8 the words whereof are, *be it enacted*, not *declared*. 2. That fines heretofore levied, which shews that fines were levied of intailed lands, but wanted the support of an Act of Parliament. 3. That this Act shall not extend to lands, whereof the reversion is in the King, but that every such fine shall be of like force as it was or should be if this Act had not been made. Then cometh the statute of 34 H. 8, which says, that there was a greater mischief by this doubt for a recovery, but not by a fine, which shews that fines were not used in such cases.

True it is, that recoveries did bar the issues before 34 H. 8, as 'tis resolved in *Wiseman's case*, 2 Co. 16 a. and reason there was for it. 1. By reason of the pretended recompence as in *Octavian Lumbard's case*, 44 E. 3, 21, cited in 1 Co. 94 b. tenant in tail grants a rent for a release of one who hath right to the land, it shall bind the issues. 2. But 2ndly, for the reason given by brother Maynard, that recoveries in adversary writs did bar in all cases, till the *quod ei deforceat* was given

by Westm. 2, 4, which was the same Parliament that the Statute de Donis was made. And so is 19 E. 3, F. Recovery in Value 20 Hill. 23 E. 3, F. Recovery in Value 13. 44 Ass. 35. Mich. 44 E. 3, 29 b. pl. 9. Pasch. 5 E. 4, 2 a. pl. 11. 10 Co. 43 b. But in case of fines it was otherwise.

And yet to prevent all doubts in that case the Judges have construed the statute of 34 H. 8. to extend to fines, as appears by *Notley's case*, cited in *Stafford's case*, which though objected against as not to be found elsewhere, yet it is no spurious case; for 'tis reported again by Baron Savil 105, pl. 173, where the case upon a replevin (upon which the **[350]** pleading is set out at large) was, that King H. 8 being seised in fee in right of his Crown, granted the lands to Philip Van Wilder in tail male, after whose death the same descended to his son Henry Van Wilder, to whom Weston and Gibs acknowledged a fine, and he granted and rendered the land to them for 4000 years, and then died. And whether this lease were good, being made by *fine sur render* to bind the issues in tail, was the question, and no judgment; but seemed that it did not bind.

So that upon the whole matter, as to this point I hold, that though this case be out of the statute of 34 H. 8, yet not alienable by the statutes of 4 H. 7, or 32 H. 8.

I come now to the second great point, viz. what influence the statute of 34 H. 8 hath upon this case.

In handling of which the great difficulty will appear to arise out of the construction of the Private Act of 4 Jac.

For the true intelligence whereof we are to consider,

1. The mischiefs which had befallen the family of Darby.
2. The remedy which this Act applies.
3. The consequences which do arise hereby.

As for the mischiefs, they appear in the preamble of the Act, that by the death of Earl Ferdinand, who died without issue male, and left three daughters married into three noble families, those daughters had no certainty of their portions; and lands they were as incertain of, though heirs at law to their father, the reason that the same were intailed upon the heir male of the family, either by the Crown, or by some precedent ancestor. 2. The Lady Alice their mother and dowager, and relict of Earl Ferdinand, though intitled to dower, as the widow of one dying seised of lands of inheritance, yet not able to bring a writ of dower with any certainty, because ignorant of the tenant of the freehold. 3. Some of the branches of the family, by reason of the antiquity either of the limitations of the estates found in offices, or ancient settlements, incertain which of them shall immediately succeed Earl William in case he shall die without issue male. And 4. All of them incertain what lands were settled one way, and what another; and hence arose diverse variances, suits and controversies.

The remedy was, that all the said parties referred themselves to five honourable persons who were well affected friends of all of them; and thereupon they award the lands to be settled as in the Act.

[351] The consequence of which will be either one way or other, as the true construction of the same Act shall happen to be made, viz.

Whether this Act thus settling the lands hath altered, and made the estate formerly settled in the family, another estate substantially or specifically (as the logicians say) different from what it was before; for if the estate do now become new, then 'twill be for the defendant; but if the old estate-tail did remain in Earl Charles when he made the conveyance, it will be for the plaintiff.

And I am of opinion, that the estate-tail granted by the letters patent is not altered by the Act of Parliament.

And my chief reason shall be taken from the intent and meaning of the Act, and of all the parties concerned, which being only a Private Act, is to be considered as a settlement made by the legislative power of the kingdom. 1 Co. 47 b.

Wherein the parties to be more especially taken notice of, are,

1. The Derby family.
2. The referees.
3. The King. Every of which we cannot but presume had notice of the letters patent.

1. For were it not for them, it doth not appear by the record how the daughters of Earl Ferdinand could be disturbed from enjoying the lands in question as heirs at law to their father; were it not for them, Earl William could have no pretence.

2. The referees must needs know of them; for one of the referees was then Lord Treasurer, and there is a rent of 50l. per annum reserved, and in charge in the Exchequer.

3. The King's Counsel could not but know them; for in all Acts of Parliament, 'tis their duty to examine how far the Crown's interest is concerned.

And this knowledge and notice of the letters patent produced the words so frequently in the Acts, viz. in the recital of the award, *that all the said lands which were of the Earl Ferdinand should be assigned, conveyed and enjoyed, unto, and by such persons, for such estates, and with and under such limitations, powers, liberties, declarations and savings as is afterwards expressed.* 3. *And* **[352]** *that the same shall be vested, adjudged, deemed and taken to be in the said persons for such estates, and with and under such powers, liberties, provisoes, exceptions, declarations and savings, as afterwards is mentioned, declared, limited and expressed.* 4. The proviso itself.

All which do shew that the Act was intended to pass *sub modo*, and that there should be somewhat preserved from being destroyed thereby; and in truth so there was.

For by the letters patent it appears, that the patentees (under whom the lessor doth derive) were persons well deserving of the Crown; and therefore *ob singulare & fidele servitium qd' nobis præantea impenderunt, ac pro bono & fideli servitio nobis & hæridibus nostris Regibus Angliæ per eosdem Thomam & Georgium & hæredes suos pro defensione nostra & regni nostri contra quoscunq proditores inimicos & rebelles quoties futuris temporibus opus erit impendend. &c.* the King grants; so that he did not only respect what was past, but also service to be done for the future; and not only by them, but their descendants and heirs, and to the King and his heirs.

Now whether this would make any condition or tie of any sort in law upon the estate, may be doubtful, though Hob. 41 says, that *pro & in consideratione*, do not regularly, and in the case of a common person, purport a condition.

But most certain it is, that the King and his counsel intended that those words should signify somewhat.

The Parliament in 11 H. 7 had so great regard to such gifts of offices or annuities, that they bound the grantees to attend the King and his heirs in person in his wars, upon pain of forfeiture, though there was no such consideration mentioned in the patent; as you may see 11 H. 7, cap. 18.

And the Act of 34 H. 8 takes notice; for the words are,

To the intent that recompence for such service of the donees should not only be a benefit for their own persons, but a continual profit for the heirs of their bodies, whereby such heirs should have in special memory, and daily remembrance, the profit that they have, and take by the service of their ancestors done to the Kings of this realm, and thereby be the better encouraged to do like service to their Sovereign Lord, as to their duties of allegiance appertaineth.

[353] And the advantage the Crown receives by such remembrance in public families is not final, and therefore the ground of that Act was very considerable both for the King's honour and his profit.

Now this advantage is utterly lost if the estate granted by R. 3. be altered by this Act of 4 Jac. which as the times then were, and as the family of the house of Derby was then affected, would never be allowed, either by the King or any of the parties concerned in the Act: for observe the time of the making the same; 'twas the next year after the attempt of the gun-powder treason, and not quite, or at least but two years after an attempt, or at least an apparent inclination of another contrary party against the Crown and established Government, as appears by the resolution in 2 Cr. 37. So that had any of the parties or the King been asked whether they intended to dissolve the tie (of honour at least) between the family and the Crown, in relation to the service they owed to the Crown specified in the first gift, they would have returned a negative answer without doubt.

Add to this, that the proviso itself is not a bare saving, which might have been excepted against, as opposing, or not well consisting with other parts of the Act, as

in *Porter's case* it is objected; but it is an enacting clause, whereby it is enacted, *that the King shall have, hold and enjoy all such and the same rights, titles, profits, commodities, emoluments, claims and demands, as if the Act had not been made.*

By all which it most plainly appears, that 'twas the intent of the Act that the estate should not be altered.

Then, to construe this Act otherwise, if possible to prevent it, is to make it support a fraud to the King. *Rex fallere non vult, falli non potest.* 12 Co. 3.

This being so, it must be considered, whether this intention can consist with the rules of law. In examination whereof the objections are in order to be considered.

Object. 1. The Lady Alice hath an estate for life, which she cannot have out of the old estate-tail of Earl William.

Resp. 1. This consists with the former estate, because but of a third part, and so in lieu of dower; and to prevent her danger of suit, which could not be with ease, for want knowledge of a right tenant of the freehold.

[354] 2. But however, she is dead, and so no objection; for though that might have altered the intail, it would be but during the continuance of the estate for life, which is determined.

Object. 2. Earl William hath hereby only an estate for life.

Resp. The Act doth but pare away part of the intail, and leave an estate for life; for though an estate for life cannot be said to be the same estate with the intail, yet the original intail is not hereby altered in the issue of Earl William; as in the case of *The Lord Delaware*, 11 Co. 1, he had an estate-tail in his honour, and disabled for his life; and so part of the estate in the honour suspended by Act of Parliament; and this is here an execution of the agreement.

Object. 3. Earl James hath an estate in his father's lifetime, which he could not have by the first intail.

Resp. Here is no gift of an estate, but a distribution of the enjoyment of it, nevertheless consistent with the former estate; for all is within the compass of the first intail: and it is but a confirmation of an agreement, as Acts of Parliament for confirming inclosures, or establishing custom for common, or a partition between tenants in tail. And this Act of Parliament works in this case, not by way of *gift*, but by ordinance, as letters patent, whereby the King may erect a fair, market, warren, park, forest, piscary, or the like, by ordinance, without granting them to any, Hob. 15, the case of burgesses of Parliament.

Object. 4. Earl William hath power to make leases, which he could not do as tenant for life.

Resp. Such power alters not the estate, for it is but a collateral qualification, and such a thing as may *adesse & abesse sine interitu subjecti.*

Object. 5. Power in tenant for life, and in Earl William's sons, to make jointures.

Resp. Observe, that the power is but of a third part, and so to supply dower, that there may be a writ of dower brought, wherein difficulty may be of finding a right tenant of the freehold.

Object. 6. If the parties shall bring a *formedon*, they must declare upon this Act, and not upon the letters patent.

Resp. The heir need not bring any action, for he may enter. But 2. If he will bring his action, he must declare upon both letters patent and Act; for suppose the intail be spent, **[355]** the King in a *formedon* in *reverter* must declare upon the letters patent only.

Object. 7. In all estates-tail there must be donor and donee, and here the King cannot be the donor.

Resp. An Act of Parliament can create an estate-tail without a donor; and where we see estates limited for a particular purpose, we are not to measure the validity of such limitations by the strict rules of the common law; for the Parliament can control the rules of the common law, 13 Co. 64. It can make an estate of freehold to cease as if the party were dead; as the estate of a parson who accepts a second benefice contrary to the statute of 21 H. 8 of Pluralities, 6 Co. 40 b. and for this cause the Lord Hobart says, p. 346. That Judges have authority to mould statute laws according to reason and best convenience, to the truest and best use, especially considering that the Parliament precedes many crimes according to natural equity *secundum æquum*

& bonum, which is *lex legum*, without respect to legal ceremonies. Hob. 224. So that where the drift and sole intent of an Act of Parliament is most plainly discerned, as in this case, and yet that intention cannot be observed, were the same in a deed, by construction according to the rules of law, we ought rather to presume the Parliament (in whose power it was so to do) resolved to leap over and waive the rules of law, and to make a particular law for that occasion. As for the purpose in *The Prince's case*, 8 Co. 16. The honour of the Duke of Cornwal is limited to Prince Edward, *& ipsius & hæred. suorum regum Angliæ filiis primogenitis & dicti loci ducibus & regni Angliæ hæreditarie successuris.* By which, he that ought to inherit by virtue of that grant, ought to be the eldest son and heir apparent of the King of England, and of such a King as is heir to Prince Edward, and that such an eldest son and heir apparent to the Crown shall inherit the said dukedom in the life of the King his father; and the lands there mentioned are accordingly annexed to the dukedom for the same estate.

Now by what rules of law could this grant be construed in this manner? certainly by none, but the Judges were forced to bend and conform their legal reason to the words of the Act of Parliament, and rather to construe the words literally, and that the Parliament intended to create a new limitation as well as a new title, rather than to strain the sense of the words and the construction thereof farther than ever the Parliament intended. They did not stretch their invention to **[356]** find out legal reasons for that limitation, as men that would shew themselves more witty than serious, might have done. But *qui rationem in omnibus quærit, rationem confundit.* And they gave the same reason for their resolution, which appears in this case, viz. that otherwise it would be impossible to make good that limitation; and if they should not make such construction, the whole design of the Act of Parliament would be frustrated. So here the design was, that the agreement and award should be performed, and yet the King not prejudiced, which cannot be if not construed as the plaintiff would have it.

True it is, should the letters patent be left out of the verdict, and the differences, and the award and the agreement and proviso struck out of the Act of Parliament, I should not doubt but to account the estates therein mentioned to be all new, and that all the estate in the letters patent, except the King's reversion, to be totally altered; but all those things considered together, I think it must necessarily be otherwise.

Object. 8. The Act of 34 H. 8 ought to be strictly construed, because it restrains alienation.

Resp. If it were to restrain such alienations as are favoured in law, viz. of tenant in fee-simple, or tenant in tail of the gift of a subject, whereby trade and commerce might be prevented, debts unpaid, and children unprovided for, which is the reason that the law disallows of perpetuities and conditions which restrain alienation, doubtless the Act were to be construed strictly.

But this Act carries a reason in its preamble answerable to those inconveniencies, *that the grantees should not alien, for that the lands were given to the intent that recompence should not only be to the donees for their service, but a perpetual profit to their heirs of their bodies, whereby such heirs should have in special memory, and daily remembrance, the profit that they have and take by the service of their ancestors done to the Kings of this realm, and thereby be the better incouraged to do like service to their Sovereign Lord, as to their duties of allegiance appertaineth.*

Now the said inconveniencies will not fail in such cases.

1. Because the lands thus disposed are not many, *et ad ea quæ frequentius accidunt jura adaptantur.*

2. They are to persons generally of noble families, of whom the Crown hath always a care.

[357] 3. This law is for support of the Crown and Government, which ought to be secured before all private interests.

Object. 9. The tenure is altered by this Act of Parliament.

Resp. Tenure is not an essential quality to an estate, for there are estates whose tenures may be gone, and yet the estate remains; as suppose the King had released the tenure of knights service, and that the patentees should hold in socage, yet the estate-tail had continued the same. 4 Co. 9 a. If a mesnalty become a rent-seck by surplusage, the ancient seisin is sufficient. 1 H. 4, 4. If H. recovers in an assise, a

rent-service, and afterwards that rent becomes a rent-seck and he is disseised of it, he shall have a redisseisin, because the substance of the rent remains, though the quality be altered. Co. Lit. 154 b.

Object. 10. The estate-tail was without impeachment of waste, so is not the estate for life here.

Resp. The quality of being without impeachment of waste makes no alteration. 3 Cro. 40, *Clare* versus *Pepys.*

Object. 11. By the letters patent there was one intire estate given, but here are several estates for life, and estates-tail, which are not intire.

Resp. These estates are all the same in quantity, which they would have been without the Act; and it is the same estate as to duration, for all the estates here do arise out of the original estate-tail, and the reversion is not touched.

Object. 12. Lastly, these estates do arise out of the estate-tail, and are to continue no longer, and are distinct from it; as if tenant in tail bargain and sell to one and his heirs, the bargainee hath fee, and the estate granted continues till the issue enters.

Resp. True it is, that such construction may be made in a conveyance, and so might it have been in this Act, had not the intent appeared otherwise; but therefore it shall not be so construed here, because it would prejudice the King's interest contrary to the proviso.

And in the exposition of an Act of Parliament we need not labour in maintaining its conformity to the rules of law, when its design is for another purpose.

Tenant in tail makes a lease for three lives, by 32 H. 8 this cannot be made good by the rules of the common law.

[358] As for authorities in this case, *Gardiner's case* 14 Car. 2, cited by my brother Weston, is nothing to this purpose, which was, that H. 8 gave to Michael Stanhope and his wife, and the heirs of their bodies certain lands, Michael dies, the lands descend to Thomas Stanhope his son and heir, who petitions the Queen to grant the reversion to some persons in fee, to the intent that he may make a lease for ninety-nine years by way of mortgage, and enters into a recognizance to the Queen, conditioned, that nothing shall be done whilst the reversion is out of the Crown, prejudicial to the Crown.

The Queen conveys the reversion to the Lord Burleigh and Sir Walter Mildmay in fee, Thomas Stanhope makes a lease and then suffers a recovery, the trustees reconvey to the Queen.

Resolv. 1. 'Twas a good grant.

2. Thomas Stanhope was not restrained from aliening.

But I may resemble this to the case of *Falkner and Bellingham*, Mich. 3 Car. 1, in C. B. reported by 1 Cr. 80, and Jones 233. The case was this, *Ultimus presbyter celebrando divina* in the church of East Grinsted was seised in fee of a messuage and lands *in jure presbyteratus sui*, and held them of the lord of the manor of Brambleton, by the rent of 18s. and other services, who became seised of the rent. By the statute of 1 E. 6, cap. 14, this messuage and lands became forfeited to the Crown; but in that statute there is a saving of all rents and services to all other persons. The King granted the lands over, and no seisin was had of the rent for above forty years after the statute of 1 E. 6. And whether seisin within forty years was necessary, or no, was the question; for if it were the same rent, then seisin was necessary; but if a new rent created by the statute, then seisin was not necessary. And resolved by three justices *contra* two in C. B. that it was a new rent; and there held by the three justices, that this rent being originally a rent-service, was now turned into rent seck by the Act of Parliament, and became a rent coming out of the womb of the Parliament, as Justice Hutton called it; and though it were the same rent in estate, as if there were tenant for life, the remainder in fee, or if descendible on the part of the mother; so now; yet altered in quality.

But the other two justices, and the whole Court of B. R. wherein the first judgment was reversed, resolved, that it is the same rent to all purposes, and 'tis parcel of the **[359]** manor as before. And it is not a rent given by the statute, because a saving never amounts to a gift of any new thing, but is *quasi* an exception out of the statute, where otherwise it would be extinguished and lost.

And they resolved, that though the tenure was destroyed, it remained the same rent in substance, and in all other things; as if an arrow loses one or two feathers, yet it is an arrow still, or if H. loses some members, he continues a man still.

As to the objection, that if the Act shall be thus construed, this will be very mischievous, because there are many purchasors for valuable consideration, and it will blow up their estates;

Resp. 1. There can be no case adjudged, but must be mischievous to some body; as 1 Co. 53 a. b. But

2. The mischief appears not in the record.

3. Better suffer a mischief than an inconvenience; for should this Act be construed against the intention, the King must lose the advantage before mentioned; and to expound an Act so, would be generally inconvenient; and so I conceive judgment ought to be given for the plaintiff.

In this case the Court of Exchequer was divided, viz. Mountague Chief Baron, and myself for the plaintiff, and Atkins and Gregory for the defendant; and thereupon the cause was adjourned into the Exchequer Chamber, where it was argued again by counsel three several times, and also by eleven of the Judges; for that North Chief Justice of C. B. was made Lord Keeper last vacation; and all the Judges, except Gregory, Atkins and Dolben, gave their opinions for the plaintiff.

As to the first point, all but Jones, Charlton and myself, were of opinion, that the issue of tenant in tail was barred by a fine levied by his ancestor, by virtue of the statute of 4 H. 7, before the statute of 32 H. 8. And all who argued for the plaintiff agreed, that the Act of 4 Jac. did not destroy the estate created by R. 3, but was only an instrument to perfect the agreement made by the arbitrators in the Derby family. The Lord Keeper's opinion was delivered by the Chief Justice Pemberton, by the Lord Keeper's direction, accordingly.

[360] TERM. PASCH. 32 CAR. 2, B. R.

Memorandum, This term were made Serjeants, of the Inner Temple, Sir G. Jeoffries Recorder of London, Sir J. Kelyng, one of the King's Counsel, Edmund West, R. Hanson, Sir Fr. Manley and W. Bugby, of Gray's Inn, Edw. Bigland and W. Richardson of Lincoln's Inn; Rob. Wright of the Middle Temple.

KIRTON *versus* GUILDER.

Prohibition.

Guilder sues the plaintiff in the Ecclesiastical Court at York, for procurations belonging to him as archdeacon, and libels, that for ten, twenty, thirty and forty years last past there hath been due and paid 6s. annually for the said procurations, by the said Kirton and his predecessors, Parsons of D. And Kirton by Hoyle prays a prohibition, and suggests, that the said duty hath not been payable, and denies the prescription, and so the Ecclesiastical Court cannot have conusance of a prescription, which is properly triable by the common law. Rastal's Ent. 483. 2 Roll. Abr. 283, pl. 16. 2 Roll. Rep. 293.

But Holt *e contra*, that procurations are payable of common right, Linwood 67, as tithes are, and no action will lie for the same at common law; and a prescription in the ecclesiastical law may have a different commencement from what it hath by the common law, and a pension is suable in the ecclesiastical law. F. N. B. 151 b.

Per Cur. A consultation is granted *quoad* procurations demanded generally; but if the plaintiff denied the *quantum*, then a prohibition.

WILLIAM COLE ESQ; *vers.* WILLIAM IRELAND GENT. LEICEST.

Hundred. 2 Jones 194. Pollexf. 606. Skin. 41.

The plaintiff declares, that whereas 12 November 27 Car. 2, the King by his letters patent then dated had made him Sheriff of the county of Leicester, *custodiendum quamdiu dicto domino Regi placeret*, which office is an ancient office, to which the right

and title of naming and constituting a bailiff of the bailiwick of the hundred of Gartree in the said county time out of mind hath belonged, and still is incident, annexed and inseparable from the same; **[361]** and that every sheriff of the said county for the time being, hath from time to time named, constituted and ought to name and constitute a bailiff of the bailiwick of the hundred aforesaid, and hath held, and of right ought to hold a view of frankpledge of the hundred aforesaid, and a Court of the said county; and by occasion thereof divers fees, commodities, profits and emoluments had and received, and of right ought to have and receive as incident thereunto. 29 March 28 Car. 2. The defendant at Turlangton and elsewhere in and through the said hundred took upon him, and exercised the said office for the space of six months against the will of the plaintiff, and without any right or lawful authority, and without the plaintiff's consent or nomination, the plaintiff being all the while sheriff of the said county: and also the same 29th of March 28 Car. 2, at Shankton in the hundred aforesaid, the defendant did of his own wrong, and without right or lawful authority hold a view of frankpledge of the said hundred, and also a court baron, and several courts baron from three weeks to three weeks there did hold, and on that occasion received several profits to the value of 5l. *ad dammum* 40l.

The defendant pleads not guilty, and the jury find a special verdict, viz.

That the plaintiff was made sheriff, as he declares.

That 12 E. 2 the King committed to one John de Sadington his hundred of Gartree, in these words. Leic. Rex ad requisitionem Isabellæ Reginæ Angliæ Consortis suæ charissimæ commisit dilecto sibi Johanni de Sadington valecto ipsius Reginæ hundred' Regis de Gartree cum pertin' in com' Leic' custodiend' quamdiu Regi placuerit reddend' inde Regi per annum ad Scaccarium suum 16l. prout ad idem Scaccarium jam redditur pro eodem, dum tamen hundred' ill' custodiat juxta formam statuti nuper apud Lincoln' inde edit' & provis. in cujus, &c. Teste Rege apud Eborum 6 Febr. per ipsum Regem et mandat' est Johanni de Greydeston quod eidem Johanni de Sadington hundred' præd' cum pertin' quod in custodia sua ex commissione Regis existit liberet custodiend' in forma præd'. Teste ut supra.

2 October 1 H. 4. The King granted the same to William Hoghwick in hæc verba. Rex omnibus ad quos, &c. salutem. Sciatis quod de gratia nostra speciali & pro bono servitio quod dilectus armiger noster Willielmus Hoghwick nobis impendit & impendet in futuro concessimus eidem Willielmo hundred' **[362]** de Gartree in com' Leicest' cum pertin' habend' pro termino vitæ suæ una cum omnibus firm' reddit' sect' Cur' & omnibus aliis rebus proficuis & commoditat' ad præd' hundred' quoquomodo rationabili spectan' sive pertin' absque aliquo nobis inde reddend' aliquibus statut' sive ordination' ante dat' præsentium fact' non obstan' in cujus &c. Teste Rege apud Westm. 2, Octob. per breve de privato sigillo.

19 November 15 Jac. The King granted the said hundred to William Ireland father of the defendant, *habend'* from Michaelmas last for twenty-one years, *reddend'* 17l. 15d. and *ob.* viz. for the hundred of Goodlaxton mentioned in the letters patent 17l. 19s. 3d. and for the hundred of Gartree, 9l. 2s. *ob.* and 20s. of increase.

5 September 13 Car. 2. The King granted to the defendant the premisses in these words, viz. Custod' sive firm' separal' hundred' de Goodlaxton & Gartree cum omnibus & singulis eorum pertinen' in com' Leic. Ac officii & officiorum seneschalli & seneschalsiæ ballivi ballivat' præd' hundred' de Goodlaxton & Gartree & eorum alter' cum omnibus & singulis juribus membris pertin' proficuis advantagiis allocation' authoritat' præheminenc' libertat' & emolument' quibuscunque eisdem offic' seneschalli & seneschalsiæ ballivi & ballivat' sive ballivorum vel ballivatorum nostrorum præd' hundred' de Goodlaxton & Gartree & eorum alteri qualitercunque spectan' vel pertin' ac cum omnibus vadis feodis proficuis commoditat' & advantag' quibuscunque eisdem officiis aut eorum alicui ut prædict' qualitercunque spectan' pertinen' sive debend' una cum executione omnium & singulorum brevium process. præcept' summonitorum arrestat' warrant, attachiament' & mandatorum nostrorum hæred' & successorum nostrorum infra separal' hundred' præd' exequend' & emergen' adeo plene libere & integre ac in tam amplis modo & forma prout aliquis ballivus vel aliqui ballivi separal' hundred'

præd' exequi vel facere possit vel possint debet vel debent gavisus fuit vel habuit gavis. fuer' vel habuer' vel gaudere debuit vel debuere necnon custod' letarum vis. franc' pleg' & Cur' præd' separal' hundred, & turn' vicecom. infra separal' hundred' præd' & eorum alter. Ac omnium proficuorum earundem letarum vis. franc' pleg' & Cur' hundred' & turn' & eorum cujustibet necnon amerciament' fines pœnas forisfact' sect' servic' reddit' perquisition' Cur' let' & vis. franc' pleg' & omnium aliorum proficuorum commoditat' libertat' privileg' franches. jurisdiction' & emolument' quorumcunque infra **[363]** separal' hundred' præd' quoquomodo provenien' dictis separal' hundred' & officiis præd' seu eorum alicui pertinen' spectan' sive acciden' aut ut pars vel parcell' eorundem hundred' ballivi & ballivat' seu aliquorum eorum habit' cognit' accept' usitat' occupat' seu gavis. existen' cum libertate pro levation' & collectione eorundem infra separal' hundred' præd' ac etiam custod' sive firm' omnium & omnimodorum bonorum & catallorum felon' fugitivorum felon' de se & in exigend' posit' condemnat' & utlagat' sive waviat' bonorum waviat' & extrahur' emergen' crescen' contingen' sive provenien' dict' separal' hundred' & ballivat' præd' seu eorum alicui quoquomodo spectan' sive pertinen' aut cum eisdem aut eorum aliquo usitat' dimiss. locat' sive gavis. Quæ quidem hundred' & cætera præmissa per literas nostras patentes dimiss. sunt parcel' possession' antiquæ Coronæ nostræ Angliæ. Except' tamen semper & extra hanc præsentem concession' nobis hæred' & successor' nostris omnino reservat' omnibus & omnimod' fin' amerciament' & exitibus annuatim & de tempore in tempus provenien' crescen' sive renovan' seu quovismodo forisfact' in aliqua Cur' nostra hæred' & successorum nostrorum de recordo sive aliquibus Cur' nostris de recordo sive coram justic' nostris ad Assisas Justic' ad pacem sive clerico mercati provenien' crescen' acciden' emergen' sive renovan' ac etiam libertat' pro levation' & collection' eorundem infra separal' hundred' præd' habend' from the making of the letters patent for thirty-one years. Reddend' annuatim 18l. and 15d. *ob.* and 10s. increase.

The jury also find the statutes of 2 E. 3, cap. 12, and 14 E. cap. 9. That the defendant did keep the courts and receive the profits of the hundred, as the plaintiff hath declared; and if the plaintiff be guilty they assess 5l. damage.

Lovel for the plaintiff. The single question is, whether the grant of this hundred, and other things therein specified be good? and I hold that the same is not good in law.

Hundreds and bailiwicks granted before Edward the Second's time are good, but not those which have been granted afterwards. As to the original of hundreds before King Alfred's time, which was anno 872, the counties remained intire, but then divided into hundreds; for before that the earls who were *consanguinei* of the King and of the Royal blood had the custody thereof. This office continued in the earls till by reason of the great trouble, they were weary of it, and then were appointed *vicecomites*, which continue to this day. This office was assisted with inferior **[364]** jurisdictions, as view of frankpledge and turn, to take inrolment of the freeholders. The hundred court, &c. and these courts continued until Edward the Second's time, and then the King granted out of the turn the leet, and out of the hundred court a court baron. Fitz. Leet 11. Br. Leet 26. Dyer 13 b. 64. But notwithstanding these courts were thus chipped out of the county, yet the jurisdiction of the county remained intire to the sheriff, until afterwards the King granted some hundreds away in fee, and also franchises to several other persons. And thereupon several statutes were made to restrain the mischiefs of such grants, whereby insufficient persons were become owners of them, and managed them to the prejudice of the people, viz. 9 E. 2, the Statute of Lincoln, which injoins, that the sheriffs have sufficient in the county to answer the King; and so of farmers of hundreds, and that executions shall be made by bailiffs of hundreds: so 2 E. 3, cap. 4 and 5. But those statutes did not remedy the inconvenience, for the Crown did grant bailiwicks in fee, and thereupon were the Acts of 2 E. 3, cap. 12, and 14 E. 3, cap. 9, made, both which statutes do forbid the granting more bailiwicks than were then granted.

As to the things granted they are five, and none of them grantable.

1. Courts. They are not grantable by the King, because the turn is called the

sheriff's turn, 31 E. 3, cap. 15, and so Pasch. 6 H. 7, 2, pl. 4. And the County Court is the sheriff's. 4 Co. 33 a. *Mitton's case.*

2. Offices. The officers of these courts belong to the sheriff. *Mitton's case, Scrog's case,* Dyer 175.

3. Fines and profits. They are the sheriff, 1 E. 3, they shall be delivered to the use of the sheriff.

4. Bailiwicks. That is incident to the office of the sheriff, and he ought to answer for him. Dyer 241 a. pl. 47.

5. Hundred. If the sheriff shall not have it, he cannot answer for escapes there.

This very case resolved, 2 Car. *Fortescue's case,* Co. 4, Inst. 367.

Bigland *contra.* As to the case of Mitton, and other cases, wherein certain offices incident to sheriffs are alledged, they stand upon different reasons from our case.

The King may except any part of the county from the power of the sheriff. 1 Roll. Rep. 118, *Villa de Derby* versus *Foxley.*

Of common right a hundred belongs to the King. 2 Roll. Abr. 73 b.

[365] As to the statutes, that of 2 E. 3, cap. 12, extends only to such hundreds as were let to farm by the then King, and the statute of 14 E. 3, cap. 9, is relative to the other Act, and ancient statutes are construed according to the subsequent usage. *Et adjournatur.* And afterwards, viz. Pasch. 34 Car. 2, judgment was given for the plaintiff.

AMBROSIUS MANATON'S CASE.

Mandamus Trem. 450.

Ambrosius Manaton had a *mandamus* directed to Charles Luxon Mayor of the borough of Trevena Beseny in the county of Cornwal, to be sworn mayor there, according to an election made of him by the said borough, to which writ the said Charles Luxon returns, that before the coming of the writ, and before the issuing out thereof, viz. 25 Octob. 31 Car. 2, he the said Charles was removed from the place of mayor, and one William Amy then chose, admitted and sworn, and from that time *hucusque fuit & adhuc est major burgi prædicti,* and by reason of his said office hath the custody of the common seal, and thereupon he the said Charles could not restore him, as the writ requires; and whether this was a good return was the question? And the objection is, because it is not returned, that the new mayor Amy was *debito modo electus,* and it may be that he was chose out of time, and not according to charter. 2. Returns must be certain, and not by implication, because the party outed hath not liberty to reply to them; and of this opinion were my brother Dolben and myself; but Scrogs Chief Justice, and Jones Justice *contra,* that when Amy is returned, he shall be intended *debito modo electus;* and if an action upon the case shall be brought for this false return, and the issue be elected or not; if he was not duly elected, it will go for the plaintiff in the action; as Co. Lit. 381. Fines levied, is intended lawfully levied, Westm. 2, cap. 5. *ita quod episcopus ecclesiam conferat, i.e. legitime conferat. Non præstat impedimentum quod de jure non sortitur effectum.* But I do conceive, and was then of opinion, that the return is not good, because only by implication. As the case of the Recorder of Barnstable, Pasch. 18 Car. 2, B. R. the return was, *non constat nobis,* that he was ever elected; and adjudged insufficient. *Vide antea.* And these places do concern the publick government, and we ought not to favour false returns; and if we suspect a return to be false, this Court can make a corporation **[366]** swear the return; but by reason the Court was divided no writ went.

CONSTANCE HARVEY WIDOW OF HENRY HARVEY, DEMANDANT, *versus* FRANCIS HARVEY. IN DOWER. IN C. B.

Error. 2 Jon. 121. 2 Show. 61.

The tenant pleads, that after marriage the husband had settled other lands upon the demandant for her life, for her jointure, and that she after his death agreed thereto, and entered accordingly. The demandant replies, that it was a voluntary settlement of her husband, and traverses, that it was not for her jointure, and issue thereupon;

and at the Nisi Prius the tenant made default, and a petty cape awarded and returned, and judgment, that the demandant have seisin; and the demandant suggests, that her husband died seised, and prays a writ to enquire of the damages, returnable *crastin Pur.* The sheriff returned, that he hath delivered seisin of the lands particularly; and also an inquisition, which finds that the lands are worth 114l. 11s. per annum, and that her husband had been dead six years and three quarters, and that she had sustained damages *occasione detentionis dotis ultra valorem præd' & ultra misas & custag' sua* 195l. *& pro mis. & custag.* 20s. And upon this Constance, *gratis* releases the 195l. and demands judgment only for the 20s. And judgment is given, that the demandant recover *tam valorem tertiæ partis præd.* from the death of her husband, which comes to 257l. and the 20s. and 11l. *de incremento*, in all 269l. and the tenant brings a writ of error, and assigns several things for error, which are made good upon diminution alledged, and there being a variance between the inquisition and the writ of seisin, the writ of seisin and execution was erroneous, and thereupon a writ of enquiry, and the value of the land found; and now alledged, that here ought to be no writ of enquiry, because the damages were released by the demandant. But upon consideration had of the record, the whole Court resolved, that the release was only of the damages sustained *occasione detentionis dotis*, and not of the mesne profits of the land, for they are two distinct things, as appears by the precedents. Co Lit. 32 b. *Belfield* versus *Rous.* The writ is to enquire not only of the value of the lands, but also of the damages *ratione detentionis dotis*, and judgment accordingly. So is Rast. Entr. 237, tit. Dower en **[367]** Judgment 13, and so are all the judgments; and a *fi. fa.* lies for the damages, Formulæ Bene Placitandi 223. And judgment was affirmed.

Sir Miles Stapleton's Case.

Court.

Sir Miles Stapleton having been arraigned at the King's Bench Bar this last term for high treason, and a day appointed next term for his trial; the prosecutor, one Boldron, suggested to the Lords of the Privy Council, that his wife, who he said was a material witness, was in expectation of being brought to bed every day, and so she could not be at the trial, and therefore desired the prisoner might be tried in the country; and thereupon the Lords of the Council ordered, that the Judges of the King's Bench should be attended, and to consider whether the indictment may be sent down into Yorkshire to be tried there next Assizes by Nisi Prius, and whether a tales is grantable in case of high treason; whereupon Mr. Attorney General attended at my brother Jone's chamber, where my brother Dolben and I discoursed together concerning this matter, my Lord Chief Justice being out of town, and we did resolve, 1. That an indictment of high treason may be tried by Nisi Prius, for so is Co. 4 Inst. 73, and the statute of 14 H. 6, cap. 1, gives power to the Judges of Nisi Prius to give judgment, and award execution in cases of felony and treason, which cannot be but where such offences are tried by Nisi Prius, for *quatenus* Judges of Nisi Prius they cannot give judgment in cases not legally coming before them. As for felony and murder, indictments removed into the King's Bench concerning these offences, may be sent down to be determined by virtue of 6 H. 8, cap. 6, but that statute extends not to treason. 2. We resolved, that a *tales de circumstantibus* may be awarded in case of treason, by the statute of 4 and 5 Ph. and Mar. cap. 7, where the King is party. And so we left it to Mr. Attorney to do as he shall see cause, with the prisoner.

[368] William Muschamp and Others, Plaintiffs, *versus* Henry Aston, Defendant. Error. Ireland.

Duties.

The plaintiff below declares that he was possessed of two hundred twenty-six hundred and an half of lambskins, and intended to transport them from the port of the City of Dublin to England, and for the exportation of the same skins had paid

tonnage and poundage, according to an Act of Parliament made at Dublin 4 March 14 Car. 2, viz. *for every hundred* 10*d.* The defendant *vi & armis* did assault the plaintiff, and hindered him from exporting the said skins till he had paid 84l. 8s. 11d. over and above the said duty of 10d. per cent. *ad damnum* 200l. The defendants plead not guilty to all, but the hinderance of the exportation till payment of the 84l. 8s. 11d. and as to that they say, that by the same Act it is enacted, *That every one exporting Irish wool out of the kingdom of Ireland shall pay to the King upon the exportation thereof, for every stone containing* 18lb. 1s. 8d. That 8 April 1676, the King by indenture granted the duty to the defendant, *habend.* from Christmas 1675, till Christmas 1682. That there was upon the said skins 1351 stone, and 7-eighths of a stone of wool of six months growth, and that 84l. 8s. 11d. was due for the same; and for not payment a seizure *prout.* The plaintiff demurred. This action was originally brought in the Common Pleas in Ireland, and judgment there given for the plaintiff; and upon a writ of error in B. R. in Ireland, that judgment affirmed; and now the defendants have brought this writ; and upon debate, whether the duty should be paid both for the skins and the wool separately and distinctly, we all resolved, that there shall be but only one duty paid, viz. for the skins; for it cannot be presumed, that men will kill the lambs barely to deprive the King of his customs; and by the Act of Parliament,

	l.	*s.*	*d.*
Sheep-skins tawed with the wool on, an hundred . . .	1	10	0
Pelts drest or undrest, without the wool, an hundred . .	1	0	0
Sheep-skins with the wool, the hundred	1	0	0
Lamb-skins drest or undrest, the hundred . . .	0	16	8

By which it appears that lamb-skins are to contain the wool on them; and it is not usual in many places to shear lambs, and therefore judgment was affirmed. *Per tot Cur'.*

[369] TERM. TRIN. 32 CAR. 2, 1680, B. R.

Witness.

The first day of this term Elizabeth Celier, the wife of Peter Celier, was tried at the Bar upon an indictment, for *that she, with others unknown* 1 *November* 31 Car. 2, *did compass and intend the death of the King, to change the Government, and extirpate the Protestant religion, and to that purpose did meet and advise together, and did contribute, pay and disburse great sums of money; and for better concealing of the treasons aforesaid, did disburse great sums of money to divers persons to lay and charge the treasons upon other persons.* Upon not guilty pleaded, she was found not guilty. There was one person who came against her as a witness, who was the then prosecutor, Thomas Dangerfield, against whose evidence the prisoner excepted, for that he had been several times convicted of cheating, and had been set upon the pillory, and had been whipped, and was of very little credit, and then would have produced a pardon of these offences; but she produced a copy of a conviction of a felony, for which he was burnt in the hand, which was out of that pardon; and also an outlawry for another felony, which was likewise out of that pardon; and so his testimony was set aside. And it was debated, that admit a witness be convicted of felony, and afterwards pardoned, whether he shall thereby be restored to be a good witness? and my Lord Chief Justice Scrogs and myself were of opinion, that he could not, because the pardon doth take away the punishment due to the offence, but cannot restore the person to his reputation; and of that opinion was Justice Nichols in *Cuddington and Wilkin's case*, Moor 872, pl. 1213. But my brother Jones and Dolben *contra;* and so afterwards did I conceive; for in the case of *Cuddington and Wilkins*, as 'tis reported in Hobart, 'tis said, that the pardon takes away not only *pœnam*, but *reatum.* Another question was started, viz. whether a man convicted and burned in the hand be stigmatique as to his testimony? And Jones held that he was not, because the burning of the hand **[370]** is no part of his judgment, and is by 4 H. 7, cap. 13, only to notify to the Judge that he hath had his clergy before, 5 Co. 50 a. *Biggins's case.* But I have examined that case, and do find that no judgment was given therein, but

compounded, as 'tis reported both by 3 Cro. 682, and by Moor 571, pl. 782. And Cro. says, there were two Judges against two; and Moor says, 'twas agreed, the King could not pardon the burning of the hand in an appeal. And in truth it seems to me to be part of the judgment; for the entry is, *Ideo consideratum est, quod le offender cauterizetur in manu sua læva.* Rast. Entr. 1 b. and 56 a. But upon the whole matter it appears by *Heston's case*, cited in *Foxley's case*, 5 Co. 110 a. That the burning in the hand is (by virtue of 18 Eliz. cap. 6, which says he shall be forthwith enlarged) in nature of a pardon, and the prisoner is thereby cleared from the offence, and consequently he is a good witness, and not stigmatique. Hob. 292, *Searl* versus *Williams.*

THOMAS HUNT *versus* WILLIAM DANVERS. ASSUMPSIT. ERROR IN C. B.

[See *Dennett* v. *Atherton*, 1872, L. R. 7 Q. B. 326.]

Assumpsit.

The plaintiff in C. B. declares, that there was a discourse between him and the defendant concerning a portion of tithes in the parish of Banbury, and of the Rectory of Banbury, and concerning divers controversies concerning the same, and concerning a verdict for 18l. against one Henry Tasker for the tithe of Berrymore-Mead obtained by the plaintiff; and thereupon the defendant, in consideration that the plaintiff at the request of the defendant would acquit the said Henry Tasker from the said 18l. *& acquietaret omnes alios occupatores* of the lands called Crench, Berrymore-Mead, Burdens, Gaberesses, Little Fullarke, Great Fullarke, Castlemead, &c. from all arrears of tithes then unpaid to the plaintiff, and permit the defendant then to receive of the then occupiers of the aforesaid lands, the tithe of hay growing upon the said lands, which then had not been received by the plaintiff, did promise,

1. To allow the tithe of hay of the said closes to be the right of the plaintiff, and clearly to belong to the said portion of tithes.

[371] 2. That the plaintiff from thence-forward should quietly receive all tithes of the said closes without any interruption or molestation.

3. That he would seal a writing purporting a disclaimer of the defendant and his trustees of the tithes of the said closes.

The plaintiff in fact says, that he hath done all on his part, and assigns for breath, that the defendant did not permit the plaintiff to receive the tithes of the said closes without interruption and molestation; but term. Mich. 26 Car. 2 did prosecute two suits in the Exchequer Chamber, *ad damnum* 300*l.* Upon *non assumpsit* pleaded, and verdict and judgment for the plaintiff, the defendant brings a writ of error, and assigns the general error. The sole question proposed by Holt of counsel with Hunt, the plaintiff in the writ of error, was, whether a suit in equity be a breach of the agreement, such as the common law can take notice of? and relied upon 3 Leon. 72.

And I have considered that book, and others, and do conceive such suit is a disturbance; for, 1. *Ex vi termini*, when a man is in possession, to be *subpœnaed* to appear in Chancery is a disturbance. And this suit arises by reason of these tithes, 1 And. 137, pl. 188, *Burr* versus *Higgs.* Debt upon an obligation, conditioned to permit the plaintiff quietly to take, reap and carry away corn. The defendant pleads *quod permisit.* The plaintiff replies that he came and forbid him to reap; and adjudged a breach of the condition. Mich. 47 E. 3, 22 a. pl. 51. In an assise between two tenants in common, a forbidding by word of mouth to the tenant to pay his rent was adjudged a disseisin.

True it is, that *Selby and Chute's case* is, that a suit in Chancery is no disturbance, as 'tis reported by Moor 859, pl. 1179. 1 Roll. Abr. 430, pl. 15. 1 Brownl. 23. But by the record itself, Winch Intr. 116, it appears that judgment was given for the plaintiff, and Winch was one of the Judges that gave the judgment; for this was 11 Jac. and he was made Judge 9 Jac. and so he should know better than any of those who report the case, none of which then attended the Court of C. B. but Brownlow; and this judgment is entered not in his, but in Waller's office.

As to the case cited at the Bar, 3 Leon. 71. The suit was there against the lessor by a stranger; and so the lessee could not be disturbed thereby. And I take

such a suit not to be a breach of covenant against incumbrances, because a **[372]** decree is no incumbrance upon the land, but 'tis a molestation to the person. And the law doth take notice of suits in Chancery; for a forbearance to sue in Chancery is a good consideration to ground an *assumpsit*, 3 Cro. 768, *Dowdenay* versus *Oland*, by the Courts of C. B. and B. R. and so is 3 Cro. 847, *Coulston* versus *Carr*. And of this opinion were the other three Judges; but my brother Dolben found a flaw in the assignment of the breach of the promise; and so it was adjourned.

VISCOUNT CLARE *versus* LINCH. ERROR. IRELAND.

Trial.

An ejectment for lands in the county of Clare, of the demise of Peter Cransborough for ten years. Upon not guilty pleaded, issue was joined, and then there is an entry upon the roll thus:

Et super hoc pro indifferenti triatione exit' præd' inter partes præd' superius junct' habend' eædem partes ex eorum unanimi consensu & assensu, & ex assensu & consensu eorum consilii & attorn' in Cur' domini Regis coram ipso Rege hic scilicet apud the King's Court prædict' petunt breve domini Regis Vic' com' Corke dirigend' de venire faciend' coram dicto domino Rege hic &c. duodecim, &c. de corpore com' sui ad triand' exit' præd'. Et quia videtur Cur' hic quod petitio ill' est rationi consona, ideo præcept' est Vic' com' Corke præd' quod venire fac' coram domino Rege hic scilicet apud the King's Court die Martis proximo post octab' Pur' Beatæ Mariæ Virginis duodecim, &c. de corpore com' sui per quos &c. qui nec, &c.

Then there is a Nisi Prius granted to the said county of Corke, and the cause there tried, and a bill of exceptions put in, and upon debate in B. R. in Ireland, judgment was given for Linch; and now the Lord Viscount Clare brings a writ of error, assigns the general error; and the question now debated was, whether consent make this trial, had in a foreign county, good, contrary to *Crow and Edward's case*, Hob. 5.

And we all resolved that the trial was well had; for the case in Pasch. 44 E. 3, 6 b. pl. 2, is as strong a case, where villenage was tried where the lands lay, and not where the action was brought, as it ought to be by law, but consent made it good, *vide Dormer's case*, 5 Co. where consent shall make good what otherwise would not be so. And *Crow and* **[373]** *Edwards's case*, the consent was entered on record, as 'tis in this case. And so judgment was affirmed, in the point resolved 2 Roll. Rep. 166. *Macduncoh* versus *Stafford*, Palmer 100. 2 Roll. Rep. 363, *Lloyd* versus *Williams*.

TOPHAM *versus* PANNEL.

Condition.

Debt for 20l. upon condition that Anne Mason *alias* Fawne, shall pay 7l. 9s. 4d. such a day to the plaintiff, or personally appear 23 Jan. instant, in the house of William Barnsley, Esq. precisely at ten o'clock in the morning. The defendant pleads, that the said Anne Mason upon the said 23d day of January, and diverse days as well before as after, *ex visitatione Dei ægrota fuit, & sub quodam morbo ex visitatione præd' tant' laboravit, quod eadem Anna totaliter inhabilis ad comparend' super eundem vicesimum tertiam diem Januarii in præd' domo præfat' Willielmi Barnesley devenit, scilicet apud, &c. Et hoc, &c.* The plaintiff demurs.

And first, the Court seemed to agree that the plea as to the sickness was good, notwithstanding Co. Lit. 259 b. 1 Anders. 32, pl. 79, and Bro. Saver Default 45, and 48 Abridgment de Assise 55 a. and which is allowed an excuse in outlawry for felony, Fitz. Challenge 153. For 'tis not barely she was sick, &c. but *ex visitatione Dei ægrota fuit, & totaliter inhabilis ad comparend, &c.*

But 2dly. They resolved, that though the condition be in the disjunctive, and one part is impossible, yet that the other ought to be performed, as the case is, because to be done by a stranger; and my brother Dolben urged, that the reason given by the Lord Coke, was not needful in that case; and by that reason there given, if I

sell my land, and desire the purchaser to pay the money down, and I will either make him an assurance, or pay the money; if I die, the money would be lost. And judgment was given for the plaintiff; for this reason chiefly, that the appearance was to be by a stranger, and not by the obligor himself.

[374] DOMINUS REX *versus* HONORA MUNSON & ALIOS. ERROR. ASSISES AT HEREFORD.

Oath.

The defendants were indicted for refusing the oath of obedience injoined by 3 Jac. cap. 4, and the indictment was, that at the Assises and general gaol-delivery held before Sir Robert Atkins, &c. and Zachary Babington, gent. *eidem Roberto Atkins* and *Timotheo Littleton, &c. hac vice associat. per sacramentum suum, &c. præsentat. existit modo sequen. viz. jur. pro domino Rege præsentant quod,* at the general Quarter-Sessions for the county of Hereford, 14 January 30, the justices of peace did tender the said oath to the defendants, and they refused, and that afterwards *ad Assisas tent. pro com. Hereford præd.* 31 *Martii* 31 *Car.* 2, *coram Roberto Atkins Milite Balnei un. Justic. dicti domini Regis de Banco & Zacharia Babington gen. eidem Roberto Atkins & Timotheo Littleton Mil. un. Baron. Scaccarii dicti domini Regis ad Assisas in com. Hereford præd. capiend. assign. per formam statut.* the said Justices Atkins and Zachary Babington again tendered the said oath, and they refused to take the same; and upon not guilty pleaded, the defendants afterwards, *relicta verificatione,* confess the indictment; and judgment is given, that the defendants *ponantur & quilibet eorum ponatur extra protection. dicti domini Regis, & quod forisfaciant & quilibet eorum forisfaciat dicto domino Regi omnia bona & catalla terras & tenementa sua,* and that they *committantur & quilibet eorum committatur gaolæ dicti domini Regis in com. Hereford præd. ibidem remansur. duran. beneplacito dicti domini Regis, &c.* Upon the writ of error, the error assigned was, that the second tender of the oath was by the Justices of Assise only. Whereas the statute of 3 Jac. says, it must be by the Justices of Assise and Gaol-delivery, and this error seemed not to be allowed by my brother Dolben, but by the other two it was not spoke to. But I conceive 'tis error, and that the Justices of Assise cannot, by virtue of that commission barely, tender the said oath; for the statute says, that in case they shall refuse to take the said oath tendered them by the justices of peace, then the said justices shall and may commit the same persons to the common gaol, there to remain without bail **[375]** or mainprise, until the next Assises, where the said oath shall be again in the said open Assises required of them by the said Justices of Assise and Gaol-delivery in their open Assises, every person so refusing shall incur the danger and penalty of *præmunire;* by which it appears, that they being committed to gaol by judgment of the justices of peace, none can deliver them but they who have power to deliver the gaol. And though the Statute de Finibus, 27 E. 1, gives Justices of Assise power to deliver the gaol, that is intended only of felons, as appears by Stamf. Pla. Cor. 57 and 58. But the judgment was reversed for another error incurable, for misreciting the oath contained in the Act; for whereas the oath in the Act is, *and him and them will defend to the uttermost of my power against all conspiracy and attempts whatsoever,* the indictment is, *against all conspiracies and contempts whatsoever.*

DOMINUS REX *versus* PEMLINGTON. ERROR. CHESTER.

Error.

The indictment was for entering into the close of one Crew, and he was found guilty, and judgment, and fined 12d. and the error assigned is, because the first process is a *capias;* whereas in all indictments for trespass and under felony, a *venire facias* is the first process. And judgment was for this cause reversed.

DODDESWORTH, &c. *versus* ANDERSON.

Bankrupt. 1 Danv. Abr. 686, p. 1. 2 Jones 141.

The case was upon a special promise. The question between the plaintiffs and defendant was, whether William Grice was a bankrupt before a conveyance by him made to the defendant and Mary his wife, dated 23 Septem. 23 Car. 2. And the jury find a special verdict.

That the said William Grice was a subject born of the King of England, and lived at Dublin in Ireland.

That before the making of the said conveyance he traded as a merchant at Dublin, and got his living by buying and selling.

That he frequently came into England and bought goods there, and sold them in Ireland, and became indebted to divers persons in divers sums of money as yet unpaid, exceeding 100l.

[376] That he once did sell in England a parcel of neats tongues, and at another time in Ireland did sell a parcel of tallow to be delivered at Chester in England, which was done accordingly.

That he left his house and trade in Dublin, and there absconded from his creditors.

That he afterwards sojourned with a friend in England, and gave order to be denied, and absconded from his creditors in England before the making of the said conveyance.

That the said conveyance was made *bona fide*, and for valuable consideration, 23 Octob. 23 Car. 2, but dated 23 Sept. 25 Car. 2.

And upon this verdict we resolved, that Grice was a bankrupt before the conveyance; for though he is found to buy and sell but once in England, it is not necessary that he do so, for many merchants do only buy beyond sea and sell here, and others do only buy here and sell beyond sea; for 'tis trading that makes a person capable of being a bankrupt, and 'tis plain that Grice did trade in England. And judgment was given accordingly.

Memorandum, June 18, 1680, Mr. Nathaniel Redding having been convicted (before justices of oyer and terminer by virtue of a special commission for that purpose granted) for endeavouring to persuade Bedlow, who was a witness against the noblemen imprisoned in the Tower of London, to forbear his prosecution of them; and he the said Mr. Redding having had judgment executed upon him by being set in the pillory, and fined 1000l. and imprisoned for the same, but his fine since pardoned by the King, came this day into Court, and demanded that an information which he there brought in his hand might be received by Mr. Astrey against the commissioners who condemned him, of which my brother Jones and brother Dolben were two, and that the information may be filed. But the Court did declare that he was in a wrong way to exhibit any information in this manner, and did cause his words, whereby he did accuse the two Judges of oppression, to be recorded; and for those words, and for that he was infamous by having been on the pillory, the gentlemen at the Bar did pray that his gown might be pulled over his ears (he having been formerly a practiser at the Bar) which was ordered and executed in Court, and he was also condemned in Court to pay the King 500l. and to lie in prison till he paid it. He seemed to complain much for not being allowed a writ of error to reverse **[377]** his judgment before the commissioners; and afterwards the last day of this term he petitioned to be spared his fine, and therefore the Court did remit his fine and imprisonment, and only took a recognizance of him for his good behaviour; for that during the term such power remains in the Judges. Co. Lit. 260 a.(1)

(1) In this case one *Marshal's case* was cited, who was fined 1500l. & afterwards in the same term reduced to 500l. And though it be said, 1 Cr. 251, in *Sir James Wingfield's case*, that fines assessed in Court by judgment upon an information cannot be afterwards qualified or mitigated, it is meant in another term, and not in the same term.

DOMINUS REX *versus* OCULLEAN. MIDDLESEX.

Priest.

An indictment, that the defendant born within the King's dominions, being a priest, and ordained by authority from the See of Rome, 28 Febr. 31 Car. 2, *infra hoc regnum Angliæ, scilicet* at the parish of St. Margaret's Westminster, *proditorie & ut falsus proditor dicti domini Regis nunc fuit & remansit contra formam statut. in hujusmodi casu edit. & provis. Et contra pacem, &c.* upon not guilty, the jury find a special verdict.

That the said defendant was born in Ireland, within the King's dominions.

That he is *sacerdos factus & ordinat. per authoritat.* derived from the See of Rome before 28 Febr. 31 Car. 2.

That on the said 28 Febr. 31 Car. 2 the defendant in a certain ship sailing from Bourdeaux, in the dominion of the King of France, towards Corke in Ireland by tempest *coactus fuit, Angliæ* was driven into Minehead in Somersetshire, and there immediately *pro alta proditione præd. capt. & apprehensus fuit. Sed utrum super tota materia* the defendant be guilty or no, *petunt advisamentum Cur.* And I conceive upon this verdict, the defendant is not guilty, for these reasons.

1. From the preamble of the Act of 27 Eliz. cap. 2, which says, *that whereas divers persons called Jesuits, seminary priests, and other priests, have of late years come and been sent, and daily do come and are sent into England to withdraw the subjects from their obedience, &c.* Now this man neither came nor was sent, properly speaking, but *coactus fuit* into Minehead.

2. The clause which prohibits priests to come into or remain, reaches not here, because it is said that he was, **[378]** immediately after his being driven a-shore, taken, and so cannot be said to remain.

3. There is the act of God in the case, which is *summa necessitas*, of which all laws, both human and divine, allow. And in this Act it is said in the clause, which injoins priests to depart, if the wind, weather and passage shall serve for the same; and so the clause which preserves liberty, who cannot go for infirmity.

4. *Actus non facit reum, nisi mens sit rea.*

As to that clause in the indictment, *that he was going into the King's dominions, viz. Ireland.*

Resp. Nil efficit conatus, nisi sortitur effectu. And with my opinion agreed the whole Court. And judgment was given for the defendant.

DOMINUS REX *versus* ALSOP. DERB. ERROR.

Game. 3 Keb. 516.

The defendant was indicted at the Quarter Sessions, that he *non habens terras tenementa feod. annuitat. reddit. vel officia in jure suo proprio vel in jure uxor. ejus ad usum suum propr. nec aliqua alia persona sive aliquæ aliæ personæ ad usum ipsius Thomæ vel uxor. ejus vel ad usum eorum alterius annui valor.* 100*l.* 9 *die Novemb.* 31 *Car.* 2, *apud Boylstin Sagittavit in quodam tormento, Anglice vocat.* a handgun, *contra formam statut. in hujusmodi casu edit. & provis. ac contra pacem dicti d'ni Regis nunc Coron. & dignitat suas.* The defendant pleads not guilty, and found guilty; and judgment is entered thus: *Ideo consideratum est per Cur. dicti d'ni Regis nunc hic quod præd. Thomas Alsop solvet dicto d'no Regi secund. formam statut. in hujusmodi casu edit. & provis. decem librar. pro fine suo super ipsum occasione præd. imposit. Et quod præd. Thomas Alsop capiatur ad satisfaciend. d'no Regi de fine præd', &c.* The defendant assigns the general error. But the errors insisted upon were these. 1. *Non habens terr.* refers to the time of the indictment, and not the shooting; and so he may have 100*l.* per annum when he did shoot, and may have parted with it at the time of the indictment, as 3 Cro. 754, *Stansbie's case.* An indictment of forcible entry into lands *existen. liberum tenementum* of the party, is not good, for not saying *adtunc existen.* 2. The judgment is *solvet* for *solvat.* 3. *Decem librarum* for *decem libras;* and for these reasons judgment was reversed.

[379] SIR JOHN SPARROW *versus* DRAPER. LONDON.

Repleader.

Debt for rent. The defendant pleads in abatement, *quod præd. Johannes Sparrow in billa præd. nominat. est & die exhibitionis billæ præd. fuit miles prout per billam præd. superius supponitur et hoc &c. unde petit judicium de billa &c.* The plaintiff replies, that the plaintiff is, and at the time of exhibiting the bill was, a knight, and tenders issue to be tried *per patriam.* The defendant demurs, because this issue ought to be tried by the king at arms. But resolved, that the issue ought to be tried *per patriam;* for Co. Lit. 74 a. says there are but six kinds of certificates, and this by the king at arms is none of them; and this issue is triable either by certificate or *per patriam.* And this very issue was tried *per patriam* Mich. 7 H. 16, 15 a. pl. 101, in *qu. imp.* The defendant pleads, that the plaintiff *apres le darreine continuance* was knighted: and the plaintiff denies it, and issue thereupon, and tried *per patriam.* And judgment was in the principal case, that the defendant *respondeat ouster.*

DOMINUS REX *versus* COUNT DE CASTLEMAIN.

Witness.

The Earl of Castlemain was indicted by the name of Roger Palmer Esq.; Earl of Castlemain in the kingdom of Ireland, for that he traiterously intending to kill the King, to introduce the Romish religion, and to subvert the Government, 20 June 30 Car. 2, at the parish of St. Giles in the Fields, together with other false traitors, did unite and gather themselves together, and did consult to put the King to death, to depose him from his Crown and Government, and to introduce the Romish religion, and to that purpose did promise great rewards; and pay divers sums of money to divers persons unknown; and that he did write divers notes in writing to incite divers other persons to compleat the treasons aforesaid, *contra pacem & contra formam statuti.* Upon not guilty pleaded, the defendant having been a prisoner in the Tower for some time, was the twenty-third of June 1680 tried at the Bar. There were only two witnesses who offered materially to depose against him, and they **[380]** did depose very positively against him as to his attempting to procure some to kill the King, the witnesses were Doctor Titus Oates, and one Thomas Dangerfield. Upon the evidence of Dangerfield, who had been found guilty upon several indictments, one of felony, for which he had his clergy, and was burnt in the hand; upon other indictments he had been upon the pillory for cheating but had obtained his pardon under the Great Seal for all the said offences; a question did arise whether he might be a witness, and thereupon the prisoner did desire to have counsel assigned him, and it was granted; and Mr. Daniel, one of his counsel, urged, that Dangerfield ought not to be a witness, for that he was blemished, and the pardon had not restored him to his testimony; and cited 2 Brownlow 47, where it is said that the King pardoned a man attaint, for giving a false verdict, yet he shall not be at another time impanelled upon any jury; for though the punishment were pardoned, yet the guilt remains. 2 Bulstr. 154, *Brown* versus *Crashaw.* In a prohibition, the suggestion was proved only by two persons attainted of felony. And Coke Chief Justice cited Hill. 11 H. 4, 41 b. pl. 7, That if a man be attainted of felony and pardoned, he shall not afterwards be sworn upon a jury, because he is not *probus & legalis homo.* But the Court willing to be thoroughly satisfied, sent me to the Court of Common Pleas to know their opinions in this point. And the Judges there resolved, that the burning of the hand was *quasi* a statute pardon, as to the felony; and as to that he was a good witness, and the pardon made him a good witness as to the other offences. But they said, that had he not been burnt in the hand, the pardon would not have restored him to his credit again, because in his testimony the people are concerned, and consequently the pardon will not deprive them of their interest, and thereupon we allowed him to be a good witness; and with the opinion of the Judges of the Common Pleas, as to the burning of the hand, agree the books of 5 Co. 110 a. *Heston's case;* and Hob. 292 and 67, *Cuddington and Wilkin's case;* but Moor 872 says, that Justice Nichols was of opinion, that if the

plaintiff had been convicted, the judgment would have been otherwise. And upon the whole evidence, the defendant was found not guilty.

Bail.

[381] Memorandum, The Lord Viscount Stafford, upon a *habeas corpus* from the Tower, desired to be bailed, being impeached in Parliament by the House of Commons, and by reason thereof had lain in prison in the Tower almost two years; but we did resolve, that a person accused of high treason, and not within the Act for *habeas corpus's*, is not *de jure* to be bailed by this Court, and we did not think fit in discretion to bail him; and we alledged likewise the orders of the House of Lords, though we did not rely thereon, which are as followeth, viz.

Die Martis 11 *Martii* $167\frac{8}{9}$.

It being moved, that this House would declare whether petitions of appeal which were presented to this House in the last Parliament be still in force to be proceeded on, it is ordered by the Lords Spiritual and Temporal in Parliament assembled, that it be, and is hereby referred to the Lords Committees for privileges to consider thereof, and report their opinion thereupon unto this House, and that the said Lords Committees do meet on Thursday next at three of the clock in the afternoon for that purpose.

Die Mercurii 12 *Martii* $167\frac{8}{9}$.

The Earl of Shaftsbury reported, that the committee appointed yesterday to consider in what state the impeachments in the last Parliament now stand, have perused the journal of this House, and find that the fifth day of December 1678, the impeachments against the five lords now prisoners in the Tower were brought from the House of Commons, which consisted of a general charge of treason, and other high crimes. The House of Commons declaring they would in convenient time exhibit the articles of their charge then. The next day this House appointed to go upon the consideration of these impeachments, and all the Judges were appointed to be then present, but nothing was done thereon.

The Lords Committees do also find that an impeachment of high treason, and other high crimes against Thomas Earl of Danby Lord Treasurer, was brought from the House of Commons the twenty-third day of December 1678, and the particular articles then exhibited, and the Commons desired that he might be sequestered from his place in Parliament, and committed to safe custody.

[382] That the Lord Treasurer desired copies of all papers and proceedings concerning this business, and that it was then resolved upon the question, that the Lord Treasurer should not then withdraw.

It farther appears, that on the twenty-sixth of December 1678, the Lord Treasurer moved the House for a copy of his charge, and that he might not lie long under it; whereupon it was moved that the House would consider of the desire of the House of Commons concerning his confinement.

The debate was adjourned.

It appears that this House on the twenty-seventh of December, resolved, that the Lord Treasurer should not now be confined; and ordered, that he should have a copy of the articles, to which he was appointed to bring in his answer before the third day of January, and that he might have counsel to assist him.

Upon report made by the Earl of Shaftsbury from the Lords Committees for examination of the late horrid conspiracy concerning the impeachments brought up from the House of Commons in the last Parliament, how they stand entered in the journal of this House.

It is ordered, that it be, and is hereby referred to the Lords Committees for Privileges, to consider of the state of the said impeachments, and all the incidents relating thereunto, and report their opinion thereupon unto this House.

Die Lunæ 17 *Martii* $167\frac{8}{9}$.

Ordered by the Lords Spiritual and Temporal in Parliament assembled, that it be, and is hereby referred to the Lords Committees for Privileges, to consider whether petitions of appeal which were presented to this House in the last Parliament be still in force to be proceeded on, as also to consider of the state of the impeachments brought up from the House of Commons last Parliament, and all the incidents relating thereunto, and make report thereof unto the house.

Die Martis 18 *Martii* $167\frac{8}{9}$.

The Earl of Essex reported, that the Lords Committees for Privileges, in obedience to the order of this House dated the seventeenth of this instant March, have considered of the matters referred to them, whether petitions of appeals which **[383]** were presented to this House in the last Parliament be still in force to be proceeded in; as also to consider of the state of the impeachment brought up from the House of Commons last Parliament, and all the incidents relating thereunto, and make report thereof unto the House; and their Lordships upon perusal of the judgment of this House, of the twenty-ninth of March 1673, are of opinion, that in all cases of appeals and writs of error they continue, and are to be proceeded on *in statu quo* as they stood at the dissolution of the last Parliament, without beginning *de novo*.

The judgment and proceedings being large, are omitted to be reported, the journal of this House being ready, wherein that judgment is entered.

And upon consideration had of the matter referred to their Lordships concerning the state of the impeachments brought up from the House of Commons the last Parliament, and all the incidents relating thereunto, their Lordships find, that the five lords who are in the Tower are upon general impeachments, and the other lord is impeached with special matter assigned, they refer the House to the report made the 12th of March instant, which states what is entered in the journal of the last Parliament concerning this matter; and their Lordships are of opinion, that the dissolution of the last Parliament doth not alter the state of the impeachments brought up by the Commons in that Parliament.

Die Mercurii 19 *Martii* $167\frac{8}{9}$.

Next the House entered into consideration of the report from the Lords Committees for Privileges, whether petitions of appeal which were presented the last Parliament be still in force to be proceeded in; and concerning the state of impeachments brought from the House of Commons the last Parliament, and all the incidents relating thereunto; and in the midst of the debate the Earl of Lincoln came into the House, and took the oaths of allegiance and supremacy, and made and subscribed the declaration in pursuance of the Act for the more effectual preserving the King's person and Government by disabling Papists from sitting in either House of Parliament.

After this the House proceeded in the debate aforesaid, and after some time spent therein, it was desired that this question might be put, whether to agree with the Committee in this **[384]** report? Then this present question was put, whether this question shall be now put? And it was resolved in the affirmative.

Then the main question was put, whether to agree with the Committee in this report? And it was resolved in the affirmative.

The House this day taking into consideration the report made from the Lords Committees for Privileges, that in pursuance of the order of the seventeenth instant to them directed for considering whether petitions of appeal which were presented to this House in the last Parliament be still in force to be proceeded on, and for considering of the state of the impeachments brought up from the House of Commons the last Parliament, and all the incidents relating thereunto, upon which the Lords Committees were of opinion, that in all cases of appeals and writs of error they continue and are to be proceeded on *in statu quo*, as they stood at the dissolution of the last Parliament without being *de novo*, and that the dissolution of the last Parliament doth not alter the state of the impeachments brought up by the Commons in that Parliament. After some time spent in consideration thereof,

It is resolved by the Lords Spiritual and Temporal in Parliament assembled, that this House agrees with the Lords Committees in the said report.

DOMINUS REX *versus* THE INHABITANTS OF THE COUNTY OF ESSEX.

Ways. Trem. 205.

An information for not repairing a certain common stone-bridge commonly called Daggenham Bridge, *alias* Daggenham Beam, situate lying and being *in separalibus parochiis de Hornechurch & Daggenham* in the same county *in communi alta Regia via ducen' a paroch. de Raynham in com. præd. usq; paroch. de Daggenham præd. in com. præd. & sic vers. Civitat. London.* The defendants plead, that they ought to be charged with the repairing of the said bridge, for that by an inquisition taken at Chelmesford 3 Aug. 26 Car. 2, before Sir Matthew Hale Knight, Chief Justice of B. R. and Justice Twisden and others, justices of oyer and terminer, it was presented, that a certain common bridge commonly called *Daggenham Beam, jacen. & existen. in parochia de Daggenham in com. Essex præd. in communi alta Regia via ibidem ducen. a Daggenham præd. in com. præd. ad vill de Raynham in eodem* [385] *com.* was then in decay and out of repair, and that Sir Norton Knatchbull, Bart. and Sir Thomas Fanshaw, Knt. by reason of the tenure of lands in the parish of Barking, and elsewhere in the said county, late the lands of the Abbess of the Abbey of Barking, ought to repair the same, and thereupon a *venire fac'* issued against the said Sir Norton and Sir Thomas; and 10 July 28 Car. 2, before Justice Jones and other commissioners of oyer and terminer, and the said Sir Thomas came and pleaded that he ought not to repair the said bridge by reason of the said tenure, but that the inhabitants of Daggenham ought to repair the same, and thereupon a trial was had 12 March 29 Car. 2, and found that the said Sir Thomas ought to repair the said bridge *modo & forma prout, &c.* and judgment against him to the King for 20l. and then avers that this and that are the same bridge, and that the said judgment continues still in force, and not reversed; and upon this plea the King's Attorney demurred, because the bridge contained in the information is in two parishes, and the bridge in the plea lies but in one, and so cannot be the same; and so was the opinion of the Court, for Sir Thomas Fanshaw may be tied to repair so much of the bridge as is in Daggenham, and the country the other part. And judgment was given for the King.

DOMINUS REX *versus* JOHN BISHOP. CIVITAS OXON.

Trade.

The defendant is indicted before the justices of peace of the City of Oxon by the name of *John Bishop de Civitate Oxon præd. Millener 5 October 29 Car. 2, & multis aliis diebus & vicibus continue post præd. quintum diem Octobris* for three months and more, viz. to the taking of the inquisition, did use, exercise and occupy unlawfully, *& pro lucro suo propr. artem mysterium sive manualem occupation. venditoris, Anglice of a salesman, existen. artem mysterium sive manual. occupation. usitat. infra hoc regnum Angliæ 12 die Januarii 5 El. eodem Johanne Bishop nunquam existen. in dicta arte mysterio sive manuali occupation. educat.* as an apprentice for the space of seven years. Upon a demurrer to the indictment, the sole question was, whether a salesman was within the statute of 5 Eliz. because it seemed to be a new trade. But resolved it was a trade then used, and so within the statute.

[386] DOMINUS REX *versus* WILLIAM TEMPEST & AUTERS. DUNELM.

Error.

Tempest, Scot, and others were convicted of a riot in the county of Durham, upon the view of John Morland and William Blackston, Esq; two justices of peace, and Nicholas Conyers, Esq; sheriff of the said county, of a riot, *contra formam statuti de 13 H. 4, cap. 7*, and they were fined by the justices, viz. Tempest 20l. and the rest

5l. a-piece, but the sheriffs did not join in setting the fine; and the defendants bring a writ of error, and assign for errors, 1. It doth not appear that the defendants were convicted by the view of the justices. 2. The sheriff did not join in the fining them; and the statute says, that the sheriff is to be joined with the justices in the whole proceeding; and for these errors the judgment was reversed.

WOODROFFE *versus* MARGARET WILGRESS.

Ley gager.

Debt for 4l. recovered in a court-baron for damages and costs recovered in a court-baron, in an action brought there for words. The defendant offered to wage her law, and came to the Bar, and brought her compurgators with her, and she was ready to swear, and she laid her hand on the book, and began to swear; but upon the Court's demanding what the cause of action was, and finding it to be aforesaid, we asked her if she had paid the monies recovered, and she answered, that she owed the plaintiff nothing; but she not affirming that she had paid it, and it being an apparent debt by the recovery, we asked some of the compurgators whether they believed she would swear true in this case? And they believing she could not, we deferred taking her oath till next day, and then she offered to pay the money, so as she might be abated the costs. And it seemed clear, that though wager of law doth lie of a debt recovered in a court-baron, yet that shall be intended of a debt originally sued for there; *tamen quære*, for I am in doubt how that will differ from the case at Bar, only in the case at Bar wager of law would not have been upon the original action, because there is an injury supposed in the **[387]** defendant, in which case wager of law lies not, Co. 295 a. and therefore though it be in a recovery in a court baron, yet because the original cause of the action will not permit *ley gage*, I think we did well in refusing her waging of law. *Vide* March 15, pl. 35. Moor 276, pl. 430.

PHILIP BROGAN *versus* JOHN AUNGER, CLERK. ERROR IN IRELAND. ATTACHMENT UPON A PROHIBITION.

Intr. Hill. 30 & 31 Car. 2.

Damages. 2 Jones 128. 1 Vent. 348, 350. 2 Show. 56, 88.

The plaintiff declares, that one Cornelius Duffe, late Prior of the Hospital of St. John's by Kells in the county of Meath, 1 January 33 H. 8, being seised of the said hospital and priory, and of the rectory impropriate of the parochial church of Durvagh, *alias* Darvy, in the counties of Meath and Cavan, and of the tithes of the eleven pole lands of Bally-Bruise lying in the parish of Darvy, and of all tithes in the said parish in fee, that he and all his predecessors, &c. had and received time out of mind, for the use of the said hospital, tithes of the said lands called Bally-Bruise, within the said parish of Darvy, that all the said hospital and rectory came to King Henry the Eighth, by a statute made in Ireland, 15 Febr. 33 H. 8, cap. 5, and from King Henry the Eighth they descended to Edward the Sixth, from him to Queen Mary, from her to Elizabeth, from her to King James, who granted them to Medhop, who sold them to Crow and others, who sold them to James Bishop of Meath, and Sir William Usher, who granted them to Sir Robert Forth and his heirs, and from him they descended to John Forth his son and heir, who sold the same to Thomas Taylor and his heirs for 725l. and that the plaintiff as his bailiff gathered the tithes of four pole, part of the eleven pole lands of Bally-Bruise; and the defendant as rector of the parish of Lurgan in the diocese of Kilmore, sues the plaintiff in the Ecclesiastical Court for the tithes of those four pole lands, pretending that they lie within the parish of Lurgan, whereas they lie within the parish of Darvy; and the right and limits of parishes i to be determined at common law, *ad damnum* 100*l.*

Judgment was entered by default; and upon a writ of enquiry of damages, the jury found 100l. damages and **[388]** 6d. costs; and judgment was given for the 100l.

and 28l. 5s. *de incremento*, for damages and costs. The errors assigned upon the record, was only the general error. But the counsel insisted upon these;

1. The writ of enquiry finds 100l. damage, and 6d. costs, and there is no notice taken in the judgment of the 6d. costs; *sed non allocatur.*

2. There is no *visne* laid where the suit in the Ecclesiastical Court was; so that if the defendant had pleaded *non prosecutus fuit* after the writ of prohibition delivered, and issue had been taken thereon, there could have been no trial. To this exception was answered, that all or most of the precedents are so; and the *visne* is never alledged in such case. But upon examination I find these precedents to the contrary, viz. where there is a *visne* alledged in such case, viz.

Hob. 306, *Wright* versus *Gerard*, the record whereof is Winch. Intr. 642.

Co. Intr. 456, and Co. 2, 46, *The Archbishop of Canterbury's case.*

2 Co. 41 b, *The Bishop of Winchester's case.*

Rastal's Intr. 485, tit. Prohibition in Debt, 3, 4, 5, 6, 7, and 488, 489. In Dismes 3, 6. In Trespass 2, Plow. 468 b, *Soby* versus *Molyns.*

2. Brownl. Intr. 236, *Dowse* versus *Gooch* 239, *Hawkes* versus *Parkman.*

Formulæ bene placitandi 1, 303, 314, 2, 187, *Mayhue* versus *Green* upon a *modus decimandi* 190. *Banks* versus *Betty pro dismes in London.*

Liber placitandi 229 and 242, *al Court de Requests* 237, *pro substractione tabulæ ab ecclesia* 238, *de modo decimandi* 245, *pur suant in le marches de Wales.*

And I find this difference, viz. Where damages are given for the plaintiff, there generally he lays a *visne* where the suit in the Ecclesiastical Court was; but otherwise the want of a *visne* hurts not. And judgment was reversed for this reason by the opinion of the whole Court.

[389] THOMAS RYDER *versus* RICHARD HILL. LONDON.

Discontinuance.

Debt for rent upon a lease parol. The defendant pleads, that the plaintiff *nihil habuit in tenementis tempore dimissionis.* The plaintiff replies, that 19 Febr. 1656, John Lord St. John of Basing, Marquess of Winchester, was seised in fee, and so being seised, by indenture then dated, for money bargained and sold, and William Owen, Luke Cropley and Thomas Henslow confirmed to one Richard Norton, Esq; for ninety-nine years, 1 March 29 Car. 2. The estate of the said Richard Norton by several mesne conveyances came to the plaintiff, by virtue whereof he became possessed, and demised to the defendant as is aforesaid. The defendant demurs, because the plaintiff doth not shew how he comes to the term. And it was adjudged for the plaintiff, that upon the trial the plaintiff may set forth all at large, and he shall not be compelled to lengthen the record by setting forth every deed. Mich. 18 Car. 2, B. R. *Cotes* versus *Wade*, *ante* fol. 74 b. True it is, that 3 Cro. 22, pl. 5, seems contrary; but *ante* 55 b. agrees with this judgment. Mich. 1653, B. R. *Elston* versus *Drake.* In debt for rent, the case was, the plaintiff as administrator declares, *quod cum le intestate demise al defendant certain terre*, rendering rent to him, his executors and assigns, the defendant had not paid to the plaintiff, *unde actio accrevit, &c.* The defendant pleads *non detinet*, and found for the plaintiff; and it was moved in arrest of judgment, because the plaintiff doth not shew of what estate the intestate was seised or possessed; for if of an estate in fee, then the rent ceases by his death, and the words *per quod actio accrevit* will not help, though after a verdict, for the conclusion is not put to a jury, and action may accrue to administrator, though the intestate was seised in fee, for if the rent was in arrear in his life-time, the administrator may sue for it. On the other side for the plaintiff it was urged, that it being after a verdict, and being an equal doubt, the best shall be taken for support of the verdict; and the jury have found, *quod detinet*, and 'tis impossible that the defendant should *detinere*, if the plaintiff had not cause of action. There was no judgment in this case of *Elston and Drake*, because the parties agreed to go to a new trial. But the whole Court were of opinion for **[390]** the defendant, but gave the plaintiff leave to discontinue, paying costs.

MUSTARD *versus* HARNDEN. ERROR C. B. CASE. ESSEX.

Error.

The plaintiff, James Mustard, declares that he was possessed of a hoy called the Mary, loaded with divers goods and chattels, and floating at anchor in the river of Thames, within the parish of West Thurrock, in a convenient place of the same river; and that the defendant Thomas Harnden *satis sciens*, the said 17 May 30 Car. 2, being master of the ship called The Hound, and then sailing in the said ship, in the said river towards the City of London, did govern the said ship so negligently and improvidently, that she sailing in the said river *in prædictam naviculam ipsius* the plaintiff so floating at anchor, as aforesaid, *voilenter ruebat, & naviculam illam ut præfertur onerat' fregit & submersit, ad damnum* 200*l.* The defendant pleads not guilty. The jury said, that *quoad negligent. & improvidam gubernation. navis infra nominant' vocat' le Hound navigan. in rivo Thamesis infrascript. per quod eadem navis in rivo præd. ut præfertur navigans in naviculam præfat. le plaintiff in rivo præd. ad anchoram stactuan. violent. ruebat & naviculam ill. fregit & submersit*, the defendant is guilty, and assess damages to 50*l.* *Et quoad resid. de præmissis*, not guilty, and judgment accordingly; and the error assigned was, that there was no *residuum* to find the defendant not guilty; for the first part of the verdict comprehends all the injury complained of in the declaration, and then the judgment, that the plaintiff shall be *in misericordia pro falso clamore*, as to the *residuum* is not good; and of this opinion was the whole Court, though the objection was, that it might be that the *residuum* might be intended the *satis sciens;* but that was not allowed of, nor the goods with which the hoy was loaded; and so judgment was reversed.

[391] OBEDEN *versus* KEYNEL. DORSET.

Recusancy. 2 Jon. 187. 2 Show. 179. *Postea* 465.

Debt upon 23 Eliz. cap. 1 for not coming to church. At the trial, after the jury sworn, and before verdict given, the defendant came into the Court, and did there submit, recognize, confess and acknowledge, that he had offended and done ill in not going to church, and not conforming himself to the law therein, and did then prove that he had conformed himself since the suit brought by going to church, receiving the sacrament, and behaving himself orderly and soberly during all the time of divine service, according to the law; and did then and there promise and engage to conform, and go to church, and there to behave himself soberly and orderly, according to the law; and that the said defendant was never indicted or prosecuted for any offence of this nature before.

This is an action for 20*l.* a month for not coming to church, tried the last Assizes in Dorset, and a verdict for the plaintiff for 40*l.* At the trial the defendant comes into Court and conforms, and makes the above written recognition; whether hat doth discharge the action and verdict, or no, is the question?

It was objected, that in the action *tam quam* the plaintiff hath an interest which shall not be divested within the intent of the clause in 23 Eliz. cap. 1, the words whereof are, *Every person guilty of any offence against the statute (other than treason and misprision of treason) which shall before he be thereof indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese, where he shall be resident, or before the justices where he shall be indicted, arraigned or tried (having not before made like submission at any his trial, being indicted for his first like offence) shall, upon his recognition of such submission in open Assizes or sessions of the county, where such person shall be resident, be discharged of all and every the said offences against this Act (except treason and misprision of treason) and of all pains and forfeitures for the same;* for that this clause refers only to such cases where the party is arraigned or indicted, and not to actions.

But it seems that the words shall be taken distributively at his arraignment, or trial before judgment, *i.e.* arraignment in case of indictment, and trial in all cases. But no **[392]** resolution was given, but adjourned to farther consideration. *Vide*

2 Bulstr. 324. *The King and Shoile* versus *Foster*, the statute of 29 Eliz. pardons all penalties of one conforming, except what is converted into one debt. 1 Roll. Rep. 94, *Post.*

THOMAS HORTON, ESQ; *versus* NANFAN & AL'. LONDON. ERROR IN C. B.

Error.

An action in nature of a ravishment of ward by guardian in socage. The plaintiff declares, that William Finch was seised of lands in Kent, Cambridgeshire and Hertfordshire, in fee, held in socage, and died without issue, by reason whereof the said lands descended to his five sisters and co-heirs, all under the age of fourteen, and that he is next of kin to them, viz. brother to their mother. The defendant pleads, that the said William Finch was tenant in tail, the reversion in fee in the defendants; *absque hoc*, that he was seised of the said lands *modo & forma prout* the plaintiff hath declared; and issue thereupon, and tried in London where the action is laid, and found for the plaintiff, and damages 400l. and judgment thereupon; and the error insisted was, that the seisin of lands in Kent, and other counties, is tried in London. But the Court seemed to incline that it is well enough after a verdict, by the statute of 16 & 17 Car. 2, cap. 8, which is continued 22 & 23 Car. 2, cap. 4. *Sed adjournatur.*

CARTLEDGE *versus* MAWDLIN. COVENANT. SOUTHAMPTON. INTR. MICH. 31 CAR. 2.

Common.

The plaintiff declares upon articles intended, dat. 10 Nov. 22 Car. 2, between all the tenants, as well copyholders and inhabitants, and others, within the tithing of Ramsdean and Langrish, within the manor of Meon in the said county of Southampton, for the better regulating, ordering, governing, ascertaining and stinting all such cattle as afterwards should be kept in and upon the common and waste-ground called the Strood and Sheet Commons within the **[393]** said manor, from time to time, thenceforth for ever; whereby it was agreed between them (amongst whom the plaintiff and defendant were two) mutually, that no tenant or any other person claiming in, from or under him or them from thenceforth should keep or put out into the said commons, or either of them, after the 15th of May then next following, any number of beasts, but only such as by the same articles were expressed, limited and appointed, viz. the defendant three, &c. The plaintiff *in fait* says, that the defendant kept and put in 15 March 31 Car. 2, and so to 1 May 32 Car. 2, four beasts, *contra formam articulorum prædict.* by reason whereof the plaintiff could not have so large common as he ought to have by virtue of the said articles. The defendant pleads *actio non*, because before the exhibiting the said bill, and after the said articles, viz. 9 April 28 Car. 2, the plaintiff and one William Baker by their writing then dated, remised, released, and for ever quit-claimed to the defendant, his heirs, executors and administrators, all and all manner of actions and causes of action, *sect', billas, obligation', scripta, obligatoria*, debts, dues, duties, accounts, sum and sums of money, judgments, executions, quarrels, controversies, trespasses, damages and demands whatsoever, as well in law as in equity, or any other way or means whatsoever, which they the said plaintiff, and William Baker, or either of them ever had, or then had or might have for or by reason or means of any matter, cause or thing from the beginning of the world to the day of the said release. To this the plaintiff demurs, and the question is, whether any of the words in the release will discharge these articles? And the most material for this purpose is, the word *scripta obligatoria*, which *ex vi termini*, is any writing under seal; but according to the usual acceptation is bonds: but here it should signify something more, because the word *obligations* is also in the releases. But my brother Jones said, that writings made by scriveners very often, and for the most part, do contain divers words, which signify the same thing, to fill up the instrument, and to inlarge the reckoning; and so in this place; and of the same opinion

seemed my Lord Chief Justice and Dolben to be. And I added, that I conceive it was never the intent of the parties, that the plaintiff should release this agreement; for why should he join another in the same deed of release, who was not party (for aught appears by the record) to the said agreement? And 2dly, there would **[394]** have been some notice taken of the common, had it been intended that the same should have been included in the release, and therefore the whole Court inclined, that judgment should be given for the plaintiff.

PHEASANT *versus* FINCH. ESSEX.

Intr. Hill. 31 & 32 Car. 2.

Qui tam.

Debt for 200l. The plaintiff declares, that the defendant for eleven months together next before the 20th of October 31 Car. 2, being above the age of sixteen, and inhabiting at Halstead, did not go to church, contrary to the form of the statute. The defendant demurs generally, and the sole question is, whether this suit may be commenced in this Court, notwithstanding the statute of 21 Jac. cap. 4. The Lord Coke 3 Inst. 194 says, that the informer cannot inform for this offence, or any other offence therein excepted, in any of the Courts at Westminster, but before the justices appointed by the Act, because the clause of excepting them out of the Act, extends only for the laying or alledging any of those offences in any county that he will. But to me it seems, 1. That the words of the Act are, *that all offences hereafter to be committed against any penal statute, for which any common informer may lawfully ground any popular action, bill, plaint, suit, &c. before Justices of Assise, Nisi Prius, gaol-delivery, oyer and terminer, or justices of peace, shall be commenced, sued, prosecuted, tried, recovered and determined by way of action, plaint, bill, information or indictment before the said Justices of Assise, &c. having power to inquire of, hear and determine the same, &c. and not elsewhere;* by which it seems that if they cannot determine the same, or that such actions will not lie before them, then they are to be determined, where such jurisdiction is given by the law. Now the statute of 23 Eliz. cap. 1 gives remedy by *action of debt, bill, information or plaint, &c.* And an action of debt cannot be commenced before the Justices of Assise, &c. either by writ or bill, and consequently it will not be within this statute of 21 Jac. *et adjourn.* And Mich. 32 Car. 2 adjudged for the plaintiff; and many precedents were produced of informations in C. B. and this Court, for the penalty.

[395] DURNFORD *versus* IRISH. ERROR IN MARLEBOROUGH.

Error.

Indebitatus assumpsit; the error insisted on was, that the Court is said to be held *coram majore & burgensibus burgi præd. secundum consuetudinem ejusdem burgi, a tempore quo, &c.* And the name of the mayor is not mentioned, which ought to be, 2 Cro. 184, *Jerrat* versus *Caldewel*, there was a writ of error of a judgment in Burton upon Trent, and said, *coram senescallo & ballivo Domini Paget*, and shewed not their names, and held to be an incurable error, and seems a good exception. But it was adjourned; and after judgment was reversed.

CUTFORTHAY *versus* TAYLOR. NOTT.

Error. 3 Danv. Ab. 78, p. 11.

Trespass *vi & armis* for taking the mare *ipsius queren. necnon bona & catalla sequen.* viz. and sums them up, but doth not say they were the goods *ipsius quer.* And thereupon the defendant demurs; and resolved the plaintiff may have judgment for the mare, and release the action for the residue; and it was said, there are precedents of such judgment, but I can find none. *Vide* 2 Cro. 104, *Woodhouse's case* upon the statute of 37 H. 8, cap. 9, upon an usurious contract. 1 Cro. 512, *Mulcany* versus

Eyres. Ejectment for one hundred acres of bog, and other things; the plaintiff released his demand to that, and took judgment for the residue.

WALSAL *versus* MARY ALLEN.

Words. A plea in bar held good though it ought to have been in abatement.

Action on the case for words. The plaintiff declares, that he being a clergyman, the defendant said of him these words, viz. *Francis Walsal is a thief, and he stole plate from Maudlin College in Oxford; and I bought plate of one in Oxford, and gave it to the college for that plate, and thereby saved him from being hanged, ad damnum* 500*l.* The defendant pleads in bar by attorney, that *ante diem, scilicet* 1 *Julii* 12 *Car.* 2, the plaintiff married the defendant, and thereupon the plaintiff demurred; and adjudged for the defendant, though pleaded in bar.

[396] NAPPIER & AL. *versus* CURTIS & AL. IN TRESPASS. HILL. 31 & 32 CAR. 2, ROT. 20.

The plaintiff declares, that the defendants 8 August 30 Car. 2, *vi & armis* did break the plaintiff's close called Worgret Common within the parish of St. Michael in Wareham, and spoiled the grass *ad valentiam* 40*l. pedibus ambulando*, and other grass of the plaintiff's *cum quibusdam averiis, viz. equis, &c. necnon cum carucis plaustris & aliis carriagiis suis aliam herbam & solum clausi præd. depresser. subverter. & spoliaver.* and in the said close did dig tobacco-pipe clay, and carried away two thousand loads thereof to the value of 400*l. transgressionem prædictam quoad depasturationem conculcationem & consumptionem herbæ præd. cum averiis, et quoad depressionem subversion & spoliation, al. herbæ & soli clausi præd. cum carucis plaustris & al. cariagiis præd. necnon quoad effossion. in clauso præd. a præd.* 8 *die Augusti* 30 *Car.* 2 *usq.* 23 *diem Octobris* 31 *Car.* 2, *diversis diebus & vicibus continuando et alia enormia, &c. ad damnum* 500*l.* The defendants demur, because the several continuances of the trespasses, are several trespasses by themselves, and ought not to be declared upon with a *continuando.* Mich. 20 H. 7, 3, pl. 7, *trespass quare domum suam fregit* 1 *Maii continuando* till 1 *Junii.* Per Yaxley it is good, *quia chescun entry est un fraction. Mes Curia contra,* Bro. Trespass 441, but for feeding the grass it is good, *ibid.* Mich. 2 R. 3, 15, pl. 41, *al mesne l'intent.* Pasch. 17 Car. 2, B. R. *Letchford* versus *Elliot.* Trespass for throwing logs into the plaintiff's close with a *continuando,* not good, but if *diversis diebus & vicibus* were in, it would be good, Mich. 25 Car. 2, B. R. *King* versus *Trespass quare clausum fregit pedibus ambulando & prosterne ses fences continuando* from such a day to such a day, after verdict seems not good, 2 Roll. Abr. 549, pl. 5. 9 Car. 1, *Hoskins* versus *Jennings,* for cutting of trees. But it seems the words *diversis diebus & vicibus* do make the action good, as Pasch. 5 Jac. B. R. 2 Roll. Abr. 549, pl. 6, *King's case.* Trespass for spoiling corn in the blade, may be with a *continuando diversis diebus & temporibus per* two years, though there cannot be a continuance of such a trespass for so long together. *Et adjournatur.*

[397] JAMAICA, OCTOBER 20, 1660.

In the year 1661, Sir Charles Littleton as Deputy Governor to the Lord Windsor called the first assembly, which was held in Jamaica, and thereby made laws for raising a publick revenue by a tax on strong liquors towards the upholding of the Government there, which laws are indefinite and perpetual. Afterwards, viz. 15 February 1663, the King grants power to Sir Thomas Modyford to choose his own counsel, and with the consent of the major part of them to frame general assemblies of freeholders, according to the usage of other plantations, and with their consent to make laws suitable to those of England, which should remain in force for the space of two years, and no longer, unless approved by His Majesty. After Sir Thomas Modyford, Sir Thomas Linch succeeded, and after him the Lord Vaughan, who had the like power with Sir Thomas Modyford; during the government of the

Lord Vaughan, the assembly granted the like revenue out of strong liquors, but to continue but two years.

The question hence arose, and which was referred by the Privy Council to the Lord Chief Justice North to consider and certify his opinion, and to take the opinion of such other Judges therein as he should think fit, whether the law made by the assembly in the Lord Vaughan's time had totally laid aside the law made in Sir Charles Littleton's time by implication? And upon debate of the matter by the Lord Chief Justice North, Ellys, myself and Charleton Justices, and Baron Gregory, it was resolved, that the last council having power to make laws to continue but two years, did not repeal the perpetual law made before, but did suspend its power during the two years, and no longer, according to the case of prices of wine, Hob. 215, where by 37 H. 8, cap. 23, a perpetual law was made for setting prices of wine; then by the statute of 5 E. 6, the said Perpetual Act (through the inadvertency of the Parliament) was continued amongst other Acts till the end of the Parliament, which continuance was resolved to be idle as to that Act; for an affirmative continuance of a perpetual statute cannot work an abrogation thereof; and when the two years expire, it is as if no such Act had been made; for by 12 Co. 7, and 2 Inst. 684, when an Act of repeal is repealed, the first Act repealed is revived.

[398] JOHN NORRIS *versus* BAYFIELD. ERROR C. B. LONDON.

Variance.

In ejectment of a messuage, with the appurtenances in the parish of Saint Christopher, of the demise of Francis Norris gentleman. Upon not guilty pleaded, verdict was given for the plaintiff, *quoad il. parcell. messuagii prædict. jacen. proximam ad messuagium modo infra nominat. Francisci Neve & contin. ex Boreali parte inde in fronte juxta Thredneedle-Street ab occiden. ad orien. octo pedes, & in profunditatea Borea ad Austrum quindecim pedes, & contin. ex Australi parte inde in fronte juxta Cornhil ab occiden. ad orien. tres pedes & dimidium unius pedis, & in profunditate ab Austro ad Boream quadraginta pedes, et quoad residuum* for the defendant, and judgment is given *quod quer. recuperet terminum suum prædictum de & in prædict. parcell. prædict. messuagii jacen. proximum ad prædict. messuagium ut præfertur in occupatione prædict. Francisci Neve & continen. &c.*

Error general assigned, and the defendant pleads *in nullo est erratum.* But the chief error is, the variance between the verdict and the judgment. The verdict is, *jacen. proximum ad messuagium modo Francisci Neve.* The judgment is, *jacen. proximum ad messuagium in occupatione prædict. Francisci Neve.* Now if this variance be not amendable by the common law, it is not within any of the Statutes of Jeofails, unless the words of 16 and 17 Car. 2, cap. 8, will help it, which are, *but that all such omissions, variances, defects, and all other matters of like nature, not being against the right of the matter of the suit, shall be amended, &c.* But I think, *of* and *in* the occupation are the same. *Et adjournatur.*

[399] PARSONS *versus* EDWARD COTTREL. DEBT UPON AN OBLIGATION OF 100L. DAT. 25 FEBR. 31 CAR. 2.

Intr. Trin. 31 Car. 2.

Debt.

The defendant pleads, that before the exhibiting the bill, and after the date of the said obligation, viz. 17 March 31 Car. 2. By indenture between John Ely and the plaintiff of the one part, and one William Cotterel, and one John Cotterel, son of the said William, and the defendant, of the other part, *hic in Cur. prolat.* the plaintiff released to the defendant all claims and demands; *et hoc, &c.*

The plaintiff demands oyer of the indenture, the words (as to this purpose) are, *The said John Ely and Thomas Parsons, for and in consideration of the sum of* 50l. *to them or one of them paid, or secured by bond lately entered into by the said Edward Cotterel, the*

receipt whereof they the said Thomas Parsons and John Ely do, and either of them doth release and acquit the said John Cotterel and Edward Cotterel, and either of them, and their and either of their heirs, &c. and for other good causes, &c. have granted and released to the said John Cotterel, his heirs and assigns, all that messuage, &c. Quibus lectis & auditis, the plaintiff replies, that the bond in the declaration, and the bond mentioned in the indenture are the same; *et hoc, &c.* The plaintiff demurs. And I am of opinion for the plaintiff. 1. The intent is clear that this security should not be discharged. 2. Claims and demands shall be intended for the money, and not concerning the bond. Pasch. 3 Car. 1, *Abree* versus *Page*. Debt upon an obligation, the defendant pleads a release of all errors, and all actions, suits and writs of error whatsoever. Adjudged, the release extended only to writs of error. But the case of *Rotheram and Crawley*, 3 Cro. 370, **[400]** and Owen, 71, pl. 142, seems otherwise: and therefore *quære*. *Et adjournatur*.

AGLIONBY *versus* ISABELLA TOWERSON WIDOW. ERROR IN CARLISLE.

Assumpsit. 1 Danv. Ab. 73, p. 15.

The plaintiff declares, that 11 November 29 Car. 2, there was a discourse between the plaintiff and defendant of and concerning a marriage to be had between one Christopher Richmond, Esq; his sister's son, and one Isabel Reynoldson niece of the defendant. Upon which the said defendant then and there, in consideration that the plaintiff at the special instance and request of the defendant would endeavour and labour to persuade the said Christopher Richmond to marry the said Isabel Reynoldson, did promise that she would pay the plaintiff 40l. if the said marriage should take effect. The plaintiff *in fait* says, that he 31 Dec. 29 Car. 2, and divers other days and times at the instance and request of the defendant, *omnibus modis quibus poterat conatus fuit & elaboravit suadere præd. Christophorum* to marry the said Isabel Reynoldson, and that afterwards, viz. 1 July 30 Car. 2, the said marriage took effect, and yet the defendant hath not paid him the 40l. though ult. Sept. last past she was thereunto required.

The defendant pleaded *non assumpsit*, and verdict and judgment for the plaintiff, and 40l. damages; and the general error assigned; but the error insisted on was, that the plaintiff doth not shew how he did endeavour to persuade, and so uncertain, for he says only, *omnibus modis quibus poterat*. But I conceive it is good enough; for 1. We shall not presume he did prevaricate, *iniquum non est præsumendum*. 2. If he should set forth his speeches he made either in commendation of the young woman, or advantages of a married life, &c. the record would be too long, and perhaps we could not be competent judges of it, Mich. 1651, in B. R. *Barber* versus *Clerk*, *assumpsit*, in consideration the plaintiff would renounce an executorship, the defendant would pay, &c. The plaintiff avers, *quod renunciavit*, and good; and yet the person before whom the renunciation was, might not be competent. Mich. 1661, B. R. *Baker* versus *Smith*, *assumpsit*, the plaintiff being a virgin, had been prevailed with to make a contract with the defendant, and afterwards the defendant was desirous to be free; and thereupon the defendant **[401]** in consideration that the plaintiff would *disonerare*, *Anglice* would disengage, him of his promise, he promised to pay her 1000l. and she alledges, that she did disengage him; and adjudged good, without shewing how she did disengage him; and the whole Court seemed to agree, that the declaration in principal is good; but they persuaded the plaintiff to go to a new trial, and he was prevailed with, because the damages were great for so small a matter.

MASON *versus* JENNINGS.

Case.

In a special action upon the case. The plaintiff declares, that he is a hackney-coachman, and that the defendant with an intent to disgrace him did *ride Skimmington*, and describes how, thereby surmising that the plaintiff's wife had beat the plaintiff, and by reason thereof persons who formerly used him, refused to come into his coach

and to be carried by him, *ad damnum*. Upon not guilty pleaded, a verdict for the plaintiff; and upon motion in arrest of judgment, judgment was given *quod quer. nil capiat per billam;* and a judgment in the like case in C. B. was cited Trin. 14 Car. 2, C. B. Rot. 1461, in the case of *Lumley and Baddenley.*

[402] TERM. MICH. 32 CAR. 2, 1680, B. R.

JANE ZINZAN AND FRANCES ZINZAN *versus* TALMAGE. ERROR IN C. B. BERKS.

Copyhold. 2 Danv. Abr. 183, p. 3. Pollexf. 561. 2 Jon. 142. 2 Show. 130.

In ejectment of the demise of Henry Zinzan, jun. of three messuages, two hundred acres of land, forty acres of meadow, one hundred acres of pasture, and eight acres of wood in Tylehurst. The jury find a special verdict, that Sir Peter Vanlore, jun. was seised in fee of the manor of Tylehurst, of which the lands in question are parcel, and held by copy of court-roll for one, two or three lives successively, one after the other, as they are named in the copy, according to the custom of the manor: Sir Peter Vanlore had issue three daughters, viz. Jacoba, wife of Henry Zinzan, sen. Esq; Susanna, wife of Sir Robert Croke, Knt. Mary, wife of Henry Alexander late Earl of Sterling in Scotland. The said Sir Peter Vanlore, jun. at a court held 8 March 1638, granted by copy the lands in question to Henry Zinzan, sen. *habend.* to him and to the said Henry Zinzan, jun. lessor of the plaintiff, and Peter Zinzan sons of the said Henry Zinzan, sen. for their lives, successively, as they are named in the grant, at the will of the lord, according to the custom of the said manor. Henry Zinzan, sen. was admitted tenant, and entered and became seised for life, the remainder to Henry Zinzan, jun. and Peter Zinzan successively. Sir Peter Vanlore died without any issue male, and the said manor descended to his said three daughters. Within the said manor there is a custom, that if any customary lands are granted by one copy to two or more persons named in the same copy, for their lives, and the life of the longer liver of them successively, then the first person in such copy first named, may surrender all the lands, and thereby determine and destroy all the right, estate and title in the same tenements of all the other persons therein named.

[403] By indenture quadripartite, 10 May 28 Car. 2, between the now Earl of Sterling, son and heir of Mary late Countess of Sterling, deceased, one of the daughters and co-heirs of the said Sir Peter Vanlore, jun. deceased, and one of the grand-children and co-heirs of Sir Peter Vanlore, sen. deceased, of the first part, the said Sir Robert Croke and Susanna his wife, of the second part, the said Henry Zinzan *alias* Alexander, sen. first named in the said copy, and Jacoba his wife, of the third part, and Daniel Blagrave and Joseph Baker, of the fourth part, it was mutually agreed to levy a fine *come ceo, &c.* to the said Blagrave and Baker, of the manor of Tylehurst, and of the lands in question by name, to the use of the said Henry Zinzan, sen. and Jacoba his wife for their lives without impeachment of waste, the remainder to the use of such person or persons, and for such estate and estates, limitations, uses, trusts, intents and purposes as the said Jacoba Zinzan in her life-time, married or unmarried, by any writing or writings by her sealed and subscribed in the presence of two or more credible witnesses, or by her last will and testament by her sealed and subscribed in the presence of two or more credible witnesses, should declare, nominate or appoint; and in default of such declaration, nomination or appointment, to the only use of the right heirs and assigns of the said Jacoba for ever. In Trin. term next a fine was levied accordingly. 20 November 1676 the said Henry Zinzan, sen. died, and the said Jacoba him survived. 22 & 23 February 1676 the said Jacoba by her indentures of lease and release conveyed the premisses to the said Jane and Frances Zinzan and their heirs, to the use of them and their heirs. 25 June 1677 Jacoba died, and the said Jane and Frances entered. Henry Zinzan, jun. being the second person in the said copy named, entered upon the possession of the said Jane and Frances, and demised to the plaintiff, upon whose possession the defendant re-entered. *Et sic, &c.* and judgment was given in C. B. for the plaintiff. And after argument in this Court at the Bar, judgment was affirmed by the whole Court. The sole question was, whether the conveyance of 10 May 28 Car. 2, and the fine pursuant thereto be a

surrender within the custom to bar the estate of Henry Zinzan; and resolved it is not, because, 1. The custom extends only to the copyhold estate, and that cannot pass by the fine. 2. It being against common right shall be taken strictly. 'Tis against common right, because it gives power to tenant for life to destroy a third person's estate without any recompence. 'Tis taken strictly. **[404]** Yelverton 1, *Baspole* versus *Long*. A custom, that if a surrenderee comes not in upon the third proclamation, he shall forfeit the estate. A surrender is made to the use of A. for life, the remainder to B. A. comes not in, B. shall not forfeit.

ELIZABETH CHICHESTER *versus* MICHAEL PHILIPS.

Intr. Pasch. 32 Car. 2. Error out of Ireland. Ejectment.

Error. 3 Danv. Abr. 111, p. 3. 2 Jon. 146.

The plaintiff Philips in the action, brought the action first in C. B. in Ireland, and declared of the demise of Roger Masterson, Esq; for eleven years. Upon not guilty pleaded, and a trial at the Bar in C. B. there was a bill of exceptions put in by the defendant, which was as follows:

Com. Wexford, ss. Memorandum qd. 11 Nov. 1678, existen. die præfix per Justic. domini Regis de C. B. hic in crast. Animarum hoc termino Sancti Michaelis 1678, supradict. ad triand. exit. inter Mich. Philips gen. quer. & Eliz. Chichester vid. def. junct. de placito transgr. & ejection. firmæ exit. præd. triat. fuit coram Roberto Johnson Arm. Secundo Justic. domini Regis de Banco prædict. & Adamo Gusack Arm. un. al. Justic. dicti d'ni Regis de Banco præd. ad Barram Cur. præd. præfat. Michael suppon. per breve & narration. sua quod quidam Rogerus Masterson 11 die Januarii 29 Car. 2, *demised, &c. and recite the declaration and plea, and issue.* Et modo hic ad triation. exitus prædict. præfat. Michael dedit in evidenc. quod præfat. Rogerus seisit. fuit de præmiss. prædict. in dominico suo ut de feodo, & sic. seisit. existen. dimisit tenementa præd. cum pertin. eidem Michæli, et quod ipse idem Michael virtute ejusdem dimission. in tenementa præd. intravit, & fuit inde possessionat. quousq; le defendent luy eject, prout il ad declare.

That the defendant gave in evidence to prove that she was not guilty, that the said Roger Masterson long before the said demise to the plaintiff, viz. 4 January 1672, by indenture for money bargained and sold the premisses to one Edward Chichester for 500 years, that the said Edward Chichester afterwards, viz. 14 February 1673, did make his last will in writing, and thereof made his brother John Chichester his executor, and William Hancock overseer. And to prove that he made the said will, she produced an instrument **[405]** under the seal of the Prerogative Court of Canterbury, reciting the said will, and that the said John Chichester was beyond the seas, and a grant of the administration to the said William Hancock for so long time as the said executor shall be beyond sea, dat. 3 Sept. 1674. And also one other writing in parchment under the seal of the consistory of the Bishop of Ferns, purporting a probate of the said will by the executor himself, dat. 7 November 1678, that Edward Chichester named in the will, and in the probate, are the same persons. That the said Edward died in England 28 May 1673, and that the said John Chichester the executor is alive. That the plaintiff gave in evidence another writing in parchment, under the seal of the Prerogative Court of Ireland, dat. 15 December 1677, whereby reciting that the said Edward Chichester died intestate, the Archbishop of Armagh granted administration to the plaintiff as principal creditor; whereupon the said Elizabeth without any farther proof of the said will, desired the said justices that they would direct the jury that the said writings produced by her were conclusive evidence to prove that the said Edward Chichester made the said will, and so she was not guilty of the said trespass and ejectment.

Nevertheless the said justices did only direct the jury that the said writings were evidence, upon which they might find that the said Edward made the said will, but not that the same was conclusive evidence in that behalf, and so left it indifferently to the jury, whether the said Edward made the said will or no, though the plaintiff

offered nothing against the said will, but the said letters of administration granted by the said Archbishop of Armagh; whereupon the jury found that the said Edward made no such will; thereupon judgment was given in B. B. for the plaintiff, and the defendant brought a writ of error in B. R. in Ireland, and there the judgment was affirmed; and now she hath brought a writ of error here, and assigns for error, the not allowing of the evidence to be conclusive, as in the bill of exceptions is alledged. And here also judgment was affirmed by the whole Court, because though the evidence be conclusive, yet the jury may hazard an attaint if they please; and the proper way for the defendant had been to have demurred upon the plaintiff's evidence. This question, whether the probate is conclusive, hath been variously allowed; but of later days it hath been adjudged, that nothing can be given in evidence against it, but forgery of it, or its being obtained by surprise.

[406] Authorities, that the evidence is not conclusive.

Trin. 44 E. 3, 16 a. pl. 1. Debt against an administrator. The defendant pleads, that the party made a will, and the defendant and another his executors, and judgment of the writ, and produces the will in Court under the seal of the Ordinary. The plaintiff replies that he died intestate, and the defendant rejoins, that the plaintiff ought not to be admitted to aver that against the seal of the Ordinary; but *non allocatur*.

The defendant's suggestion, and issue was taken, whether he died intestate, or no, notwithstanding the probate under seal. Fitz. Estoppel 9. Br. Estoppel 36. 9 Co. 31 a. 41 a.

Pasch. 22 H. 6, 52 b. pl. 25. By Newton and all his companions, the defendant may traverse, that the plaintiffs were not made executors notwithstanding the testament. F. Executors 17. Bro. Testament 4. Mich. 34 H. 6, 14 b. pl. 26. By Prisot, a testament may be disproved by the law of the Church; as if H. makes two testaments and dies, the first testament is proved, and afterwards the second testament, which is the last will, is found, and another named executor, in this case this last testament now shall be proved, and the other shall be void. If the first executor bring an action as executor, the defendant may well avoid it by special matter. Mich. 21 E. 4, 50 a. pl. 9, by Choke and Catesby, where executors are plaintiffs, the defendant may say that the testator did not make them his executors, but such an one, and the issue shall be taken upon the matter in fact, and upon the probate of the testament, for they might forge a testament; so in administration the issue shall not be taken on the letters of the bishop, but on the matter *in fait*, viz. that the Ordinary did not commit to them the administration by his letters. Bro. Record 28. A testament is not matter of record at the common law, notwithstanding the probate, for H. may deny the making of the parties executors, and try it *per patriam*. Rast. Ent. 325. Several pleas that the testator did not make the plaintiffs executors, and issue upon them. Plow. 282 a. The seal of the Ordinary put to the administration is but matter *in fait*, which is not any estoppel for the time, nor shall enforce the executor to sue in the Spiritual Court to repeal it; but he shall avoid this by plea, or by taking the goods of the administrator, or by any matter *in fait*, as occasion ministers. Dyer 294 b. pl. 7. Issue was joined, if the Bishop of London hath committed administration, it shall be tried by the country. On the contrary, that the probate is not **[407]** traversable; and so is the law at this day, Roll. 1 Rep. 226, Trin. 13 Jac. B. R. debt by an executor, he shews the will to the Court proved by sentence. The testator pleads the defendant died intestate, and that the administration was committed to him, and shews an appeal of the said sentence of the probate of the will. And by Coke, Dodderidge and Houghton it is not a good plea, because if it should, no executor should have an action during such appeal, which would be a grand prejudice.

Memorandum, 3 December 1680. At one o'clock in the morning died Sir William Ellys, Knt. one of the Justices of the Court of Common Pleas, at his chamber in Serjeants-Inn in Fleet-street, *grandævus senectute, viz. ætat.* 71.

Upon the trial of the Lord Viscount Stafford, who was impeached by the House of Commons of high treason, the case fell out to be, that his charge was, *that he hired persons to kill the King*. And upon the evidence it appeared, that Stephen Dugdale swore,

that the prisoner proffered him 500l. to do it; and Oates another witness swore, that the prisoner received a commission to be pay-master to an army to be raised by the Roman Catholicks; and Turbervile swore, that another five or six years before time, the prisoner at Paris proffered him a good reward to kill the King. And upon this evidence, the question was put to all the Judges then attending (who were all there, but Scrogs Chief Justice, and Ellys, who was lately dead) whether this was sufficient evidence for convicting the offender by the statute of 1 E. 6, cap 12, and 5 E. 6, cap. 11, which requires two witnesses for convicting of a traitor, and for finding an indictment; and here is but one witness to each fact. And after conference between themselves, all the Judges delivered their opinions *seriatim*, beginning with the Lord Chief Justice North; that when the prisoner is charged with the offence of killing the King, and the evidence is, that he at several times laboured it, and by several ways, and to each particular time and fact there is but one witness, and yet every of the said facts conduces directly to the effecting and perpetration of the fact and treason charged upon the prisoner, such evidence is sufficient within the statute. But otherwise it had been if the facts had been tending to another several treason; and the reason given why such evidence was good, was because otherwise it would be a most difficult thing, and almost **[408]** impossible to convict any one of high treason for compassing the death of the King, for such compassings are seldom acted in the presence of two witnesses at one time present. And upon this occasion my Lord Chancellor in the Lords House was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar he believed; and it was this, anciently all or most of the Judges were churchmen and ecclesiastical persons, and by the canon law now, and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretick, but not a traitor, and antiently heresy was treason; and from thence the Parliament thought fit to appoint, that two witnesses ought to be for proof of high treason.

In the same trial of the said viscount, after the Lords had *seriatim* voted (whereof thirty-two acquitted, and fifty-four condemned him) he moved in arrest of judgment, that every person arraigned ought by the law to hold up his hand at the Bar, which he did not, nor ever was demanded so to do; and thereupon the opinion of all the Judges was asked, who unanimously answered, that that ceremony was only for the making known the person of the offender to the Court, and if he answers that he is the same person, 'tis all one; and so it falls out sometimes in the circuits, that some will not hold up their hand, and yet have been condemned; and judgment of high treason was given against the prisoner on Tuesday the 7th of December 1680, by the Lord Chancellor Finch, who was high steward *pro tempore*.

JOHN STEAD *versus* ELIZABETH BERRIER, WIDOW. ERROR OUT OF C. B.

Devise. 2 Danv. Abr. 534, p. 10. 1 Vent. 341. 2 Lev. 243. 2 Jones 135. Pollexf. 546. 1 Mod. 267. 2 Mod. 313. 3 Keb. 845. 2 Show. 63.

Ejectment of the demise of Thomas Stead and Judith his wife, and Richard Stockdale and Mary his wife for five years. Upon not guilty pleaded, the jury find a special verdict,

That Robert Berrier of Kingston upon Hull was seised of the lands in question in fee, and had issue William his eldest son, and Robert his younger, and 29 October 1669 made his will in writing, and thereby devised in these words,

[409] *I devise and give to my son Robert Berrier and his heirs for ever, all that my farm &c.* being the lands in question, &c. *inter alia.* Item, *I give and bequeath unto my grandchild Robert Berrier* 100*l.*

26 December 1669. Robert Berrier the son of the testator died (the testator living) leaving issue Robert Berrier his son and heir.

Robert Berrier the grandfather 26 March 1671 made a codicil to be annexed to his said will in these words,

And also I the aforesaid Robert Berrier do give and bequeath unto my grandchild Judith

Berrier, and her heirs for ever, more than I have formerly given by this my last will and testament, a little close, &c. This I will shall be added as a codicil, and taken as part of my last will and testament.

The tenements by the said codicil devised are ten acres of meadow, and ten acres in Fithing, part of the tenements devised by the said Robert the grandfather to Robert the father.

The tenements in the declaration are the tenements devised by the will to Robert the father.

16 May 1671. Robert the grandfather did republish his last will, and by parol, and without any writing, *animo testandi* did declare, that the said Robert Berrier the grandson by the same will should take and have as the said Robert Berrier his father might take and have.

1 March 1672. Robert the grandfather died, and Robert the grandson him survived, and entered into the said premisses, and became seised *prout lex postulat.*

William Berrier eldest son of the said Robert the grandfather, 25 September 1646, died, leaving issue Judith and Mary the lessors of the plaintiff, whose husbands in their right entered on the possession of the said Robert the grandson, and made the lease to the plaintiff. *Et si, &c.*

Judgment was given in C. B. for the defendant, and the plaintiff brings his writ of error, and assigns the general error. And by Scrogs Chief Justice, Jones and myself, judgment was reversed, but Dolben Justice *contra.* We had all prepared to deliver our opinions openly in Court, but in regard my Lord Chief Justice had business of his own in the Lords House, he desired that he might deliver the sense of the Court without any argument; I was prepared with this to say for my opinion, viz.

[410] 1. I do not find at the Bar any objection to the want of finding a good title for the plaintiff in this verdict, as was objected in C. B. viz. that it is not found that Judith and Mary wives of the lessors of the plaintiff are granddaughters and heirs to the testator; neither do I find any ground for the objection; for it is found that Robert Berrier the testator had issue William, *primogenitum filium suum,* and also Robert father of the defendant his younger, and that William died in the lifetime of the testator, leaving issue the said women, whereby in a special verdict it must be necessarily intended, that they are heirs at law to the testator.

In this case there have been two points in question, both tending to the making good a title to the defendant.

1. Whether the new publication of 16 May 1671, whereby the testator did declare that Robert Berrier the grandson by the same will should take and have, as the said Robert Berrier his father might take and have, did pass any estate to Robert the grandson?

2. If that point fail for the defendant, then, whether by the words of the will, *I devise and give to my son Robert Berrier and his heirs for ever,* Robert the grandson can take?

I hold in both points for the plaintiff in the action, and that the judgment (with all due reverence and respect to the persons and Court that gave it) ought to be reversed.

As to the first point, I cannot distinguish it from the third point in *Bret and Rigden's case,* Plowden 345 b. The words there were, *That Thomas Bret the son should be heir to Giles (the devisor) and that he should have all the lands which his father by the will should have, if he had lived;* and here the words are, *That Robert Berrier the grandson shall take and have as his father might take and have.* It not being in writing cannot pass any thing, by reason of the statutes which appoint land to pass by will in writing. And so were Gawdy and Clench's opinions in *Fuller and Fuller's case,* 3 Cro. 423. But this point seems to be agreed with me at the Bar, and therefore I shall not insist upon it farther.

As to the second point. Constructions of wills ought to be collected out of the words, and not *dehors,* or by averment, as 5 Co. 68, *Chenye's case;* and therefore 39 Eliz. *Challoner* versus *Bowyer,* 2 Leon. 70, pl. 94, *William Bowyer had two sons, and devised his land to his younger son in tail,* **[411]** *the remainder to the heirs of the body of his*

eldest son, the remainder to his daughters in tail; William Bowyer dies, the younger son dies without issue, living the eldest son; and in an assise, the tenant produced witnesses to swear that the devisor declared, *that as long as his eldest son had issue of his body, the daughters should not have the land;* but the Court utterly rejected the evidence; and indeed were it otherwise, no man could advise his client, or know the certainty of any will; for if contrary to, or otherwise than what appears written might be averred, one will would appear in writing, and quite another upon evidence.

Which being so, it necessarily follows, that the parol declaration is out of doors in this will, and it is not at all to be taken notice of.

Then the words on which the defendant must rely for his title are,

I give to my son Robert and his heirs, by which the defendant must take either as heir to his father, or as son to his grandfather.

The first he cannot, by *Bret and Rigden's case*, in the second point there, because the words (*heirs*) is but to shew the quantity of the estate given, and to make them persons to take immediately by the will.

He cannot take as son, for these reasons.

1. The word *son* is never taken for *grandson*, no more than *child* is taken for *grandchild*. 3 Cro. 357, *Brown* versus *Pease*. Warner seised in fee of two manors, Warners and Churchall, devises Warners to the eldest son of his cousin Richard Foster in fee, and he devised the manor of Churchall to Margaret Waters for life, the remainder to such of his cousin Foster's children as shall be then alive and owner of Warners. Resolved, if such son be dead, when Waters dies, the grandchild of Richard Foster shall not take; the reason is given, because out of the words *child* and *grandchild* are different persons.

2. The words (*son*) and (*grandson*) are discriminating words in all instruments, and in this very will, for he gives the land to his son, and 100l. legacy to his grandson.

3. By the same reason, the son of the grandson may take; and it appears not whether this Robert had a son named Robert.

4. It was not the intent of the devisor (as expressed in the will) *that the grandson should take*, for he makes him a distinct legatee.

[412] 5. The inconvenience which would ensue, should the word (*son*) be so taken; no certain construction could be made, for so *godson, great-grandson, son-in-law, &c. may take*, and no body can guess whom the testator meant. The same mischief would happen, as by an averment beforementioned.

Had the defendant been called frequently by the testator in his life-time, his son, he had been capable to take by that name; as an illegitimate son may take by the name of the reputed father, after he hath acquired a certain name by reputation.

But it is not found in the whole record, that the testator knew of the death of his son Robert. True it is, that the parol declaration disposes to the defendant what was given to his father, but that may be as well for other reasons as for death.

Object. The new publication is as if the will were new writ over again.

Resp. I grant it. But then if the words are the same, there will no more pass than by the first writing.

If he had devised to Robert Berrier (without addition) or to my heir Robert (if the truth were, that his heir at his death proved to be Robert) this new publication would have made the will have passed the lands, because the words would have agreed with the person of the devisee, as in *Beckford and Parncot's case*, 3 Cro. 493. *Parsons* seised of lands in Aldworth devised all his lands there to his daughters Barbara and Joan, and then purchases more, and then new publishes his will. Resolved, the new purchased lands passed, because sufficient words; so is *Bret and Rigden's case* in the second point there.

Object. By the record it appears, that the devisor intended to pass the land to his grandson the defendant.

Resp. The intent appears not by the will. 2. That intent was not according to law, and the intent must be subservient to the rules of law, and not *e contra*, as *Counden and Clark's case* is, and many cases might be cited on that head. And 3dly, wills must have an apparent intent, when they disinherit an heir. 1 Cro. 369, *Sprit* versus *Bence*.

As to the lease made by two copartners and their husbands, *vide* Moor 682, pl. 929. *Millener* versus *Robinson*, Noy 13. 2 Cro. 83, *Jurdain* versus *Steer* 166. *Mantle* versus *Wollington*. It seems good enough after a verdict; and judgment was reversed.

[413] HARRISON *versus* BELSEY. KANC. EJECTMENT.

Remainder. 1 Vent. 345. 2 Jon. 136. 2 Show. 91. Pollexf. 573.

John Pepper seised in fee, by lease and release for 100l. conveys the lands in question, *to the use of Paul Barret sen. and Sarah Barret his daughter, for their lives, the remainder to the use of the first, and every other sons of Sarah in tail male, the remainder to the use of her daughters equally to be divided in tail male, the remainder to the use of the right heirs of Paul. Sarah by deed gives, grants, remises and releases all her right and estate to the said Paul and his heirs, to the use of him and his heirs.* Sarah marries Samuel Hall, and hath issue Samuel Hall lessor of the plaintiff. Paul Barret by indenture 22 May 28 Car. 2, covenants to stand seised *to the use of himself for life, the remainder to Sarah Norwood his grandchild for her life, the remainder to Paul and Thomas Norwood his grandchilden, and their heirs. Paul dies.*

The sole question of this case is, whether the remainder limited to Samuel Hall lessor of the plaintiff, as first son of Sarah, be destroyed by Sarah's release?

And I conceive it is not, and that judgment ought to be given for the plaintiff.

1. It cannot be denied by the other side, but that Paul Barret and Sarah were joint-tenants for their lives, and that the estate in fee-simple is not executed in Paul Barret. Coke upon Littleton 182 a.

For though a discent or any other subsequent conveyance will destroy the jointure, as *Westcot's case* is, 2 Co. 60, yet till then they remain joint-tenants.

Coke upon Littleton 273. Two coparceners of a rent, and one marries the tertenant, the other may release to her that was married.

'Tis requisite for the execution of all contingent remainders, that the particular estate do continue the same it was at the time of the creation thereof, when the use comes *in esse;* for it must vest either during the particular estate, or at least *eo instante* that the particular estate determines. 1 Co. 66, *Archer's case.*

3. This release doth not alter the estate. 1 Coke upon Littleton 273. Such a release is no alienation, Winch 63, *Wase* versus *Pretty.* By Winch Justice, and Hobart, if land be given to two upon condition, that they shall not alien, and **[414]** one releases to the other, it is no breach of the condition. 2. It makes no degree, for the relessee is in by the lessor. Coke upon Littleton 184.

And though the remainder did before depend upon an estate for two lives, and now but on one, that one is the same estate in quality, though not in quantity.

Fitz. Aid 77. Tenants in special tail recover in assize, and afterwards one dies without issue, and the other being tenant in tail after possibility, is redisseised, he shall have a redisseisin, because it is the same freehold which he had before, and is part of the estate-tail.

I conceive the case of a condition of accruer is a stronger case; there the estate on which the condition is to grow must continue the same. And yet 8 Co. 75 b. If a man grant land to another and his heirs on the body of his wife, with such a condition, and the wife dies without issue, yet he may perform the condition.

4. The intent of the parties (which is observable in all acts, and especially in the disposition of estates) was only to transfer Sarah's estate to Paul, and not to deprive her children, she being but tenant for life.

Her acts shall be construed with as much strictness as the rules of law will permit. Judgment was given for the plaintiff by Scrogs Chief Justice, Jones and myself: but my brother Dolben was for the defendant, but had not opportunity to shew his reasons, because my Lord Chief Justice desired that he might deliver all our opinions shortly.

OSBORN *versus* WANDEL.

Trespass.

Trespass upon the statute of 1 R. 3, cap. 3, for taking the plaintiff's goods (being arrested for suspicion of felony) before conviction, and declares of seizing a certain parcel of money; and after verdict for the plaintiff, Stanhope moved in arrest of judgment, because the words of the statute are, *that none shall seize the (goods) of any person, &c.* and money is not goods, Fitz. Brief 512. But adjudged for the plaintiff, and that money is goods; and that case is only the opinion of Finchden.

[415] VALENTINE JOYNER *versus* SIR ROBERT VYNER.
ERROR IN C. B. LONDON.

Intr. Pasch. 32 Car. 2.

Award.

Debt upon a bond against the defendant as son and heir of Christopher Joyner. The defendant demands oyer of the condition, which is, *whereas the above-bound Christopher Joyner did 4 December* 1665 *leave with Henry Lewys, then servant to the above-named Sir Robert Vyner, a bill of exchange of the sum of* 61*l.* 14*s.* 4*d. payable by Richard Fuller late of London merchant, deceased, and upon leaving the said bill the said Christopher Joyner had credit in his account with the said Sir Robert Vyner for the said sum of* 61*l.* 14*s.* 4*d.* And whereas the said Henry Lewys doth aver that the said sum of 61l. 14s. 4d. *was not paid to the said Sir Robert Vyner, or any other person for his use, the condition therefore of this obligation is such, that if the said Christopher Joyner shall not, before the* 10*th of November next the date above-written, legally and sufficiently prove, that the said sum of* 61*l.* 14*s.* 4*d. was paid to the said Sir Robert Vyner, or to his use, then if the said Christopher Joyner, his heirs, executors, administrators or assigns do well and truly pay or cause to be paid to the said Sir Robert Vyner, his executors or assigns upon the said* 10*th of November the said sum of* 61*l.* 14*s.* 4*d. and all interest at* 6*l. per* 100*l. per annum accrewing for the said money, from the said* 4*th day of December* 1665, *until the payment thereof, that then this obligation to be void. Quibus lectis & auditis*, the defendant pleads, that the said Christopher Joyner his father, after the making of the said bond, and before the said 10th of November viz. 20 May 24 Car. 2, died. The plaintiff demurs; and adjudged by the whole Court for the plaintiff; for there is a difference where the condition contains a duty vested in the obligee, and where it is only a collateral act; for in the first case the executors are bound to perform it; and so the obligor forfeits his obligation if it be not performed. 3 Cro. 10. *Kingwell* versus *Knapman*, 2 Leon. 155. Debt upon an obligation, conditioned, that whereas there were divers controversies between the plaintiff and the brother of the defendant, and they submitted themselves to the **[416]** arbitrement of one Coxin. Now if the said brother perform the award, then, &c. The defendant pleads that the arbitrator made an award that the brother should pay 30l. viz. 20l. at Easter, and 10l. at Michaelmas, and that he paid the 20l. but before Michaelmas he died; and adjudged for the plaintiff, because the sum awarded was become a duty; but otherwise where no duty, as to make a feoffment, or to prove an allegation in a bill of equity. Dyer 262 a. pl. 30, *Arundel* versus *Comb.*

DOROTHY LEE, ADMINISTRATRIX OF WILLIAM LEE HER HUSBAND, *against* CHARLES GARRET AND MARY HIS WIFE, EXECUTRIX OF FRANCES AMBLER. MIDD.

Debt. 2 Show. 143.

Debt upon an obligation of 600l. dat. 11 Aug. 1657, the condition whereof (upon oyer demanded) is, *that whereas a marriage hath been lately had between the above-named William Lee and Mary daughter of the above-bound Frances Ambler; if now the heirs, executors, administrators or assigns of the said Frances Ambler do and shall well and truly pay or cause to be paid unto the said William Lee, his executors, administrators or assigns*

the full and whole sum of 300*l. within two months next after the death of the said Frances Ambler, if the said Mary, or any issue of her body by William shall be living at the death of the said Frances. Then, &c.* The defendant pleads, that 1 January 29 Car. 2, the said William Lee died intestate, and the said Frances Ambler him survived; and 15 Febr. 31 Car. 2, died, and that the said Mary the wife of William Lee died before the said Frances, leaving the said Mary wife of the defendant.

That at the death of the said Frances, nor any time within two months next after the death of the said Frances, there was no executor or administrator of the said William Lee, nor any person appointed on the behalf of the said William Lee, to have or to receive the said 300l. in the said condition mentioned, nor to whom the same could be paid according to the form of the said condition; and that administration of his goods and chattels was not granted within one year next after the death of the said Frances. The plaintiff demurs generally; and adjudged for the plaintiff, because the money being a duty, the defendant ought to have pleaded, *uncore prist, &c.*

[417] ATTORNEY GENERAL *versus* BLOOD, CHRISTIAN & AL. MIDD.

Conspiracy. 2 Show. 114.

An information for conspiring to indict the Duke of Buckingham of buggery of a boy called Nemar. Upon not guilty pleaded, they were tried at the Bar in Trinity-term last, and found guilty. And Saunders moved in arrest of judgment.

1. That the writ of *venire facias* was *probos & legales homines*, whereas it ought to have been *liberos & legales homines*, for there is a difference between *probus*, *liber & legalis*, for *legalis* is he who is not outlawed, and against whom no exception can be taken in this behalf. *Probus* is not taken notice of in law. *Liber homo* is not only one that hath freehold land, but that hath freedom of mind, and stands indifferent, no more inclining to the one than to the other, Coke upon Littleton 155 b. but *probus* extends not so far.

2. The writ is *quorum quilibet* may expend 20l. in lands; and yet the statute of 16 & 17 Car. 2, cap. 3, is expired; and the defendant may be kept in durance and imprisonment for default of jurors of that value; and the statutes of 35 H. 8, cap. 6, and 27 Eliz. cap. 6, prescribe a certain form for the writ; and though those statutes of themselves extend not to pleas of the Crown, yet the statute of 4 & 5 Ph. & Mar. cap. 7 directs the statute of 35 H. 8 to extend to such cases; and the form being prescribed, ought not to be varied from, 1 Roll. Abr. 803 n. pl. 4, *Ludlow* versus *Edgworth*. *Scire* for *sciri*, resolved not good; and pl. 5, *quorum quilibet* had 4l. in an Inferior Court; judgment was reversed for that cause. And here no Statute of Jeofails helps, because an information for the King.

Pollexfen for the Attorney-General. 1. *Probos & liberos* are of one sense; and the statute doth not tie the writ to the very words; and there are multitudes of precedents, which are thus.

2. 'Tis for the advantage of the defendant to have a substantial jury, 2 Cro. 672, *Philpot* versus *Feeler*, 3 Cro. 257, *Morris* versus *Thomas*. And before the statutes it was, and now is in the power of the Court to award a *ven. fac.* of what larger sum they please.

[418] And the Chief Justice, and the other two justices were clear, that the writ was good for the reasons alledged by Pollexfen; and so was I as to the first exception; but I was not, nor yet am satisfied as to the second exception; for if it shall be in the power of the Court to put what sum they please in the *venire fac.* the defendant being in prison may be there detained for want of jurors of that value; but judgment was given against the defendant Christian, (for Blood was dead) and one more, viz. *that Christian should stand in the pillory an hour at Charing-Cross, between ten and twelve, and pay one hundred marks, and lie in prison till he paid it. The other was fined twenty marks, and awarded to the pillory.*

GRAY *versus* DAY.

Case. 1 Danv. Ab. 211, p. 18. 2 Jon. 132. 2 Show. 144.

An action upon the case. The plaintiff declares, that he being church-warden of such a parish, and having given an account at the end of his year to his successor, and the parishioners; the defendant falsly and maliciously cited him into the Ecclesiastical Court to render an account, and there at the defendant's request the Judge excommunicated the plaintiff for not rendering an account. Upon not guilty pleaded, and verdict for the plaintiff, Saunders moved in arrest of judgment, because the sentence was given by the Judge, and so he and the Court were to blame, and not the defendant. But resolved the action lies; and judgment was given for the plaintiff; and in this case for the plaintiff were cited 1 Cro. 291. *Carlion* versus *Mill*, 2 Cro. 667. *Steer* versus *Scoble*, 355. *Weald* versus *Pease*, 3 Cro. 574. *Willis* versus *Stroud*, Jones 312. 1 Roll. Abr. 34 c. pl. 4, 112 p. pl.

ANNE CROUCHE *versus* FASTOLFE. LONDON.

[See *Haldane* v. *Johnson*, 1853, 8 Ex. 694.]

Rent.

Debt for rent upon a lease for years, by indenture, of a messuage in Redrith in Surrey. The defendant pleads, that upon Christmas-Day (being the quarter-day for which the rent is demanded in the declaration) he was at the said messuage by the space of an hour before sun-rising until sun-setting, of the same day, ready to pay the said rent, and that neither the plaintiff nor any other on her be-**[419]**-half came or was ready there to receive it; and that he always since the said day hath been, and yet is ready to pay the same, *& denar. ill. idem Johannes hic in Cur. profert parat. fore solvend. præfat. Annæ, si eadem Anna illos de eodem Johanne recipere velit. Et hoc, &c.* And upon this the plaintiff demurs, because the defendant hath not alledged a tender on the day, but only that he was there ready to pay the rent. But resolved it is well enough; and adjudged for the defendant. 14 E. 4, 4. 22 H. 6, 57. 21 E. 4, 6. 7 Co. *Maund's case.* Hob. 207, *Crawley* versus *Kingswell.* Winch Intr. 1032. 1 Cro. 76. 3 Cro. 828. 1 Leon. 71, pl. 95, *Bret* versus *Audar.* And tender needs not; but otherwise where there is a condition, the breach whereof is to be saved.

Memorandum, 29 December 1680, *Sir John Kelyng Knight, of counsel extraordinary to the King, and his serjeant, died at his house in Southill in Bedfordshire.*

[420] TERM. HILL. 32 & 33 CAR. 2, B. R.

LEESON *versus* DOVER. LONDON. TRIN. 32 CAR. 2.

Condition.

Debt upon a bond of 600l. dat. 19 *Junii* 27 *Car.* 2. The defendant demands oyer of the condition, which is, *whereas there hath been a marriage lately solemnized between the above-named John Leeson and Anne Dover, daughter of the above-bound John Dover, and that the said John Dover did promise to pay the sum of* 500l. *as the marriage portion of the said Anne to the said John Leeson,* 200l. *of which said sum hath been paid accordingly by the above-bound John Dover. Now if the above-bound John Dover shall and do well and truly pay or cause to be paid the due interest of* 300l. *yearly, and every year, being* 18l. *unto the above-named John Leeson at two times or feasts in the year by equal portions, that is to say,* 9l. *upon the Feast of St. Thomas the Apostle next ensuing, and the other* 9l. *upon the Feast of St. John the Baptist, which shall be in the year of our Lord* 1676. *And it is farther the condition of this obligation, that the above-bound John Dover shall retain the principal money, being* 300l. *as aforesaid, in his hand, for the use of the said Anne, until such time as the said John Leeson shall settle, or cause to be settled, upon the said Anne, a jointure equal in value to the said sum of* 300l. *and then, that the above-bound John Dover shall upon half a year's*

notice thereof pay the said sum to the said John Leeson, to be to his own proper use for ever; all which the above-bound John Dover shall well and truly perform and keep; then this obligation to be void. Quibus lectis & auditis, the defendant pleads, *actio non*, for that he paid the said John Leeson 9l. on St. Thomas's Day next following the date of the said obligation, and the other 9l. on St. John Baptist's Day 1676, according to the form of the condition. That he retained the said sum of 300l. for the use of the said Anne Leeson till the **[421]** plaintiff should settle a jointure, which he hath not yet done. The plaintiff demurs, because the defendant doth not plead payment of interest for the said 300l. after the first year; and it was adjudged for the plaintiff by the whole Court, (except Scrogs Chief Justice who was absent) for that upon the whole condition it appears, that the intent of both parties was, that interest should be paid for the 300l. for these reasons.

1. By the preamble of the condition it appears, that 500l. was to be the marriage portion of Anne, and that the plaintiff was to have it without respect to the making of a jointure.

2. The words are, that the defendant shall pay due interest for the 3000l. yearly, and every year, which must necessarily extend beyond one year.

3. The principal was to be retained till settlement, which implies that he was to pay interest: for principal and interest are relatives.

LAMBERT & OLLIOT *versus* BESSEY. ERROR. C. B. PASCH. 31 CAR. 2, ROT. 382. NORFF.

[See *Rylands* v. *Fletcher*, 1868, L. R. 3 H. L. 341; *Humphries* v. *Cousins*, 1877, 2 C. P. D. 245; *Crowhurst* v. *Amersham Burial Board*, 1878, 4 Ex. D. 11.]

Imprisonment. 2 Jon. 214. Skin. 49. *Postea* 467.

Trespass and false imprisonment. The plaintiff declares, that the defendants Lambert and Olliot *simul cum* Bowles Ringall, Barloe and Woodcroft, 1 April 29 Car. 2, *vi & armis* did take and imprison the plaintiff Bessey, and him did evil intreat at Worstead, and so in prison did him from thence to Aylesham lead, and there for the space of three weeks did detain, till he paid them 7s. 4d. *Et alia enormia, &c. ad damnum* 100*l.* The defendant Lambert pleads not guilty, and after issue joined, the plaintiff enters a *nolle prosequi* as to Lambert. The defendant Olliot, as to all but the imprisonment pleads not guilty; and as to the imprisonment at Aylesham for three weeks, he says, that 12 Febr. in Hillary-term 28 & 22 Car. 2, there issued out a writ of *non omittas* out of the Court of C. B. against one Stephen Green, and against the plaintiff, and one Thomas Palmer, at the suit of Sir John Hobart Baronet, directed to the Sheriff of Norfolk, by which said writ the King commanded the said sheriff that he should take the said parties, and have their bodies at Westminster before the Justices of C. B. *mense* Pasch. then next following, to answer the said **[422]** Sir John Hobart in a plea of trespass *quare clausum fregit*, and a debt of 200l. which said writ the said Sir John Hobart, 21 March 29 Car. 2, delivered to the then Sheriff of Norfolk to be executed, by virtue whereof, and to the intent the said writ might be executed, the said sheriff made a warrant to the bailiff of the liberty of the Duke of Norfolk in the said county, who then had, and yet hath execution of all writs within the said liberty, and return thereof, *infra quam executio istius brevis totaliter restabat faciend. pro eo quod nulla alia executio inde alibi extra libertat. præd. infra ballivam suam fieri potuit*, which said warrant the said Sir John Hobart delivered to Arthur Onslow, Esq; then bailiff of the said liberty 28 March 29 Car. 2, to be executed; by virtue whereof the said Arthur Onslow made a warrant the same day to the said William Woodcroft and Samuel Bowles his deputy bailiffs, to take the said Bessey, &c. by virtue whereof the said Woodcroft and Bowles, 1 April 29 Car. 2, took the said Bessey and carried him to Aylesham, and delivered him over to the said Simon Olliot then keeper of the prison of the bailiff of the liberty aforesaid, at Aylesham aforesaid; by virtue whereof the said defendant took him the said Bessey and detained him by the space aforesaid, *prout ei bene licuit, quæ fuit eadem imprisonamenta, &c. Et hoc, &c. unde, &c.* The plaintiff replies, that the defendant

Olliot imprisoned him *de injuria sua propria, absque hoc*, that the said Woodcroft and Bowles did take the plaintiff within the said liberty of the said Duke of Norfolk. The defendant demurs, and shews for cause, that the plaintiff traverses a matter not traversable; and judgment was given in the Common Pleas for the plaintiff, and damages 100l. and the defendant brought a writ of error; and I conceive judgment ought to be affirmed.

1. In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore Mich. 6 E. 4, 7 a. pl. 18, *trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads, that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do hereby befal another, he shall answer it, if he could have avoided it. As if **[423]** a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at buts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the sallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there, *actus non facit reum nisi mens sit rea.*

Mich. 23 Car. 1, B. R. Stile. 72, *Guilbert* versus *Stone.* Trespass for entering his close, and taking away his horse. The defendant pleads, that he for fear of his life by threats of twelve men, went into the plaintiff's house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and makes satisfaction to the plaintiff.

Hob. 134, *Weaver* versus *Ward.* Trespass of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant with his musket *casualiter, & per infortunium & contra voluntatem suam* in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained.

2. The defendant here suffers no wrong but by his own act and will, for he was not compellable to be gaoler. And when a man takes an office, it is presumed he knows of all the conveniencies and inconveniencies which attend it. And in this, as in all other contracts, he must take the bad with the good.

3. As the gaols of the counties are incident to the office of the sheriff, 4 Co. 34 a. so the gaols of liberties are incident to the lord of the liberty. And the gaoler is but servant to him, as the gaoler of the county gaol is to the sheriff, and consequently they understand one another, and are privy to each other's acts relating to the prisoners, in presumption of law.

[424] *Object.* By this way a subsequent sheriff may be answerable for the tort of his predecessor.

Resp. So he must, as it hath been resolved, for the reason before alledged.

2 Cro. 379, *Wythers* versus *Henly.* Trespass and false imprisonment, and detaining him for a month. The defendant justifies by virtue of a process out of the Exchequer, directed to the defendant's predecessor, who took him by it, and also by virtue of a *latitat;* and so the plaintiff was delivered over to the defendant. The plaintiff replies as to the Exchequer process, there was a *supersedeas,* and that the predecessor detained him after the *supersedeas* delivered; and as to the *latitat,* that the plaintiff in that action ordered the defendant's predecessor to discharge the now plaintiff. And upon this plea the defendant demurred; and adjudged for the plaintiff, because this detaining by the now defendant is *quasi* a new taking. And the subsequent sheriff is bound to take conusance of the acts of his predecessor. And it is usual in other cases for one man to answer for the acts of another.

5 Co. 100 b. *Penruddock's case. Quod permittat* against a feoffee for a nusance erected by his feoffor.

2 Cro. 373. *Rippon* versus *Bowles*, 1 Roll. Rep. 222. If I have a way over the land of J. S. who stopt it, and then let it to J. D. for years, I may have an action against the lessee, and notice is not material. 3 Cro. 918, *Prince* versus *Allington*.

4. The inconvenience which would otherwise fall out; for the defendant should be thus imprisoned, and have no remedy for the wrong, for the bailiff may be dead, or the arrest might be by a deputy, or person insolvent; and no inconvenience on the other side, for he may take security that he shall be charged with no prisoners, but what shall be legally committed.

[425] HINCHCLIFFE AND A GREAT MANY OTHERS *against* THE LADY BEAUMONT. EBOR.

Prohibition.

The Lady Beaumont libels in the Ecclesiastical Court of the Archbishop of York against Hinchcliffe, and a very great many others named in a schedule affixed to the said libel, and derives her title to the tithes of Criglinton, a vill within the parish of Sandal, under a grant from the Crown of the appropriation of Sandal Magna. The inhabitants pray a prohibition, and join in a suggestion of a modus, to pay for all tithe hay 16s. 6d. and so much for a cow, and so much for a calf, to the Vicar of Sandal Magna; and it appearing plainly that the plaintiff in the Ecclesiastical Court ought to be prohibited, the great question was, whether they may have one writ of prohibition, or whether they ought to sever, and have several writs? And upon examination of the cases of Yelverton 128, *Burges and Dixon* versus *Ashton*. Noy 131. 1 Leon. 286, pl. 388, *Sir Guilbert Gerard* versus *Shering*. Owen 13, *Bartue's case*, and 106, *Worseley* versus *Charnocke*, and 3 Cro. 472, the case of an *audita querela*. We resolved the parties should bring several writs; for so had been the course of this Court formerly, and therefore we would not alter it, though some of the Judges of the Common Pleas (with whom my brother Dolben had discoursed, as he said) said, we might grant one writ for all.

JOHN WILSON *versus* DYSON, KIPPING AND DAVENANT. MIDDLESEX.

Devise.

Ejectment of the demise of Francis Kipping. Upon not guilty pleaded, a special verdict finds that Francis Kipping father of Kipping, lessor of the plaintiff, had issue the said Francis Kipping, Thomas one of the defendants, Gerard, Anne, Susan and Elizabeth, and made his will in these words.

I give my wife all that messuage called the White Hart, together without four acres of land called Aplands, in the parish of Tottenham, &c. She out of the rents and profits thereof breeding and educating all my children. *Item*, I give to my third son, Gerard Kipping, after my wife's decease, all the **[426]** said premisses, to him and his heirs for ever. *Provided always*, and upon condition, that my said son Gerard shall pay unto my daughter Elizabeth 100l. within six months after my wife's death, and his age of twenty-one years; and for default of payment thereof accordingly, I give the said premisses to my said daughter Elizabeth and her heirs. *And farther*, my will and meaning is, that if my said son Gerard happen to die without issue, my daughter Elizabeth's 100l. being first paid, then the remainder of his estate to be divided amongst my sons and daughters, and the survivors of them. *And lastly*, I make my said wife executrix, to whom I give all the residue of my estate, my debts and legacies being first paid, desiring her to be careful in bringing up my children.

Susan the wife immediately after the death of the devisor entered, and enjoyed the premisses during her life, and educated and maintained the children according to the said will.

Afterwards the said Susan, and Anne one of the daughters, died without issue.

Gerard after the death of his mother entered, and had issue Francis Kipping his only son, and no other issue, and died seised before his age of twenty-one years.

Francis the son of Gerard died before the said Gerard could have attained to the age of twenty-one years without issue.

Charles Dyson, one of the defendants, in the life of the said Gerard married Susan one of the daughters of the said Francis and Susan; and William Davenant married Elizabeth aforesaid.

The 100l. bequeathed to the said Elizabeth was not paid to the said William and Elizabeth, or either of them, by the said Gerard in his life-time, or by the said Francis his only son.

The said Francis Kipping lessor of the plaintiff, and Charles Dyson in the right of his wife, and Thomas Kipping after the death as well of the said Gerard as of the Francis, only son of the said Gerard, and before the said Gerard could have attained to his age of twenty-one years, if he had lived, did equally pay the said 100l. to the said William and Elizabeth, viz. each of them in equal proportion, and that thereupon the said Charles Dyson entered in right of his said wife.

Thomas Kipping and William Davenant in right of his said wife entered into the said three parts.

[427] Francis Kipping lessor of the plaintiff is heir of the said Gerard, and of his said only son Francis, and that after payment and entry last mentioned, he in and upon the possession of the said Charles Dyson, Thomas Kipping and William Davenant did enter, and demised to the plaintiff, upon whose possession the defendants entered; and after several arguments at the Bar, it was adjudged for the defendant; for that Gerard had but an estate-tail, and by the words, *If my said son Gerard happen to die without issue, my daughter Elizabeth's* 100l. *being first paid, then the remainder of his estate to be divided amongst my sons and daughters, and the survivors of them*, the testator intended that all his estate in the lands should be divided amongst his sons and daughters, taking out thereof only 100l. for his daughter Elizabeth, which she should have over and above her proportion of the said lands.

BROWN *versus* CUTTER. EJECTMENT. SPECIAL VERDICT. SURRY.

[See S. C. sub nom. *Luxford* v. *Cheeke*, 3 Lev. 125; 2 Show. 152.]

Devise. 2 Show. 152.

John Cheek had issue four sons, Humphry, Robert, Anthony and John, and 6 March 1589, 32 Eliz. made his will in writing thus:

First, I will that my wife shall have and enjoy all my houses, &c. in Thames Ditton during her natural life, if she do not marry; but if she do marry, then I will that my son Humphry shall presently after his mother's marriage enter and enjoy the said premisses, to him and the heirs male of his body, and for default of such issue, to my son Robert and the heirs male of his body, with remainders to his other sons, and so over to strangers.

21 October 1590, John Cheek the testator dies, his wife Isabel enters, and 20 August 1597, dies. Humphry Cheek enters, and hath issue two sons, viz. William his eldest, and Robert his second, lessor of the plaintiff.

14 June 1632, Humphry died seised, and William entered, and became seised *prout lex*, and had issue John, and Mary wife of Benjamin Cutter the defendant.

14 September 1661, John died without issue before his father.

18 June 1677, William Cheek died seised, Mary entered.

July 1677, Robert Cheek lessor of the plaintiff entered.

[428] And judgment was given for the plaintiff; and our opinions were delivered by my brother Jones. The reasons of my opinion were as follow.

1. The intention of the devisor being the pole-star that ought to guide the Judges in the exposition of all wills, 'tis necessary to consider, what estate the testator intended for his wife by his will. And I am of opinion, that he intended her an estate only *durante viduitate*, which the Lord Coke says, Co. Lit. 42 a. is in judgment of law

an estate for life determinable, and in pleading the grantee shall say that by virtue thereof he was seised for life; which being premised, the question will be, whether by the will she hath an estate *durante viduitate?* The words whereof are, *I will that my wife shall have and enjoy all my houses, lands, &c. during her natural life, if she do not marry;* and I do conceive they are so much and no more; for what is an estate during widowhood, but an estate to continue till she doth marry? And such an estate is not tied up to the words, *durante viduitate,* as exchange, warranty, frankmarriage, frankalmoign, &c. but any description thereof will satisfy; which being so, then the words, *But if she do marry after my death,* is no more than, in case the estate shall determine, *then I will that my son Humphry shall presently enter, &c.* by which it is most plain, that here is no contingent remainder, but an estate vested in Humphry to take effect in possession upon the marriage or death of the wife.

2. That the intent of the devisor was such, appears by the limitation; for he intended that the lands should go to his sons, and their issues male, and not to the females, which would not be, if this should be a contingent remainder; and such intention hath been in all ages regarded, in esteeming of issue male. 1 Reg. 21. 21 *Interficiam de Achab mingentem ad parietes,* Plowd. 305. Now this intention would not be attained without much improbability. 1. Because of the age of the wife, for she had four sons at the time of making this will, and her great-grandson was born within less than forty years afterwards, as appears by the record, and so she could not be very young, and consequently not inclinable to marry. 2. By her marriage she would lose this estate, which for aught appears by the record, was all her subsistence, both which were sufficient restraints of her marrying again without which the testator's intent would not be completed.

Object. It hath been objected, that the meaning of the testator could not have been expressed more plainly for a contingent **[429]** remainder, that Humphry should have a fee-simple if his wife did not marry.

Resp. It might have been much more plainly expressed, to have said, *If she do not marry, living Humphry, then, &c.* as *Pell and Brown's case* was, or by a more large description of all the circumstances of his intention.

Object. By this construction the eldest son would have less power of his estate than the younger, if his mother had survived him, because he could not have made an estate in fee by a recovery.

Resp. That disability arises not from the estate given, but from the collateral accident of the mother's surviving, and so it is in all vested remainders where is a tenant for life in being; and here the mother might have survived all the remainders.

As for authorities, though they cannot be expected in case of a will to be very direct, yet to me these seem pretty apposite, viz.

Moor 486, pl. 686, *Holcroft's case,* Sir John Holcroft seised in fee, covenants to levy a fine to the use of himself for life, the remainder to his son Sir John for life, until he attempt to alien, and then to Hamlet Holcroft, during the life of Sir John, jun. the remainder to Sir John the younger's first, second, third and fourth sons successively, and the heirs male of their respective bodies, the remainder to the said Hamlet in tail male. Sir John, sen. dies, Sir John, jun. had only one son, who dies, and then Sir John the younger dies. *Resolved.* 1. That Hamlet had an estate in remainder presently. 2. Though Sir John the younger had but one son, yet the remainder in tail vested in possession in Hamlet after the death of the said Sir John the younger without issue.

2 Cro. 696, Jones 56, *Foy* versus *Hinde.* Martin Keilway seised in fee, gives his lands, after his death without issue male, to Henry Keilway in tail male, until he or they make any acts to alter or discontinue this estate-tail, and then to Thomas Keilway and the heirs male of his body, with several remainders over. The devisor dies without issue, Henry enters, Thomas dies leaving issue Richard, Henry levies a fine, Richard enters. It was objected, that Richard could not enter, because the remainder devised to his father was contingent, viz. to arise upon Henry's alteration of the estate, and not before, and then Thomas dying before the contingent happened, the remainder could not vest. But resolved, the remainder to Thomas was not contingent, but an immediate **[430]** devise, because, should it be contingent, the devisor's intent would be destroyed, which was that every one in remainder, succes-

sively, should enjoy the land; and so in the case at Bar; and judgment was given by the whole Court, except Scrogs, Chief Justice, who was absent, and sate not at any time this whole term.

Memorand. 12 February, being the last day of this term, Sir Creswel Levinz, Attorney General, was made serjeant, and gave rings, *cujus inscriptio fuit, Regi servire, jura servare.* He kept his feast in the hall of Serjeants Inn in Chancery-Lane, where was no nobleman but the Lord Privy Seal, Earl of Anglesey. His coif was put on, and he counted in the Treasury of the Common Pleas, so soon as he was sworn at the Chancery Bar; and the Lord Chief Justice North sent to the Judges of B. R. to be present; but our business would not permit us.

Memorand. 23 March, Sir Richard Weston Knt. Puisne Baron of the Exchequer, died at his house in Chancery-Lane.

BERNING *versus* FOLLAT. MIDD.

Lien.

Debt upon an obligation, conditioned to pay money upon the plaintiff's delivering over to the defendant some receipts which would effect infallible cures of the pox, and other diseases. The defendant pleads, that the plaintiff did not deliver over the said receipts; which plea upon demurrer was ruled naught, and judgment seemed to be for the plaintiff; and then an exception was started, that the action is brought in Middlesex, and the bond itself, as appears upon the record, is dated in London. And Coke upon Littleton 6 a. The putting of a place for the date of the deed is disadvantageous to the feoffee; for being in general, he may alledge the deed to be made where he will; by which is to be collected, that if the place be added, he cannot alledge it to be made in any other place than where it is alledged. *Et adjournatur. Vide* Bro. Debt 46. Faits 95. Obligation 97. 48 E. 3, 2, 3.

[431] TERM. PASCH. 33 CAR. 2, B. R.

JOHNSON *versus* TAYLOR.

Error.

Error in Boston to reverse a judgment given there upon a *scire facias* grounded upon a recognizance entered into by the defendant, as bail for one Townsend at the suit of the plaintiff. The Court of Boston do certify not only the judgment upon the *scire facias*, but also the principal judgment, and all proceedings therein; and resolved good enough, because, if they should certify only the judgment in the *scire facias*, it could not well be understood by this Court, because in inferior jurisdictions there are not several rolls to enter the judgment for the principal, and another for the *scire facias*, and another for bails; but all proceedings as well against defendants as against the bail are entered (for the most part) in a book, and never entered at large unless when a writ of error is brought, and then they make up an entire record, and not otherwise; and judgment was affirmed.

Memorandum, April 23, 1681, 33 Car. 2. Sir Thomas Street Knight, Serjeant at Law, was sworn one of the Barons of the Exchequer in the place of Sir Richard Weston deceased, and Sir Robert Wright Knt. Serjeant at Law, was sworn Chief Justice of Glamorgan circuit in South Wales, in the place of Serjeant Street.

Mandamus. Trem. 454.

A *mandamus* was directed to William Stephens, gent. Mayor of the borough of Saltash in the county of Cornwal to swear Mathew Veal into the place and office of mayor of the said borough being duly elected. *ret. die Sabbati prox. post mensem Michaelis.* The said Stephens returns thus, viz. quod ante adventum hujus brevis mihi direct.

necnon ante emanationem ejusdem brevis, scilicet, 29 September 32 Car. 2. Ego præd. Williemus Stephens a loco & officio Majoris burgi de Saltash in com. Cornub. præd. amotus fui. Et quidam Andreas **[432]** Willoughby gen. existen. un. aldermannor' & liberorum burgens. burgi præd. eodem 29 die Septemb. anno supradicto in loco & officio Majoris burgi de Saltash in com. præd. elect. constitutus admiss. & jurat. fuit. Ac deinceps hucusq; fuit & adhuc est major burgi præd. & ratione officii sui a tempore constitutionis & admissionis suæ præd. ad officium illud hucusq; habuisset & modo habet in custodia sua commune sigillum burgi de Saltash præd. ratione cujus ego præd. Willielmus Stephens ipsum præd. Matheum Veal secundum exigentiam brevis præd. jurare seu admittere non potui. And resolved by the whole Court, that this return is insufficient, because it doth not answer the gist of the writ; for by such a return any officer may be kept out, for the party may procure another to be chosen before the party elected can procure a writ; and therefore the defendant ought to have returned, that Veal was never elected, and so Veal might have had an action for his false return; and so the Court awarded a new writ to Stephens to swear and admit the said Veal.

By the Act of 13 & 14 Car. 2, cap. 2, concerning the repairing the highways about London and Westminster, which is now expired, it was enacted, sect. 11. *In case any person shall propose to carry away the ashes, dirt, and other filth, for all or any of the places aforesaid, at less rates than the yearly raker or undertaker can or will perform the same, the said commissioners shall have power, and are hereby authorised to contract with such person, and for such term as they shall think fit;* the said commissioners by deed poll under their hands and seals did dispose to Windsor Sandys, Esq; the employment of raker, or general undertaker, for cleansing of the streets, lanes and other open passages of each ward and division within the parish of St. Giles in the Fields, and St. Martin in the Fields in Middlesex, for the term of 21 years, of which term eleven years being expired, Windsor Sandys died, and his interest vested in his wife, who not being able to manage the said employment, invited Thomas Row, Esq; to take it from her, and to buy out her interest, which he refused to do, without the consent of the said parishes; and thereupon he addressed himself to them, and acquainted the inhabitants of the said parish of St. Giles in the Fields with it at a general vestry, (whereof Whitcomb was one) who unanimously assented to Row's perfecting an agreement with the widow Sandys, and made an order of vestry for continuance of such their agreement with the said **[433]** Row, as they had before done with the said Windsor Sandys, and thereupon Row bought the widow Sandys's stock of horses and carts, to the value of 1000l. and entered upon the employment, and afterwards Whitcomb procured another vestry in the said parish, and there obtained an order contrary to the former, viz. that Whitcomb should have the employment, and caused the money raised by virtue of the scavengers rate to be stopped in the scavengers hands; and thereupon Row made application to the justices of the peace at the Quarter-Sessions, who ordered a reference to seven of them, who reported to them as is before-mentioned, and the Court ordered that the money should be brought to the clerk of the peace, and Row to proceed in the said employment, and that the money be paid over to Row. Upon this Whitcomb obtained a *certiorari*, and removed the order into this Court, and upon opening of it, we were all of opinion, that the order was not good in law, because the justices of peace have nothing to do with contracts; but it seems probable, that the contract and lease made by the commissioners at Scotland-yard was good to Sandys, and went to the widow, and by her might be transferred to Row; but we determined not that point, but referred the business to Sir Robert Sawyer Knight, Attorney General, to end it, if he can, because the way of managing the cleansing the streets by such undertaking hath been very convenient; and we understood that Whitcomb was a man of small ability to carry on an employment of so great charge; and in the mean time the order to remain unquashed.

PHORBES'S CASE.

Error. 3 Danv. Ab. 3, p. 5. 2 Show. 160.

James Phorbes of the City of Gloucester gent. was indicted before the justices of peace in this manner, Civit' Glouc'. ss. memorand' quod ad generalem session' pacis

tent. apud Civit' Glouc' in com' ejusdem civit' 13 die Januarii anno regni Domini Car. 2, &c. 30, coram Johanne Wagstaffe arm' Duncomb Colchester Mil' &c. Justic' ipsius domini Regis ad pacem in com' civit' præd' conservand' necnon ad divers' felon' transgr. & alia malefacta in eadem civitate perpetrat' audiend' & terminand. assign' per sacramentum Francisci Singleton &c. bonorum & legalium hominum ad inquirend' pro dicto domino Rege et pro corpore com' præd' jurat' & onerat' præsentat' existit quod Jacobus Phorbes de Civit' Glouc' gen' **[434]** 1 die Januarii 30 Car. 2, apud Civit' Glouc' præd' fuit ætat' sexdecim annorum & amplius ac non accessit, Anglice *did not repair*, Ecclesiæ Parochiali de Sancta Maria de Cript' infra civit' præd' nec alicui alii ecclesiæ capellæ aut usuali loco communis precation' nec ibidem fuit tempore communis precationis ad aliquod tempus infra spatium sex mensium integrorum extunc prox' sequen' sed abstinuit ab eisdem, Anglice *hath forborn the same*, per spatium præd' in malum aliorum exemplum contra pacem dicti domini Regis nunc Coronam & dignitatem suas &c. necnon contra formam statuti in hujusmodi casu nuper edit' & provis. Et super hoc facta hic in eadem Curia publica proclamatione pro domino Rege secundum formam statuti quod præd' Jacobus Phorbes corpus suum redderet vicecomitibus ejusdem civitat' ante prox' generalem quarterial' session' tenend' pro civitat' præd' ante quam quidem general' Quarter' Session' scilicet 28 die Aprilis existen' prox' general' session' tunc tent' pro civitate præd' post proclamation' sic ut præfertur fact' præd' Jacobus Phorbes corpus suum vic' civit' præd' non reddidit nec comperuit secundum formam & effectum cujusdam statuti in ea parte edit' & provis. sed defalt' fecit unde idem Jacobus Phorbes convict' est.

Upon this conviction, Phorbes brought a writ of error; and although the conviction was very vitious and erroneous, yet it being no judgment a writ of error doth not lie thereof; for the statute of 3 Jac. cap. 4 says, that after proclamation made, and upon every default recorded, the same shall be as sufficient a conviction in law of the said offence, as if upon the same indictment a trial by verdict thereupon had proceeded and been found against him or her and recorded; so that this is no judgment, but the statute gives process upon it for the forfeiture; and the party's remedy is in the Exchequer to quash it there. The faults in the record are, 1. The session is held 13 January 30 Car. 2, and the party is indicted at that sessions for not coming to church from 1 January 30 Car. 2, for six months, which is all but thirteen days after the sessions held, and so impossible. 2. The indictment is *per sacramentum bonorum & legalium hominum*, but not *com' præd'*, both which were held faults to have quashed the indictment, but not without first conforming, as that statute of 3 Jac. requires; and Phorbes was left to have his remedy in the Exchequer.

[435] HADDOCK'S CASE.

Corporation. 1 Vent. 355. Trem. 523.

Timothy Haddock brought a *mandamus* directed to the Mayor, Aldermen, Bailiffs and Citizens of the City of Carlisle, to restore him to the place and office of one of the aldermen of the said city, who returns as follows, viz.

That the City of Carlisle is, and time out of mind hath been an ancient city, and that the citizens of the city aforesaid for the time being, time out of mind until 21 July 13 Car. 1, were incorporated in the name of Mayor and Citizens of the City of Carlisle, and that always to that time there were within the said city twelve of the most sufficient citizens of the said city for the time being, who were named *consiliarii, alias aldermanni, civitatis præd'*, and out of which one yearly was duly chosen, and sworn in the office of mayor of the said city for one whole year next following such election, and farther till one other of the twelve counsellors, otherwise aldermen aforesaid, should be chosen and made, and sworn mayor; and that every one of the said counsellors, *alias* aldermen, after that he should be chosen and sworn into the said office of counsellor, *alias* alderman, should continue therein during his life, if he should so long well behave himself.

That from time out of mind, till the said first day of July 13 Car. 1, there were, and used to be other thirty-two good and sufficient citizens of the said city *e Gilda Mercatoria* there chosen, which together with the said other eleven counsellors, *alias*

aldermen, not being mayor, were and used to be the common council of the mayor and citizens of the said city.

That King Charles the First by his letters patent under the Great Seal of England, dated at Canterbury 21 July 13 Car. 1, did will, ordain, constitute and grant, that the said city from thenceforth should be a city of itself, and that the same should be from thenceforth incorporated by the name of Mayor, Aldermen, Bailiffs and Citizens of the said City of Carlisle.

That from thenceforward for ever there should be within the said city, one of the aldermen for the time being, who should be named mayor of the said city, and eleven besides the said mayor, who should be called aldermen, and two others of the said city, which should be called bailiffs, two other discreet men to be chosen, who should be called coroners of the said city, and four and twenty other men which should be called *capitales cives* of the said city, and should be of the common council, **[436]** and should be aiding the said mayor, aldermen and bailiffs for the time being.

That the said mayor, aldermen, bailiffs, and 24 *capitales cives*, or the greater part of them, whereof the mayor to be one, upon publick summons by the said mayor to be made, should in the Guildhall have power to make orders and by-laws for the good government of the city, and to have all amerciaments and forfeitures thereby arising for their own use; and the King appoints Richard Barewise Esq; to be the first mayor, to continue so till Monday next after Michaelmas Day following, and from thence till another out of the said eleven aldermen should be chosen, if he should so long live; and the King likewise appoints eleven others by name to be aldermen, to continue in the said office during their natural lives, unless in the mean time for ill government, or for any reasonable cause by the mayor, aldermen, bailiffs and *capitales cives* for the time being, or the greater part of them, whereof the mayor to be one, he should be amoved. He also appointed two bailiffs by name to continue till Monday next after Michaelmas, and from thence till others should be chosen, if they should so long live, unless in the mean time they should be amoved for ill government, or any other reasonable cause. In like manner he appointed two coroners by name, and also twenty-four common-council men to continue so during their natural lives, unless amoved for ill government, or for any other reasonable cause by the mayor, aldermen and chief citizens, or the greater part of them.

That the mayor, aldermen, and twenty-four *capitales cives*, or the greater part of them, without the assistance or help of other citizens might every year on Monday next after Michaelmas Day in the Guildhall, chuse one of the said aldermen to be mayor of the said city; and if the number of the choosers shall be equal, then the mayor to have a double voice.

That the mayor so chosen shall be sworn before his predecessor, if living, and if dead, before the aldermen, or greater part of them in the presence of the aldermen, bailiffs, and twenty-four, or so many of them as shall be present.

That after he shall be so sworn, he shall continue a year, or until another shall be chosen and sworn in his place.

That the said mayor, aldermen, bailiffs, and twenty-four shall on Monday next after Michaelmas Day choose two bailiffs yearly out of the citizens, who shall be sworn before the mayor, and other aldermen, and 24, and shall hold their places a year, and until others shall be chosen and sworn into their places.

[437] That if the mayor shall die within the year, then the aldermen, bailiffs, and twenty-four, or the greater part of them, shall choose one of the aldermen to be mayor, and shall continue so for the residue of the year, and till another shall be chosen, to be sworn before two aldermen; and if any of the said aldermen for the time being shall die, then the mayor and surviving aldermen, or the greater part of them, shall choose others in their places to be sworn before the mayor to continue so during his life.

That if the bailiffs, or either of them shall die, or be amoved within the year, then the mayor, bailiffs, and twenty-four, or the greater part of them, shall choose another out of the citizens of the said city, to continue during the residue of the said year; and if any of the twenty-four shall die, or be amoved, then the mayor and aldermen, or the greater part of them, shall choose others *de magis probis & discretis civibus* into his place. The King also granted that the said mayor, aldermen, bailiffs and citizens should have

a recorder, and named one to continue during the pleasure of the mayor, aldermen, &c. *prout per literas patentes (inter alia) apparet.*

That from time out of mind, to the time of making the said letters patent quilibet consiliarius, alias aldermannus, civitat. præd. pro tempore existen. pro justa & rationabili causa fuit amobilis & amot. a loco & officio suo consiliarii, alias aldermanni, dictæ civitat. per majorem consiliarios, alias aldermannos, civitat. prædictæ pro tempore existen. vel majorem partem eorum quorum major pro tempore existens fuit unus. Et post confection. literarum patent. præd. quilibet aldermannus ejusdem civitat. pro tempore existen. *by the mayor and aldermen of the said city for the time being, or the greater part of them, of which the mayor was one,* ob justam & rationabilem causam ab officio suo aldermanni civitat. præd. amobil. & amot. fuit & esse consuevit.

That the said Timothy Haddock 2 October 1673 was chose alderman, and took his oath well and faithfully to execute the said office to the effect following, viz.

Quod advisament. adjument. & consensus ipsius Timothei forent per ipsum dat. & loquut. ad omnia tempora extunc ad & cum majori parte majoris & consiliariorum civit. præd. pro bona gubernatione & incremento boni publici ejusdem non respicien. aliquod propr. lucrum vel questum pro seipso vel aliqua alia persona in præjudicium opum, Anglice *of the wealth,* libertatis vel libertatum bonorum ordinum constitutionum vel consuetudinum ejusdem civitat. quodq; non detegeret seu patefaceret **[438]** Anglice *disclose or discover,* alicui personæ vel personis ad aliquod tempus aliqua verba locutionis, Anglice *talks,* communicationes vel sermones mot. dict. vel audit. per ipsum vel aliquos socios consiliarios suos assemblat. insimul in aliquo loco ad consulend. pro opibus, Anglice *the wealth,* vel bona gubernatione civitat. præd. & condescenderet & agrearet ad omnes tales causas & materias quales major & major pars socior. Consiliar. dicti Timothei ad inde agrearent, ac etiam ad ulterius potestatem supprimeret omnes tales personas quales conarentur facere aliquas factiones, Anglice *factions,* conspirationes vel aliquam confusionem, Anglice *disorder,* contra bonam gubernationem & constitutionem dictæ civitat'.

That one Thomas Jackson being mayor, 6 October 31 Car. 1, a common council was held in the Guildhall of the city for the election of a mayor for the year ensuing, at which the said Haddock was present, who being then about to depart, the said mayor spoke to him, and requested him not to depart from the said council before the election made, but should attend the election according to his duty, and that the said Haddock instantly, contemptuously, and without any reasonable cause departed from the said council, and afterwards the same day before the said election made came back again leading thither with him divers persons to the number of sixty of the inferior citizens of the said city, not having voices in the said election, to disturb the said election, and there did *tumultuose, riotose & minaciter* require the said mayor, aldermen, bailiffs, and capital citizens then assembled, that he and the persons he brought with him might together with the said mayor, aldermen, bailiffs and capital citizens so assembled as aforesaid, choose a mayor, contrary to the form and effect of the said letters patent, saying, and with a great noise clamouring and alledging the said letters patent concerning the election aforesaid to be void, to the great terror of the said mayor, aldermen, bailiffs and capital citizens so assembled as aforesaid; and the said Timothy Haddock, and all other the persons aforesaid, and by him brought with him at and by the instigation and procurement of the said Timothy, then and there in the presence of the said mayor, bailiffs and capital citizens for the cause aforesaid assembled, did so disturb the said mayor, aldermen, bailiffs and capital citizens with threats, complaints and clamours, that they durst not, nor could not, proceed in the said election for the space of two hours; and therefore afterwards, viz. 25 October then next following **[439]** in a council held in the Guildhall aforesaid before the said Thomas Jackson then mayor of the said city, and the greater part of the aldermen of the city aforesaid, it was ordered by the same mayor and aldermen then and there present, that the said Timothy should be summoned to be at a common council of the said mayor and aldermen in the Guildhall aforesaid, 8 November then next following to be held, to answer concerning his misbehaviour aforesaid, and to shew cause why he for the said misdemeanor should not be amoved from the place and office of alderman of the said city, at which said council the said Timothy appeared, and being spoke to by the mayor if he had any thing to say in excuse of the premisses, or could shew

any cause why he ought not to be amoved from the office of alderman of the said city, said nothing in excuse of his said misbehaviour, nor shewed any cause why for his said offence he should not be amoved from his said office; and thereupon the said Thomas Jackson then mayor, and the said greater part of the said aldermen then present, did amove the said Timothy Haddock from his said office of one of the aldermen of the said city, and did declare him to be so amoved; and for that cause they cannot restore him. And we all held this return good; for though by the charter of 13 Car. 1, there is no power given for the corporation to remove an alderman, yet when the *consiliarii, alias aldermanni*, were before the said charter removeable for reasonable cause, the same power still remains, for that the charter doth not merge or extinguish any of the ancient privileges; but the corporation may use them as before; and if it should be otherwise it would be very mischievous for most of the corporations in England, who have taken new charters, but were ancient corporations before.

CARPENTER'S CASE.

Churchwarden.

A *mandamus* issued out of this Court to Sir Thomas Exton Knight, Commissary to the Dean and Chapter of St. Paul's London, to swear Edward Carpenter one of the churchwardens of the parish of Stoke-Newington in Surrey, he being thereto duly elected. But the doctor finding that there is a question between the parson and the parishioners concerning the election of the churchwardens, the parson claiming to appoint one by virtue of the canon, and the parishioners claiming a custom to choose both, makes **[440]** this special return to save himself from contempt, and also harmless from being liable to an action for a false return, viz.

Quod causa sive querela coram nobis nunc pendet indecisa inter Sidracum Simpson Clericum, Rectorem de Stoke-Newington in com. Midd. & Franciscum Staunton parochian. dictæ parochiæ & guardian. per dictum Simpson (ut asseruit) electum ex una parte & Edwardum Carpenter & Thomam Terrey gardianos per parochianos dictæ parochiæ (ut asseruerunt) electos & alios parochianos dictæ parochiæ ex altera parte, in qua quidem causa differentiæ Simpson Rector allegavit se secundum canonem in ea parte edit. & provis. dictum Franciscum Staunton elegisse in un. gardianorum dictæ parochiæ quia se præfat. Rectorem & parochianos prædictos dissent. in electione gardianorum ejusdem parochiæ & parochiani præd. allegarunt se secundum consuetudinem antiquam ejusdem parochiæ eligendi ambos gardianos elegisse dictum Edwardum Carpenter & Thomas Terrey in gardianos dictæ ecclesiæ quam consuetudinem dictus rector negabat & desuper dicti parochiani in se susceperunt ad proband. dictam consuetudinem & deder. allegation. in script, concept. quam nos admisimus. Et testes suisse per dictos parochianos product. & jurat. ad proband. dictam consuetud. & tempus eis assignat. ad eand. proband. sed dictos parochiannos neglexisse examinare & non adhuc examinasse dictos testes & dictum rectorem virtute juramenti sui negasse dictam consuetudinem, sed quamprimum parochian. probaverint dictam consuetudinem nos erimus prompti & parati ad pronunciand. pro jure dictorum parochianorum et nos insuper humiliter certificamus unum e dictis gardianis per dictos gardian. elect. juramento oneravimus de fidelit. exequend. officium gardian. dictæ parochiæ. In cujus rei testimonium, &c. And we granted a writ to swear Carpenter, because the Ecclesiastical Court cannot try the custom of choosing the churchwardens, as is alledged 2 Roll. Ab. 287, F. pl. 51, *Shirley* versus *Brown*.

ENGLEFIELD AND SMITH'S CASE.

Oath.

Midd. Berks ss. Alias scilicet die Lunæ proxim' post crastinum Ascensionis Domini ult. præterit. coram domino Rege apud Westm. per sacramentum 12 jur. proborum & legalium hominum com. præd. qui adtunc & ibidem jurat. & onerat. exist. ad inquirend. pro dicto domino Rege & corpore com. præd. præsentat. extitit quod Richardus Harrison **[441]** Miles & Valentin. Croome Arm. Justic. domini Regis nunc

ad pacem suam in & pro com. Berks conservand. assign. virtute commissionis dicti domini Regis sub Magno Sigillo suo Angliæ eis direct. ad requirend .& recipiend. sacramentum primaciæ, communiter vocat. *the oath of supremacy*, in quodam statut. fact. in anno primo Elizabethæ nuper Reginæ Angl. inactitat. & specificat. de omnibus & singulis subditis dicti domini Regis Romanæ superstitionis sectatoribus sive talit. reputat. 8 die Febr. anno 31 Car. 2, apud Reading in com. præd. sacramentum præd. Henrico Englefield de Englefield in com. Berks præd. Arm. Francisco Perkins de Ufton in com. præd. Arm. Richardo Perkins de Beenham in com. præd. gen. Nathaniel Smith de Woolhampton in com. Berks præd. gen. & Willielmo Stone de Southcot in com. præd. yeoman existen. & quilibet eorum existen. ætat. 16 annorum & amplius & subdit. dicti domini Regis Romanæ superstitionis sectatoribus existen. & tunc commoran. & cuilibet eorum adtunc commoran. infra præd. com. Berks obtulerunt & sacramentum præd. præstare & recipere requisiver. Et quod Henricus Englefield Franciscus Perkins Richardus Perkins Nathaniel Smith & Willielmus Stone sacramentum primaciæ præd. communiter vocat *the oath of supremacy*, adtunc & ibidem præstare & recipere penitus recusaver. & quilibet eorum recusavit in contempt. dicti domini Regis nunc & legum suarum contra formam statuti in hujusmodi casu edit. & provis. ac contra pacem dicti domini Regis nunc Coron. & dignitat. suas, &c.

Per quod præcept. fuit vic. quod *non* omitt. &c. quin venire fac. eos ad respondend. &c. Et modo scilicet die Veneris proxim. post crastinum Sanctæ Trin. isto eodem termino coram domino Rege apud Westm. ven. præd. Henricus Englefield & Nathaniel Smith per Robertum Seylyard attorn. suum et habit. audit. indictament. præd. separatim dicunt quod ipsi non sunt inde culpabiles et de hoc separatim pon. se super patriam et Samuel Astry Arm. Coron. & Attornatus domini in Cur' ipsius Regis coram ipso Rege qui pro eodem domino Rege in hac parte sequitur scilicet, &c. Ideo præcept. est Vic. Berks quod venire fac. coram dicto domino Rege a die Sanctæ Trinitatis in tres septimanas ubicunq ; &c. 12 &c. de visn. de Reading præd. per quos, &c. Et qui &c. ad recogn. &c. quia tam &c. Idem dies datus est tam præfat. Samueli Astry qui sequitur, &c. quam præd. Henrico Englefield & Nathaniel Smith, &c. Ad quas quidem tres septimanas Sanctæ Trinitatis coram dicto domino Rege apud Westm. ven. tam. præfat. Samuel Astry Arm. qui sequitur quam præd. Henricus Englefield & Nathaniel Smith per **[442]** attorn. suum præd. Et Vic. com. Berks præd. retorn. nomina 12 Jur. quorum nul. &c. And then a *distringas*, and a jury returned and impanelled find a special verdict by Nisi Prius in Berkshire, to this effect, viz.

That the said Sir Richard Harrison and Valentine Croome by virtue of a commission under the Great Seal of England, dated 23 November 30 Car. 2, and long before, and ever since were, and yet are justices of the peace of the county of Berks.

That the King granted a commission dated 23 November 30 Car. 2 *in hæc verba. Carolus secundus, &c. omnibus & singulis custodibus pacis com. nostri Berks salutem. Sciatis quod dedimus vobis & aliquibus duobus vel plur. vestrum potestatem & authoritatem requirendi & recipiendi sacramentum, communiter vocat.* the oath of supremacy, *specificat. in quodam statuto* 1 *Eliz. fact. Ac etiam sacramentum, vulgariter vocat.* the oath of obedience, *specificat. in quodam altero statuto* 3 *Jac. fact de omnibus & singulis subdit. nostris Romanæ superstitionis sectatoribus sive tal. reputat. Anglice* Popish recusants or so reputed, *de quibus separal. sacrament. præd. vigore statut. præd. ac virtute hujus nostræ commissionis ullo modo respective requirantur & recipiantur in aliquo loco in dicto com. nostro Berks commorantibus. Et ideo vobis firmit. mandamus quod in & circa præmissa respective diligent. intendatis. In cujus rei testimonium, &c.*

That the said Sir Richard Harrison and Valentine Croome afterwards, viz. 13 March 31 Car. 2, *Honorabili Willielmo Scrogs Mil. Capital. Justic. domini Regis ad placita coram ipso Rege tenend. assign. & aliis sociis suis justic. dicti domini Regis ad placita coram ipso Rege tenend. assign.* did certify, that the defendants refused to take the said oath, which certificate follows in these words.

[443] Com. Berks ss. Honorabili Willielmo Scrogs Mil. Capital. Justic. domini Regis ad placita coram ipso Rege tenend. assign. & aliis sociis suis justiciariis dicti domini Regis ad placita coram ipso Rege tenend. assign.

Nos quorum nomina subscript. sunt custod. pacis domini Regis in com. Berks justic. dicti domini Regis ad pacem ejusdem domini Regis infra com. Berks præd.

conservand. Necnon ad divers. felon. transgr. & al. malefacta in eodem com. perpetrat. audiend. & terminand. assign. certificamus quod virtute cujusdam commissionis dicti domini Regis sub Magno Sigillo suo Angliæ debito modo confect. geren. dat. apud Westm. 23 Novemb. jam ult. præterit. ac omnibus custodibus pacis dicti domini Regis infra com. Berks. præd. direct. 8 Febr. jam. ult. præterit. apud Reading in com. præd. obtulimus, Anglice *tendered*, juramentum primaciæ, Anglice *of supremacy* mentionat. & express. in quodam statuto fact. 1 Eliz. nuper Reginæ Angliæ Henrico Englefield &c. separatim & adtunc & ibidem scilicet eodem 8 die Febr. nunc ult. præterit. Ac requisivimus eosdem Henr. Englefield &c. separatim præstare sacramentum præd. Et ulterius certificamus quod ipsi iidem Henricus &c. adtunc. & ibidem recusaver. & quilibet eorum separatim recusavit præstare sacrament. præd. In cujus rei testimonium manus & sigilla nostra &c. 13 March 31 Car. 2, annoq. Domini 1678.

They find the Act of Parliament 1 *Eliz. intitled*, an Act to restore to the Crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same; and the clause therein, who are compellable to take the oath, and the oath itself; and that all and every person and persons that at any time hereafter shall be preferred, promoted or collated to any archbishoprick or bishoprick, or to any other spiritual or ecclesiastical benefice, promotion, dignity or office, or ministry, or that shall be by Your Highness, your heirs or successors, preferred or promoted to any temporal or lay office, ministry or service within this realm, or in any Your Highness dominions, before he or they shall take upon him or them to receive, use, exercise, supply or occupy any such archbishoprick or bishoprick, promotion, dignity, office, ministry or service, shall likewise make, take and receive the said corporal oath before mentioned upon the Evangelists, before such persons, as have or shall have authority to admit any such person to any such office, ministry or service, or else before such person or persons, as by Your Highness, your heirs or successors, by commission under the Great Seal of England, shall be named, assigned or appointed to **[444]** minister the said oath; and that it may likewise be farther enacted by the authority aforesaid, that if any such person or persons, as at any time hereafter shall be promoted, preferred or collated to any such promotion spiritual or ecclesiastical benefice, office or ministry, or that by Your Highness, your heirs or successors shall be promoted or preferred to any temporal or lay office, ministry or service, shall and do peremptorily and obstinately refuse to take the same oath so to him to be offered, that then he or they so refusing shall only be judged disabled in the law to receive, take or have the same promotion spiritual or ecclesiastical, or the same temporal office, ministry or service within this realm, or any other Your Highness dominions, to all intents, constructions and purpose.

That by another Act 5 *Eliz. intitled*, an Act for assurance of the Queen's Royal power over all estates and subjects within her dominions, *the clauses containing who shall take the said oath.*

And be it enacted by the authority aforesaid, that the Lord Chancellor or Keeper of the Great Seal of England for the time being, shall and may at all times hereafter by virtue of this Act, without any farther warrant, make and direct commission or commissions under the Great Seal of England to any person or persons, giving them or some of them thereby authority to tender and minister the oath aforesaid to such person or persons, as by the aforesaid commission or commissions the said commissioners shall be authorised to tender the same unto.

They find also the next clause expressing the penalty for the first refusal of the said oath, and the clause of certificate of refusal into the King's Bench, and concerning the indictment of the offender.

That the defendants 23 November 30 Car. 2, and 8 Febr. 31 Car. 2, were not any officers or ministers mentioned in the said statute of 1 or 5 Eliz.

That there was no other commission made to the said Harrison and Croome to tender the said oath to the said defendants; and the jury conclude, *et si* the defendants are guilty or not *petunt advisamentum Curiæ.*

And the points intended in this special verdict were three, viz. 1. The words of the Act of 5 Eliz. cap. 1. being, *that the Lord Chancellor, &c. shall, &c. make, &c. commission, &c.* to any person or persons, giving them or some of them thereby authority

to tender and minister the oath aforesaid to such person or persons, as by the aforesaid commission or commissions the said commissioners shall be authorized to tender **[445]** the same oath unto, whether the commission specified in the record be pursuant to the said Act, for it is not directed to any persons particularly, nor to tender the said oath to any persons by name; and if it shall be in the commissioners discretion to tender it as they shall think fit, they shall take upon them to judge who are *Romanæ superstitionis sectatores*, or so reputed; and though several commissions were made out about the same time of the same term with this, yet the Lord Chancellor did cause new commissions to be made out, expressing the names of the persons to whom the oath should be tendered; and this objection was raised by the Lord Chief Justice Scrogs before whom the verdict was found; but it was resolved by the other three Judges (myself doubting) that this commission was very good, because the power is left to the commissioners to choose whom they will tender the oath unto by the clause of the Act; and in this manner were the ancient commissions shortly after the statute made.

The exception was, *that the indictment sets forth a certificate from the commissioners under their hands, but not under their seals*, as the statute requires; but to this the Court answered, that in regard the certificate is found *in hæc verba* in the verdict to be under their seals, it shall be amended, and so good enough; and it was amended accordingly.

The third exception was, *the certificate is directed only to the Judges by name, and not to the King in his Court of King's Bench*, as the Act requires; but resolved by the said three justices, that that is good enough, because it shall be intended that the said Judges made the Court, and were therein sitting at the time of the certificate: but I also doubted of this answer; but the judgment was given against the defendants. And as to the finding that the defendants were none of the officers or ministers mentioned in the several statutes of 1 and 5 Eliz. the whole Court were of opinion, it was not material, because by the clause of 5 Eliz. impowering the Lord Chancellor to make out commissions, all persons, though not officers, may be offered the said oath if the commissioners think fit.

[446] TAVERNER'S CASE.

Mandamus.

Jeremiah Taverner, having been chosen into the livery of the Company of Vintners in London, had a *mandamus* directed to the master, wardens and assistants of the said company to admit him to be a livery-man according to his said election, to which they return,

That London is an ancient city, and that the citizens and freemen thereof time out of mind were, and still are incorporated, as well by the name of Mayor and Commonalty of the City of London, as by the name of Mayor, Commonalty and Citizens of the City of London, and that of the said citizens there were several societies, guilds and fraternities, of which the Company of Vintners is and always hath been one.

That in the said society there have been time out of mind certain men being citizens and freemen of the said city and company, called livery-men, who were used to be chosen for the said company.

That the said Company of Vintners (as other companies) for the preservation and maintenance as well of the honour, as state and government of the said city, as well at times of publick meeting and attendances of the mayor and aldermen, and other publick occasions, and for the preservation of the honour and reputation, and government of the said company, and for the relief of the poor members thereof, have been forced to expend great sums of money.

That the said Company of Vintners have been anciently incorporated, and called by divers names; and that the 2 Feb. 9 Jac. the King by his letters patent incorporated them by the name of Master, Wardens, and Freemen and Commonalty of the Mystery of Vintners of the said City of London, and that they may make by-laws.

That time out of mind the place and office of the livery hath been a place and degree of pre-eminence in the said company; and that as well before and since the said letters patent every fellow of the said company, who was elected into the place and office of one of the livery was used, and ought to be *idoneus homo, ac de bono statu*

& substantia qui bene potuit & ad vel ante admissionem suam per totum tempus præd. usus fuit & consuevit & debuit solvere pro & erga meliorem & necessariam supportationem & sustentationem societatis præd. & necessaria onera & expensa inde certam competen. denariorum summam.

[447] That without the assistance and relief which the said company by such payments hath had and received, it could not maintain its government and reputation.

That for many years before the 24 April 1656 the sum of money which every livery-man upon his admission paid, exceeded 31l. 13s. 4d. and then a by-law was made, that the payment should be so much only; and from that time the said sum hath been always paid by every one admitted into the livery.

That 18 June 1680, *ante adventum brevis præd.* he was chose to be a livery-man, and was then required to take the said office upon him, and that the master, wardens and company were ready to admit him to the place of a livery-man upon payment of the said sum of 31l. 13s. 4d. which he ought to pay according to the by-law aforementioned; but he hath refused so to do, and thereupon the company refuse to admit him until he shall pay the same.

Upon this return the counsel for Taverner argued, that the by-law therein mentioned for imposing 31l. 13s. 4d. upon every livery-man was unreasonable and against law, and a grievance to the subject: but the Court resolved, were the sum more or less, it could not make the by-law void, for it is to bind only the members of the corporation; and when a man will agree to be of a company, he doth thereby submit himself to the laws thereof, and we are not to take notice of the extravagancy of charges they lay upon themselves. And 'tis convenient that the company have such power to keep up their reputation, and the honour of the City of London; and so allowed the return to be good.

[448] TERM. TRIN. 33 CAR. 2, B. R.

THE CASE OF THE TOWN OF WINCHELSEA.

Certiorari. 2 Lev. 86. Trem. 556. 3 Keb. 154, 324.

A *certiorari* was granted to the Mayor, Jurats and Commonalty of the ancient town of Winchelsea in Sussex, to remove an order or decree made by them; who made this return: viz.

That there have been time out of mind in Kent and Sussex five ancient towns, viz. Hastings, Sandwich, Dover, New Rumney and Hith, which have been always called the Cinque Ports of the kingdom; and that in Sussex there are, and always have been two other ancient towns called Rye and Winchelsea, which are members of the said Cinque Ports.

That the said town of Winchelsea hath been time out of mind incorporated by the name of Mayor, Jurats and Commonalty of Winchelsea.

That all the said Cinque Ports with their members have been time out of mind places for ordering provision, and preservation of shipping of the Kings and Queens of this kingdom of England for the time being; and that by reason of their situation upon or near the sea-shores, the inhabitants and residents thereof, as well for safe keeping the said towns, as of the said kingdoms of England against foreign invasion of enemies, have always and ought to keep beacons, watch-houses and guards night and day, as well by sea as land; and for better maintenance thereof, the said town of Winchelsea in their common hall used to make taxes and rates upon every inhabitant or occupier of house or land, lying or being within the said town or liberties thereof, which said privileges were confirmed by Magna Charta.

That 1 May 32 Car. 2 they made a tax of 6d. per pound for the maintaining of the said beacons and warehouses according to a schedule annexed to the said tax, and that there was no other order or decree. And set out the schedule.

And to this schedule was objected, that 'tis not set forth that the beacons or watch-houses were in decay or out of repair, and so the rate unnecessary.

[449] But resolved, it is well enough; for 1st, 'Twould be dangerous to expect

till they became in decay, for then there must be no beacon till repaired, nor no watch-houses in the mean time, which would be dangerous for the place. 2. 'Tis to be presumed that the inhabitants will not tax themselves unnecessarily, and they do all concur in the taxation: and so the order was confirmed.

RICHARD SHELDON *versus* MICHAEL CLIPSHAM. ASSUMPSIT.

Pleading. 2 Jon. 158.

The plaintiff declares in an *indebitat' assumpsit* for 100l. received to the plaintiff's use; and also upon an *insimul computasset* for another 100l. the same day. The defendant pleads, that the said several sums of 100l. in the declaration respectively specified, are for one and the same cause of action for one sum of 100l. only, and not for several sums of 100l. and that after the time of the said several promises respectively specified, viz. such a day, the defendant paid to one Bellamy by the plaintiff's order 30l. in part of payment and satisfaction of the monies in the declaration specified; and that the defendant in full payment and satisfaction of the said monies demanded by the plaintiff in his declaration did then become bound to the plaintiff in a bond of 120l. conditioned for payment of 65l. to the plaintiff at a certain day in the said condition specified as yet not incurred; which 30l. and bond the plaintiff accepted; *et hoc parat', &c.*

Upon this plea the plaintiff demurred, and the whole Court were of opinion that the plea is good; for though 'tis frequent to lay a declaration for a debt several ways in an *assumpsit*, and 'tis not a good plea to say that the several sums are but only for the sum first mentioned, and so go no farther; yet when the defendant pleads over, that the very sum demanded is satisfied, 'tis a good plea; and if that the two several hundred pounds were two distinct sums, the plaintiff might have replied so, and taken issue thereupon. But he admits that there was but 100l. due, and that satisfied, the plea is good. But at the importunity of the plaintiff's counsel we gave him leave to waive the demurrer, and take issue upon the satisfaction, upon paying to the defendant his costs.

[450] ELIZABETH CASE *versus* JAMES BARBER.

[See *Young* v. *Austen*, 1869, L. R. 4 C. P. 558.]

Accord. 1 Danv. Abr. 77, p. 4, 241, p. 19. 2 Jon. 158.

The plaintiff declares in an *indebitatus assumpsit* for 20l. for meat, drink, washing and lodging for the defendant's wife, provided for her at the request of the defendant, and lays it two other ways. The defendant pleads that after the making the said promise, &c. and before the exhibiting the said bill, viz. such a day, it was agreed between the plaintiff and the defendant and one Jacob Barber, his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife then in her custody, and that the plaintiff should accept the said Jacob, the son, for her debtor for 9l. to be paid as soon as the said Jacob should receive his pay due from His Majesty, as lieutenant of the ship called The Happy Return, in full satisfaction and discharge of the premisses in the declaration mentioned; and avers that the plaintiff the same time did deliver to the defendant the said clothes, and that she accepted the said Jacob the son, her debtor for the said 9l. and that the said son agreed to pay the same to the plaintiff accordingly; and that the said Jacob afterwards, and as soon as he received his pay as aforesaid, viz. 27 April 32 Car. 2, was ready and offered to pay the said 9l. and the plaintiff refused to receive it; and that the said Jacob hath always since been, and still is ready to pay the same, if the said plaintiff will receive it. *Et hoc paratus, &c.* The plaintiff demurs. And it was alledged by the defendant's counsel that the plea is good; for though in *Peyto's case*, and formerly it hath been held, that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79 b. 3 Cro. 46, pl. 2, yet of late it hath been held that upon mutual promises an action lies, and consequently there being equal remedy on both sides an accord may be pleaded without execution as well as an arbitrement, and by

the same reason that an arbitrement is a good plea without performance; to which the Court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given; and for this reason, Mich. 18 Car. B. R. *Palmer* versus *Lawson, ante. In indebitatus assumpsit* against an executor upon a contract made by the testator; the defendant pleads judgment in debt upon simple contract against him for the debt of the testator, and after argument **[451]** resolved a good plea; because though in debt against an executor upon a simple contract the defendant may demur, yet when he admits the demand, and executors are now liable to pay such debts in action upon the case, the judgment so obtained was pleadable; so Vaughan Rep. *Dee* versus *Edgcomb.*

But in this case at Bar judgment was given for the plaintiff for two reasons.

1. Because it doth not appear that there is any consideration that the son should pay the 9l. but only an agreement without any consideration.

2. Admit the agreement would bind, yet now by the Statute of Frauds and Perjuries, 29 Car. 2, this agreement ought to be in writing, or else the plaintiff could have no remedy thereon; and though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the Court, that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

[452] TERM. MICH. 33 CAR. 2, B. R.

CHARLES HOLMES *versus* ELIZABETH MEYNEL. EJECTMENT. DERBY.

[See *Taafe* v. *Conmee*, 1862, 10 H. L. C. 80.]

Estate. 3 Danv. Ab. 238, p. 2. 2 Jon. 172. 2 Show. 136. Pollexf. 425. Skin. 17.

Of the demise of Francis Meynel of the moiety of the manors of Meynel-Langley and Kirk-Langley 300 messuages, 500 acres of land, 200 acres of meadow, and 500 acres of pasture in Meynel-Langly and Kirk-Langly. Upon not guilty pleaded the jury find a special verdict, viz.

That one Isaac Meynel was seised in fee entirely as well of the manor of Meynel and Kirk Langly, as of all the tenements in the declaration, 2 Novemb. 1675, made his will in writing thus: I give and devise all my lands in Meynel and Kirk-Langly in the county of Derby unto my two daughters Elizabeth and Anne Meynel, and their heirs, equally to be divided betwixt them: and in case they happen to die without issue, then I give and devise all the said lands to my nephew Francis Meynel, eldest son of my brother William Meynel deceased, and to the heirs male of his body; and for want of such issue, to William Meynel, brother of the said Francis, and the heirs male of his body, the remainder to Godfrey Meynel, brother of the said Francis and William in tail male, the remainder to John brother of the said Francis, William and Godfrey in tail male; and for want of such issue I give and devise the said lands to the next heir male of the name and family of the Meynels, and died without issue male, having issue Elizabeth, now defendant, and Anne, his two only daughters, who entered and became seised *prout lex, &c.* Anne died without issue, Francis the lessor of the plaintiff entered.

And if for the plaintiff, for the plaintiff, &c.

After several arguments at the Bar, the Court by the mouth of the Chief Justice gave judgment for the defendant. I had prepared my argument, as the rest of the Judges had done; but in regard we were all unanimous, it was thought needless for us all to argue. My argument follows.

In this case two points have been raised.

[453] 1. What estate Elizabeth and Anne have by this will.

2. Whether upon the death of Anne without issue Francis in remainder takes any thing?

As to the 1*st*, I conclude that Elizabeth and Anne have several estates-tail by moieties; for though the devise be to them and their heirs in the beginning, yet when the will afterwards says, *And if they die without issue*, it shews that (*heirs*) was intended heirs of their bodies: so it hath been construed in grants.

5 H. 5, 6 a. Lands granted to man and his wife, *& aliis hæredibus* of the husband, if the heirs of the husband and wife shall die *sine hæredibus de se*, the husband and wife had an intail: *a fortiori* in a will, 2 Cro. 448, *King* versus *Rumbal*, where many books are cited; and Bridgman 1, *Pell* versus *Brown;* so that as to this point, 'tis not much denied on either side.

As to the 2d point. I conceive Francis takes nothing upon the death of Anne, but that her part remains to her sister by way of a cross remainder.

1. I take notice that the main design and intent of the testator was, that in the first place he would take care of his own children, and then look after the continuation of his own name and family; for first he gives to his daughters, and afterwards the remainders to his nephews, then to the next heir male of the name and family of the Meynels, following herein the law of nature, and the ordinary course of the world.

That this was the intent appears by the words of the will: 1. *In case (they) die without issue, i.e.* both of them, 'tis not *they or either of them.* 2. *All the said lands*, which intends both parts, and not a moiety; and *all* cannot pass till both are dead without issue. And if the testator had been asked, what he meant by the lands going to his nephew after the death of his daughters without issue, he would have answered, that he should have the lands when both of his daughters should be dead without issue, and not before.

2. This intent consists with the rules of law, for 'tis a general rule, *that a will shall never be construed by implication to disinherit the heir at law, unless such implication be necessary, and not only constructive and possible*, 13 H. 7, 17. Br. Devise 52. A man devised his goods to his wife and after the decease of his wife, his son and heir shall have the house wherein his goods are; the son shall not have the house during the wife's life; for though it be not **[454]** expressly devised to the wife, yet by his intent it appears, that the son shall not have it during her life, and therefore it is a good devise to the wife by implication, and the devisor's intent: but if it were a devise to a stranger after the death of the wife, the heir shall have it during the wife's life, because it is not a devise to the wife by a necessary implication.

Hill. 20 & 21 Car. 2, C. B. *Gardiner* versus *Sheldon*, Vaughan 295. William Rose made his will thus, *My will and meaning is, that if it happen that my son George, Mary and Katharine my daughters, do die without issue of their bodies, then all my freeholds shall come, remain and be to my nephew William Rose and his heirs for ever.* Resolved the son and daughters had no estate by the will, and so are the books of Moor. 7, pl. 24 and 123, pl. 269. 2 Cro. 74 & 75, *Horton* versus *Horton*.

In our case here is no necessary implication that Francis must take immediately after the death of Anne without issue, for Elizabeth is still alive, and he is not to have the land till the devisor's daughters shall die without issue.

2. Had the testator set forth at length the cross remainders, this question had been out of doubt. Now he being *inops consilii* we ought by construction to make his words answer his intent, appearing in other parts of the will, as near as may be.

As for authorities we must not expect many in case of a will, for the old books cannot have any unless of a devise by custom, which is rare; and every case upon a will stands upon its own legs, according to the penning thereof; yet Mich. 32 Eliz. C. B. 4 Leon. 14, pl. 51 is direct in the point. The case was, A. seised of lands had issue two sons, and devised part to his eldest in tail, and the other part to his younger in tail, with this clause in the will, *that if any of his sons died without issue, that then the whole land should remain to a stranger in fee*, and died; the sons entered into the lands devised to them respectively, and the younger died without issue, and he to whom the fee was devised entered; and adjudged that his entry was not lawful, and that the eldest son should have the land by the implicative devise.

As to the cases objected, which are, 2 Cro. 655, *Guilbert* versus *Witty*. A devise of three several messuages to three several children, *provided if all my said children shall die without issue of their bodies, then all the said messuages shall* **[455]** *remain to my wife and her heirs*, and two died. Resolved the wife shall have the two parts.

Resp. That differs much from this case, because there are three devises, in which case cross remainders will be more difficultly settled; for whether the survivors shall be jointenants for life with several inheritances, or tenants in common in tail, would be perhaps some question, as appears by the report of the same case, 2 Roll. Rep. 281. But in our case no such difficulty can arise.

Object. Pasch. 12 Jac. C. B. *Johnson* versus *Smart*, 2 Roll. Abr. 416, F. pl. 3. A devise to two for their lives, remainder to their two sons, equally to be divided and to their heirs, and each of them to be the other's heir; and if they both shall die without issue, the remainder to another; one dies, his share shall go to the remainder man.

Resp. This case cannot be law, because 'tis apparent that each of them was to be the other's heir, which is as plain a cross remainder as can be. 2. This case was received by Roll from some other hand, and it is reported in a private report to be quite another case; for 'twas upon evidence in a trial at Bar in a case of a surrender of a copyhold, and not a devise; and Roll could not be a reporter at that time, for 'twas before he came to study the law. And each to be the other's heir makes a cross remainder. Br. Devise 38. Done 44. Pet. Br. 94 b. pl. 431.

Object. Dyer 326 a. *Huntley's case*, which was, that he being seised of two houses, one in St. Michael Queenhith, and the other in St. Michael Flesh-Shambles, which last parish was laid to the parish of Christ-Church in London, and devises that house in St. Michael Flesh-Shambles to his wife for life, the remainder to a woman and her brother, and the heirs of their bodies, and for default of such issue, to the right heirs of the devisor: the brother dies without issue: the sister hath issue, and dies; and whether the intire house shall go to the issue, or only the moiety, and the other moiety to the heir of the devisor, was the question.

Resp. Though this question is put in the book, yet I find no argument of it; and that case will differ from this, in regard there the particular estates were not limited to the children, but to strangers, and so intrenches not upon the rule in 13 H. 7, whereby an heir is disinherited. And Dyer seems to intimate, that the pleading of the case was more insisted upon than this point; for he puts the stress of the case to lie upon the pleading, that the house lay in the **[456]** parish of Christ-Church, whereas the will says in St. Michael Flesh Shambles, without averment of the union of those parishes. And 1 And. 21 says, the stress of the case was upon the apportionment of rent.

As to *Justice Wyndham's case*, 'tis not to our purpose, because that is the case of a deed, which must be taken strongest against the grantor: here it is the case of a will, the construction whereof is to be made according to the intent of the devisor.

And so upon the whole matter, in regard the words make against the plaintiff, and the intent makes for the defendant, I conceive judgment ought to be given for the defendant.

MORGAN *versus* VAUGHAN. ERROR IN DOWER AT BRECNOCK.

Estoppel. 3 Danv. Abr. 259, p. 2. 2 Jon. 170. 2 Show. 168. Skin. 10.

The case was, 20 Car. 2, Vaughan brought a writ of dower *unde nihil habet* in the Great Sessions at Brecnock against Morgan, and had judgment. And Morgan the tenant brings a writ of error, and assigns for error, that he was an infant at the time of the judgment given, viz. of the age of fourteen and no more, and that he appeared by attorney, whereas he ought to have appeared by guardian. And upon this infancy issue was taken, and laid to be at Abergavenney *in com. Monmouth*, and tried at Monmouth, and found for the plaintiff in the writ of error.

And now Pollexfen moved in arrest of judgment two exceptions.

1. The writ of error was brought 26 Car. 2, and the tenant had alledged in 20 Car. 2 that he was *infra ætatem*, viz. fourteen and no more: and this writ of error is brought 26 Car. 2, and error assigned by attorney, and then of his own shewing he was also under age when he brought the writ of error, and assigned the error, and he is now estopped to say the contrary.

2. This infancy ought to have been tried where the land lies, which is in Brecnockshire, and the *visne* is from Abergavenny *in Monmouthshire*, and there is no suggestion that 'tis the next county to Brecnockshire.

But notwithstanding these objections judgment was reversed by the whole Court.

[457] *As to the first*, Here is no estoppel, because the alledging the precise age in the viz. is idle and not traversable, and he might have alledged any other age, and the defendant in the writ of error could not have taken issue upon it.

Pasch. 12 Eliz. Dyer 289 b. pl. 59. The lord distrains for rent the cattle of the tenant, lessee for sixty years, who pleads that the tenant made him a lease for ten years, and prays in aid, and granted. Afterwards the bargainee of the tenant after the ten years were expired, enters, the lessee pleads his lease of sixty years: resolved he was not estopped by pleading his lease to be but ten years in his *aid prier*, because the lease, not the number of years, was material.

Mich. 7 E. 4, 18. Fitzh. Estoppel 69. Rescous. The plaintiff declares that B. held of him an house and an acre of land by ten marks, and that the plaintiff distrained, and the defendant made rescous. The defendant pleads that the plaintiff at another time brought an assize against the said B. of the said ten marks, who pleaded *hors de son fee*, and the plaintiff made title that the defendant held the house, and five acres of land and a mill by the services of ten marks, and so within his fee, and that the plaintiff was nonsuit, and after B. leased to the defendant for years, and demands judgment if the plaintiff shall be received to say, that the ten marks are issuing out of the house and acre only; and resolved that the plea is not good, because the quantity of the services is not material in an action of rescous, but the tenure only.

Fitz. Estoppell 247. Assise by Jane late wife of Richard Griffith; the defendant pleads feoffment by deed of the plaintiff's father with warranty; the plaintiff replies *riens passa per le fait;* the defendant rejoins, that the defendant before that time had brought an assise against the plaintiff and her late husband, who to it pleaded that the lands were given to one W. and M. his wife, and the heirs of their bodies, the remainder to Jane, the now plaintiff and her heirs, that M. died without issue by W. and that W. after the death of M. aliened in fee to the now defendant, for which Jane entered and demanded judgment *si, &c.* the plaintiff there, and now the defendant replied, that the feoffment was during the life of M. by the deed, and the jury found accordingly; judgment if the plaintiff shall now be admitted to plead, that nothing passed by that deed: and resolved the plaintiff here was not estopped, because in the first action the deed was not in question, but the time of the feoffment, viz. whether before or after the death of M.

[458] Fitz. Brief. 180, H. One shall not be estopped but of that which he may have a traverse.

As to second point, Nonage was well tried where the party was commorant, and not where the writ was brought, because collateral to the action. 1 Bulstr. 129. 1 Brownl. 150, *Ord* versus *Moreton*. Fitz. Visne 63.

Sir George Fletcher's Case.

Deer-stealing. Trem. 322.

In replevin. The defendant avows upon the statute of 13 Car. 2, cap. 10, for killing of deer, and that the plaintiff was aiding to the killing of deer in the avowant's park; the plaintiff pleads in bar, that she was not aiding, and issue thereupon, and verdict for the plaintiff.

And it was moved for the avowant, that the issue is a jeofail, because it is an immaterial issue; for the aiding was found before a justice of peace, and shall not be tried over again. I was not at the resolution of the Court but it seems plain that the statute of 32 H. 8, cap. 30 helps misjoining of issues. 3 Cro. 778, *Dighton* versus *Bartholomew*, Goldsb. 39, pl. 15.

Pasch. 1657, B. B. *Spathurst* versus *Overind*, error in C. B. debt upon a bond against Gr. Spat. as executor of J. Spat. The defendant pleads it is not his deed; the jury find it is the deed of Spat, as the plaintiff declared. And in error judgment affirmed, because here was an affirmative and a negative, and by the jury's finding the plaintiff had cause of action.

If the bar be good, and the replication naught, and issue be taken upon it, they shall replead to the replication, and the bar remains; and so if the bar is good, and the replication good, and the rejoinder naught, and issue taken upon it, they shall replead to the rejoinder, and the bar and replication remain: but if the bar is naught, and the replication good, and issue taken upon it, they shall replead for the whole anew, because the bar was naught. Long 5 E. 4, 109 a.

[459] JANE KINGDON ADMINISTRATRIX OF RICHARD KINGDON ESQUIRE, PLAINTIFF; RICHARD JONES LORD VISCOUNT RANELAGH, SIR JAMES HAYS & AL', DEFENDANTS. ERROR IN C. B. COVENANT.

Error. Skin. 6, 26. 2 Jon. 150.

The plaintiff brought an action of covenant, and judgment was given against her in C. B. upon demurrer; and now she brought a writ of error in B. R. and the case upon the record in short is,

The plaintiff declares upon articles indented of nine parts, dated 5 Aug. 23 Car. 2, made between the said Lord Viscount Ranelagh of the first part, Sir Alexander Bence of the second part, Sir James Hayes of the third part, John Bence of the fourth part, Joseph Dean of the sixth part, Robert Huntington of the seventh part, John Stepney of the eighth part, and the said Richard Kingdon of the ninth part, wherein after a recital of an indenture under the Great Seal of England dated 4 Aug. 23 Car. 2, whereby the King granted a lease of the great branches of his revenue in Ireland to the said Lord Viscount Ranelagh, Sir Alexander Bence and the rest, for five years, to end 25 Decemb. 1675. The parties did all agree amongst themselves severally, that the said profits of what should accrue after all the payments to be made pursuant to the King's grant, should be divided into twelve parts, viz. four parts to the Lord Viscount Ranelagh, and the other eight to each of the others. And that no money should be paid out of the office (which was to be kept for issuing out of cash) but according to the indenture made by His Majesty; and 150l. quarterly to each share; and that the 150l. should not be taken out of the cash, but should be continued there, and a note given by the receiver general of the said parties declaring the same to be advanced for the carrying on of the undertaking, at interest of 10l. per cent. until all the said articles should be performed, and that the said interest should be paid quarterly. And if there should not be sufficient cash to answer the ends of the agreement, then the quarterly payment should be made use of to that purpose.

Et convent' fuit & agreat' inter omnes & singulas dictas personas articulis prædictis, & quibuslibet eorum per & pro seipso separatim & respective & non conjunctim vel unus eorum pro altero eorum & pro separalibus & respectivis hæredibus **[460]** executoribus & administratoribus suis convenit promisit concessit & agreavit ad & cum quolibet altero eorum separatim & respective & non conjunctim & ad & cum executoribus & administratoribus suis quod quilibet prædict. partium articulis prædictis respective hæredes executores & administratores sui & quilibet eorum secundum illorum & cujuslibet illorum dict' proportionabiles partes vel sortes de tempore in tempus & ad omnia tempora extunc imposterum bene & sufficienter salvarent servarent indemp' & indemnificat. quemlibet & unumquenque al' & ejus & eorum hæred. execut. administrator. & assign. contra Regiam Majestatem hæredes & successores suos & omnes personas quascunque de & ab omnibus & quibuslibet conventionibus in prærecitat. indentura content. ex partibus dictarum partium articulis prædict' agend. & performand. & de & ab omnibus actionibus sectis & molestiis quæ in lege vel æquitate vel aliter venirent crescerent vel acciderent vel surgerent pro vel ratione cujuslibet materiæ vel rei quæ agerentur vel fierent in vel per rationem vel super computum dictæ susceptionis in prædict' recitat' indentura mentionat. & de & ab omnibus custag. misis & demand. quibuscunque tangen. vel concernen. eadem.

Et si accideret quod aliquis vel plur. dictarum partium articulis prædict' should happen to die before 25 Decemb. 1675, that then the share and interest of the persons so dying should devolve and be vested in the survivors according to their respective shares: and that then likewise the said surviving parties within two months after such death should well and truly pay to the executors and administrators of the party dying all and every such sum and sums of money as had been advanced by the party deceased out of the said quarterly payments of 150l. per annum, together with the interest thereof which should be then due and unpaid.

That the intestate Richard Kingdon died before 25 Decemb. 1675, viz. 1 Decemb. 1675, and that the sum of 2850l. before the said 1 Decemb. 1675 was advanced by the intestate out of the said quarterly payment of 150l. and that 712l. at his death was due for the interest thereof, which the defendants have not paid, but do deny to pay to the plaintiff.

The defendants plead, that by the said articles it was provided between the parties aforesaid, that it should not be lawful for the said parties, or any of them, at any time or times during the continuation of the said undertaking directly or indirectly to give, grant, sell or assign his or their right, title or interest of, in or to the aforesaid indenture or any **[461]** covenant, clause or agreement in the same contained, to any person or persons whatsoever, *nisi cum licentia & consensu* of any four at the least or more of the rest of the parties to the said articles, as by one part of the said articles under the seal of the said Richard Kingdon *hic in Cur' prolat'* appears; and that the said Richard Kingdon in his life-time after the making the said articles, viz. 27 Novemb. 27 Car. 2, *apud, &c.* with the licence and consent of the said Lord Viscount Ranelagh, Sir James Hayes, John Bence, Joseph Dean and Robert Huntingdon, five of the said parties, by a writing under his seal dated the same day and year, did assign and transfer to Lemuel Kingdon and William Dawson all his right and interest which he had by virtue of the said grant of the King; by virtue whereof all the estate and interest of the said Richard Kingdon in the indenture and articles aforesaid were invested in the said Lemuel Kingdon and William Dawson, so as the part, proportion and interest of the said Richard Kingdon to the said indenture and articles *per jus accrescendi* did not come to the defendants. *Et hoc parati sunt verificare, unde &c.* To this plea the plaintiff demurred; and judgment was given in C. B. for the defendant.

GRACE COCKMAN *versus* WILLIAM FARRER.

Error. 3 Danv. Ab. 33, p. 6, 86, p. 8. 2 Jon. 181. 2 Show. 162. Skin. 13.

A writ of error to reverse a fine levied in C. B. the writ of error was special, viz. Hugh Haworth was seised of a messuage, 10 acres of land, and 9 acres of pasture *pertin' in Hallifax in com. Ebor* in his demesne as of fee, and held them of Sir Arthur Ingram Knight, as of his manor of Hallifax in free socage, viz. by fealty only; so being seised 23 Novemb. 17 Jac. made his last will and testament in writing, and by the same did give the said tenements to Michael Fawcett for his life, the remainder to Hugh Fawcet and the heirs of his body, the remainder to the heirs of the body of the said Michael Fawcet, the remainder to Michael Ward and his heirs for ever. That the said Hugh Haworth died.

That the said Michael Fawcet entred and died, and that Hugh entered and became seised in tail, with the remainder over.

That the said Hugh levied a fine Pasch. 17 Car. 1, to William Bradshaw and Thompson, in which there was error *ad grave damnum Gracie Cockman vidue*, sister and heir of **[462]** Michael Ward deceased, *eo quod* the said Michael Fawcet and Hugh Fawcet died both without issue.

The plaintiff assigns for error, that the said Hugh Fawcet after the acknowledgment before commissioners, and before the return of the writ of covenant upon which the said fine was levied, viz. 6 April 17 Car. 1, died. It was thus:

17 Febr. 16 Car. 1, date of the writ of covenant.

18 Febr. 16 Car. 1, date of the *dedimus potestatem.*

22 *Marcii* 16 *Car.* 1, the caption.

6 April 17 Car. 1, Hugh Fawcet died *ante ret' brevis.*

Pasch. 17 Car. 1, the King's silver entered; so there was no question but that it is error. Whereupon the plaintiff prayed a writ of *scire facias* to the conusees, and to their heirs, and to the tertenants of the land, who returned *scire feci* upon Thomas Thompson one of the said cognizees, and one William Bradshaw, cousin and heir of the said William Bradshaw, who was dead, and also William Farrer, Esq; the defendant and others tertenants.

The defendant Farrer pleads the very fine (now endeavoured to be reversed) and five years in bar of the writ of error, to which the plaintiff demurred; and adjudged by the whole Court for the plaintiff, and the fine was reversed, and the reason was, *non potest adduci exceptio ejusdem rei cujus petitur dissolutio.*

Co. Lit. 384. Tenant in tail makes a lease for life, or a gift in tail, rendering rent, and dies, the issue brings a *formedon* in discender, the reversion and rent is no bar to the action. Pasch. 7 H. 4, 40 a. pl. 4. In a writ of error to reverse an

outlawry, the same outlawry is no good plea. And whereas it is said, Co. 2 Inst. 518, that a fine of lands in C. B. in ancient demesne is a bar after five years, it is intended another fine, and not the same which was first levied; and the case is *in terminis* 1 Anders. 172 & 74, and so the fine was reversed.

[463] TERM. PASCH. 34 CAR. 2, B. R.

WEDGEWOOD AND OTHERS *versus* BAILY AND OTHERS. TROVER, STAFF. ERROR IN B. R.

Error. 3 Danv. Ab. 32, p. 5. Skin. 39. 2 Show. 177. 3 Mod. 249.

Trover by five, and before verdict one of them dies, and they proceed to trial, and verdict for the plaintiffs, and then the plaintiffs suggest, that one of them is dead, and pray judgment for the rest, and had it; and the defendants bring a writ of error, and assign for error, that the party died before verdict, and so a verdict was given for a dead person. And after argument at the Bar judgment was reversed, because every man shall recover according to the right which he hath at the time of the bringing the action; and therefore if the heir brings an ejectment and his ancestor dies subsequent to his action, he shall not recover. And in this case, although the plaintiffs were joint-tenants, and had a capacity of having the whole survive, yet in truth every one had but a moiety, and so were not at the time of the action intitled to so much as they are after the death of one of the plaintiffs. And as to the case of 2 Bulst. 262, *Spring's case*, he reports the reason of the judgment to be, because by the death of one the action survives to the other: but he mistakes the reason, as appears by *Read and Readman's case*. As to the cases where trespass is brought against many, and one dies, they differ much from this case, because there the trespass is joint or several at the pleasure of the plaintiff. As to the case of a replevin, 3 Cro. 574, though an avowant is to some purposes a plaintiff, yet he doth not bring the action, and so not within the rule, that the same right must continue which was at the bringing the action; and so judgment was agreed to be reversed by the opinion of three against Dolben, who desired time to consider.

[464] GRIFFITH *versus* GOODHAND. COVENANT. MIDD.

Condition. 2 Danv. Ab. 44, p. 12. 2 Jon. 191. Skin. 39.

The defendant covenants that the plaintiff, his executors, administrators and assigns *valeant & possint habere* for seven years from 29 Sept. then next following the date which was 10 *Julii* 28 *Car.* 2, seven parts of all the grains made in the defendant's brew-house, and assigns one breach (*inter alia*) that the defendant with intention to deceive the plaintiff did put divers quantities of hops into the malt, of which the grains were made; by reason whereof the grains were spoiled, and became unprofitable to the plaintiff. Verdict for the plaintiff, and damages 100l.

And it was moved in arrest of judgment, that this breach is out of the articles, viz. *the putting the hops into the grains*, and damages being entire, the plaintiff ought not to have judgment. But judgment was given for the plaintiff, because the intention of the parties is to be considered in all contracts; and it was the intent of the parties here, that the plaintiff should have the grains for the use of his cattle, and they will not eat them when hops are put into them. So if I covenant that I will leave all the timber which is growing on the land I hire, upon the land at the end of the term, if I cut it down, though I leave it on the land, it is a breach of my covenant. So if I covenant to deliver so many yards of cloth, and I cut it in pieces and then deliver it, it is a breach of my covenant; for the law regards the real and faithful performance of all contracts, and doth discountenance all such acts as are *in fraudem legis*.

I grant to you an annuity till you have purchased 5s. per annum rent, and you purchase 5s. per annum jointly with another, that is no performance of the condition, because my intent was that you should purchase the rent for your own profit and advancement. Dyer 15 a. pl.

WATKINSON *versus* MERGATRON.

Prohibition. Skin. 37. 2 Jon. 191.

The plaintiff sued the defendant in the Ecclesiastical Court at York, for marrying his sister's daughter, and the defendant prayed a prohibition, because out of the Levitical degrees; but denied by the whole Court, because it is a cause of ecclesiastical cognizance, and divines better **[465]** know how to expound the law of marriages than the common lawyers; and though sometimes prohibitions have been granted in causes matrimonial, yet if it were now *res integra*, they would not be granted.

OKEDEN *versus* KEYNEL. ANTE 391.

Recusancy. 2 Jon. 187. 2 Show. 179.

Debt upon 23 Eliz. cap. 1, for not coming to church. At the trial, after the jury sworn, and before verdict given, the defendant came into the Court, and did there submit, recognize, confess and acknowledge, that he had offended and done ill in not going to church, and not conforming himself to the law therein, and did then prove that he had conformed himself since the suit brought, by going to church, receiving the sacrament, and behaving himself orderly and soberly during all the time of divine service, according to the law; and did then and there promise and engage to conform, and go to church, and there to behave himself soberly and orderly, according to the law; and that the said defendant was never indicted or prosecuted for any offence of this nature before.

This is an action for 20l. a month for not coming to church, tried at the Assizes in Dorset, and a verdict for the plaintiff for 40l. At the trial the defendant comes into Court and conforms, and makes the above written recognition, Whether that doth discharge the action and verdict, or no, is the question?

And the whole Court did resolve that the action and verdict were discharged; we did not argue the case publickly, but briefly gave our opinions. I had prepared my argument, but since we all agreed in opinion we did not argue.

The clauses in the several Acts of Parliament to be taken notice of are these, 23 Eliz. cap. 1, provided always, that every person guilty of any offence against the statute (other than treason and misprision of treason) which shall before he be thereof indicted, or at his arraignment or trial before judgment submit and conform himself before the bishop of the diocese, where he shall be resident, or before the justices where he shall be indicted, arraigned or tried (having not before made like submission at any his trial, being indicted for his first like offence) shall upon his recognition of such submission in open Assises or sessions of the county, where such person shall be resident, be discharged of all and every **[466]** the said offences against this Act (except treason and misprision of treason) and of all pains and forfeitures for the same.

1 Jac. cap. 4. *Provided* nevertheless, and be it enacted by the authority of this present Parliament, that if any that is or shall be a recusant shall submit or reform him or herself and become obedient to the laws and ordinances of the Church of England, and repair to the church, and continue there during the time of divine service and sermon according to the true meaning of the statute in that behalf in the said late Queen's time made and provided, that then every such person for and during such time, as he or she shall so continue in such conformity and obedience, shall from thenceforth be freed and discharged of and from any the penalties and losses which the same person might otherwise sustain and bear in respect, or by reason of such person's recusancy.

I conceive the proviso in 1 Jac. cap. 4 doth discharge the penalty notwithstanding the interest which the informer hath in the same.

1. Because the conforming was before trial.

2. Because by verdict the plaintiff acquires no debt or duty till judgment.

Mich. 37 & 38 Eliz. By all the Justices of England, 1 Roll. Rep. 94. If H. be convicted of recusancy by proclamation, and afterwards he conforms himself, he shall

save the penalty incurred before, because such conviction is by the words of 39 Eliz. cap. 6, and 3 Jac. cap. 4, as sufficient as if he had been tried by verdict recorded. 11 Co. 60, *Foster's case.*

Mich. 39 & 40 Eliz. 1 Roll. Rep. 94. Tenant in tail is convicted by proclamation, and dies, his heir shall not be subject to the penalty by 33 H. 8, cap. 39, because no debt arises thereby, because 'tis not a judgment; but if he had been convicted by verdict and judgment given thereon, he should have been charged.

Object. This will discourage prosecutors.

Resp. 'Tis no more loss to him than if the recusant had died, and the prosecutor did undertake this suit subject to the same hazard. 2. As prosecutors are not to be used hardly, so converts are to be encouraged, which made the Lord Chief Justice Coke (in *Dr. Foster's case*) intercede for Foster to the King after judgment, 2 Bulst 325, and did prevail, 1 Roll. Rep. 95.

[467] TERM. TRIN. 34 CAR. 2, B. R.

BESSEY *versus* OLLIOT & LAMBERT. ERROR C. B. NORFF.

False imprisonment. 2 Jon. 214. Skin. 49. *Antea* 421.

The plaintiff declares of a trespass and false imprisonment, and detaining in prison *quousq; finem fecit ad damnum* 100*l.* The defendants justify by virtue of a writ of *non omittas* directed to the Sheriff of Norfolk, and a warrant to the bailiff of the Duke of Norfolk, to whom execution of the said warrant did appertain, who committed him to the defendant as keeper of the prison of the liberty. The plaintiff replies, *de injuria sua propria, absq; hoc*, that the bailiffs took him within the liberty. The defendant demurs, because the plaintiff traverses a thing not traversable, and answers not the defendant's bar; and judgment was given in C. B. for the plaintiff.

The question was this. A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, Whether the gaoler be liable to an action of false imprisonment? and the Judges of the Common Pleas did all hold that he was; and of that opinion I am for these reasons.

1. In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore Mich. 6 E. 4, 7 a. pl. 18. *Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads, that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befal another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at buts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows **[468]** growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.*

Mich. 23 Car. 1, B. R. Stile 72, *Guilbert* versus *Stone.* Trespass for entering his close, and taking away his horse. The defendant pleads, that he for fear of his life by threats of twelve men, went into the plaintiff's house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

Hob. 134, *Weaver* versus *Ward.* Trespass of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant with his musket *casualiter, & per*

infortunium & contra voluntatem suam in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompence for the wrong the plaintiff hath sustained.

2. The defendant here suffers no wrong but by his own act and will, for he was not compellable to be gaoler. And when a man takes an office, 'tis presumed he knows of all the conveniences and inconveniences which attend it. And in this, as in all other contracts, he must take the bad with the good. *Vide* Moor 457, pl. 629, *Coot* versus *Lightworth*, a stronger case.

3. As the gaols of the counties are incident to the office of the sheriff, 4 Co. 34 a. so the gaols of liberties are incident to the lord of the liberty. And the gaoler is but servant to him, as the gaoler of the county gaol is to the sheriff, and consequently they understand one another, and are privy to each other's acts relating to the prisoners, in presumption of law.

Object. By this way a subsequent sheriff may be answerable for the tort of his predecessor.

Resp. So it hath been resolved for the reason before alledged.

[469] 2 Cro. 379, *Wythers* versus *Henley*. Trespass and false imprisonment, and detaining him for a month. The defendant justifies by virtue of a process out of the Exchequer, directed to the defendant's predecessor, who took him by it, and also by virtue of a *latitat;* and so the plaintiff was delivered over to the defendant. The plaintiff replies as to the Exchequer process, there was a *supersedeas*, and that the predecessor detained him after the *supersedeas* delivered; and as to the *latitat*, that the plaintiff in that action ordered the defendant's predecessor to discharge the now plaintiff. And upon this plea the defendant demurred; and adjudged for the plaintiff, because this detaining by the now defendant is *quasi* a new taking. And the subsequent sheriff is bound to take conusance of the acts of his predecessor. And 'tis usual in other cases for one man to answer for the acts of another.

5 Co. 100 b. *Penruddock's case. Quod permittat* against a feoffee for a nusance erected by his feoffor.

2 Cro. 373, *Rippon* versus *Bowles*, 1 Roll. Rep. 222. If I have a way over the land of J. S. who stopt it, and then let it to J. D. for years, I may have an action against the lessee, and notice is not material. 3 Cro. 918, *Prince* versus *Allington*.

4. The inconvenience which would otherwise fall out; for the defendant should be thus imprisoned, and have no remedy for his wrong, for the bailiff may be dead, or the arrest might be by a deputy, or person insolvent; and no inconvenience on the other side, for he may take security that he shall be charged with no prisoners, but what shall be legally committed; or perhaps he may have a special action upon the case for committing the prisoner to his custody, not having been duly arrested.

But the other three Judges resolved, that the defendant the gaoler could not be charged, because he could not have notice whether the prisoner were legally arrested or not, and yet he is not compellable to take the prisoner into his custody, and if he let him go he is liable to the plaintiff in the action's suit for the escape.

Afterwards Maynard Serjeant moved farther, that the defendant is charged by the declaration for imprisonment *quousq; finem fecit pro deliberatione habend.* which is not answered, for the imprisonment only is justified, and not the *finem fecit;* and this exception was taken Mich. 19 H. 6, 35 a. pl. 73. 1 Roll Rep. 264, *Slowley* versus *Eveley*. But we all **[470]** thought the plea good notwithstanding that exception, because he pleads not guilty to all *præter* the imprisonment.

JULY 18, 1682. UPON A COMMISSION OF REVIEW TO THE COURT OF DELEGATES.

Devise.

The case was thus. Thomas Boone a merchant of Excester made his will, and died possessed of a personal estate of 100,000l. which lay in several places, and upon several securities, left three sons and five daughters, and gave his five daughters 3000l. a-piece; he gave his second son Christopher Boone 2000l. to be paid him at three several payments, and he gave him no more because he found him improvident. He

makes John his eldest son his sole executor, who proves the will, and swears to bring in an inventory. A time to do it is assigned him by the Judge of the Prerogative Court of Canterbury, and he not doing it, Christopher, June 1680, takes out process and cites him before the Judge of the Prerogative Court, who is satisfied that there needs no inventory. The will is proved *per testes*, and 22 May 1680, sentenced to be a good will. The cause why the Judge thought an inventory not necessary was, because the two first payments were made, and releases given, and then for the last by the will but 4l. per centum was due, and John allowed 6l. and also offered Christopher the last payment. Christopher not being satisfied with this, appeals to the delegates, who hear the whole cause, and sentence that there was no need of an inventory at the plaintiff's instance. And now Christopher, upon a commission *ad revidend.* the sentence of the delegates, prays that the sentence may be reversed, and that John may at his instance be compelled to bring in an inventory. His reasons alledged by his counsel were. 1. There may be found another will wherein Christopher may be executor, and then he will be to seek for the estate. 2. There may be specialties taken by the testator in the name of Christopher, and there being no trust declared, the same will be construed an advancement for Christopher. 3. John the present executor may die intestate, and then the administration *de bonis non* will belong to Christopher. 4. The statute of 21 H. 8, cap. 5 says, that the executor shall make a true and perfect inventory. 5. John hath sworn so to do, and no Judge can dispense with his oath. But notwithstanding these arguments **[471]** the sentence was confirmed by North Lord Chief Justice of C. B. Wyndham Justice, and myself, and Dr. Newton, and Dr. Oxinden; and as to the three first arguments there shall not be presumed another will, specialties or dying intestate; and as to the fourth, the intention of the statute was for the advantage of legatees and creditors; and here the legacy is tendered, and no creditor complains; and 'tis found that John hath acknowledged in his hands 23,000l. more than what will pay the debts and legacies. And by the statute the inventory is to consist only of goods, chattels, wares and merchandizes, and not of things in action; and this estate consists mostly of specialties; and it would be very disadvantageous to debtors (as this case is) to have their debts discovered when no necessity requires; and the Ordinary doth frequently dispense with a longer time to bring in an inventory, and so he may dispense with the inventory upon cause; and such inventory was dispensed with in the estate of Sir Henry Martin who died 1641, and in the case of *Vandeput* 1647, and so sentence was confirmed.

[472] TERM. MICH. 34 CAR. 2, B. R.

PUT AND HARDY *versus* SIR WILLIAM RAWSTERNE, SIR THOMAS BECKFORD & AL'.

Barr. 3 Danv. Abr. 724, p. 5. Skin. 48. Pollexf. 634. 2 Mod. 316. 3 Mod. 1. 2 Show. 211.

Trover of divers goods. The defendant pleads an action of trespass *vi & armis* brought against them formerly, for taking and disposing of the same goods; and upon not guilty pleaded, a verdict for the defendants: judgment *si actio*. The plaintiff demurs; and adjudged for the plaintiff in this action of trover, because trover and trespass are actions sometimes of a different nature; for trover will sometimes lie where trespass *vi & armis* will not lie; as if a man hath my goods by my delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of trover, but not trespass *vi & armis*, because here was no tortious taking: and sometimes the case may be such, that either the one or the other will lie; as where there is a tortious taking away of goods, and detaining them, the party may have either trover or trespass, and in such case judgment in one action is a bar in the other. And the rule for this purpose is, that wheresoever the same evidence will maintain both the actions, there the recovery or judgment in one may be pleaded in bar of the other; but otherwise not; and so this judgment will not clash with *Ferrer's case*, 6 Co. which is good in law; for here it is to be presumed that the plaintiffs in the first action had mistaken their action; for that they had brought a trespass *vi &*

armis, whereas they had no evidence to prove a wrongful taking, but only a demand and denial, and therefore the verdict passed against them in that action, and so were forced to begin in this new action of trover. This judgment was given positively by Pemberton, Jones and myself, *Dolben hæsitante.*

[473] HUGHS *versus* CORNELIUS & AL'.

Trover. Skin. 59. 1 Show. 143. 2 Show. 232.

Trover for a ship and its tackle and furniture. Upon not guilty pleaded a special verdict was, that one William Gault a denizen of England was owner of the ship at the time of the taking, and was Dutch-built, and taken in the war between the Dutch and French as a Dutch prize, and condemned for prize in the Court of Admiralty of France, and sold, and that when the said ship was taken as prize, there was amity between England and France. That the master was a Dutchman born, but a denizen of England. The mate was English, and eight mariners English, and two Dutch on board; that the said ship was sold to divers persons by virtue of the sentence of the Admiralty of France, and that the plaintiff bought the said ship from the persons to whom the same was sold as aforesaid; that the defendants as servants of the said William Gault took the said ship from the plaintiff; and if the defendants be guilty, &c.

The chief question intended was, whether this sentence shall be examined by the common law? and resolved, it shall not, because though it be in another King's dominions, we ought to give credit to it, or else they will not give credit to the sentences of our Courts of Admiralty; and the defendants are at no prejudice; for the way is, if they find themselves aggrieved, to petition the King, who will examine the case, and if he finds cause of complaint, will send to his ambassador residing with the prince or state where the sentence was given, and upon failure of redress, will grant letters of marque and reprisal; and judgment was given for the plaintiff.

Challenge. Skin. 61, 76, 81. 2 Jon. 236. 2 Show. 218.

In a trial at the Bar in an information against Ford Lord Grey of Warke, and others, for taking away the Lady Henrietta Berkley, daughter of George Earl of Berkley, 20 August 34 Car. 2. The counsel for the King challenged some of the jurors who were returned out of the county of Surrey, and the counsel for the Lord Grey insisted, that the cause of the challenge ought to be presently shewn, according to the statute of 33 E. 1, called an ordinance for inquests, and to enforce them to do so, the counsel for the Lord Grey challenged *touts peravail.* But resolved by the whole Court, **[474]** that the King ought by that statute to shew cause of his challenge, but not before all the jurors of the panel are called over; for if there be enough besides those which are challenged, no cause shall be shewn of that challenge; and thereupon the defendants relinquished their challenge, and the jurors find the defendants guilty. Of this opinion is Stamford Pl. Coron. 162 b.

December 18. About three o'clock in the afternoon, or a quarter past, died the Right Honourable Sir Heneage Finch, Knight and Baronet, Lord Finch Baron of Daventry, Earl of Nottingham, and Lord High Chancellor of England, at his house in Great Queen-street.

December 20. 1682. The Great Seal was delivered to Sir Francis North, Knight, Lord Chief Justice of the Common Pleas, and he became there Lord Keeper thereof.

DESIGNY'S CASE.

Bail. 1 Danv. Abr. 680, p. 7. 2 Show. 221.

Designy a merchant trading to Jamaica spirited away the eldest son of one Turbet, who was a scholar at Merchant-Taylors School, and a hopeful youth. Turbet exhibited an information against Designy, and upon not guilty pleaded he was found guilty at

Nisi Prius before the Chief Justice Pemberton, the sitting after Trinity-term last, and this last Michaelmas-term he appeared in Court, and was fined 500l. and to lie in prison till he paid it; since which fine imposed, the prisoner procured a promise of a pardon of his fine: but the Court last term being informed of it, and it being an offence of an heinous nature, directed the father of the child to bring a *homine replegiando*, and thereupon an *elongatus* was returned, and the prisoner charged with it in prison; and now Designy procured a letter from the Commissioners of the Treasury, signifying His Majesty's inclination of pardoning the fine, if the Judges of B. R. met at the Lord Chief Justice's chamber in Serjeants Inn in Fleet-street; and upon hearing counsel of both sides, we could not think it reasonable to bail the prisoner upon the *withernam*, but did propose, that if the prisoner would bring **[475]** 1000l. into Court, we would give him his liberty, but the money to be forfeited if he produced not the child within six months, and gave him time to consider. The counsel for Designy produced a case 16 R. 2, Rot. 16, B. R. *David Degois* versus *Count de Warwick*, and 5 H. 4, Rot. 25, B. R. *William Uscot* versus *Simon Brig*, and 12 E. 4, 4, but none of the cases reached to this case, wherein the defendant could pretend to no title to the child, because he hath been already convicted upon an information.

It was objected, that if an *elongatus est* returned by the sheriff be conclusive to the defendant, so as he may not traverse it, then the defendant hath no remedy.

It was answered, 1. The defendant may bring an action upon the case for the false return, and if it be found for the plaintiff, the defendant in the *homine replegiando* may be bailed.

2. If the sheriff shall die before the issue tried, or the action brought, then the King may issue out a commission to inquire of the truth of the return, which inquisition taken by virtue of the said commission may be traversed by the defendant in the *homine replegiando*; and if the issue upon that traverse be found for him, he shall be bailed. *Vide* Rast. Intr. 402 and 403. And the *capias in withernam* is no execution; but unless the defendant will confess the taking, and having the party in custody, he cannot be bailed, as appears by all the cases before cited.

In the first week of January 1682 died Sir Thomas Twisden, Knight and Baronet, one of the Justices of B. R. *grandævus senectute*. He continued Judge to his death, but was dispensed with from sitting in Court by reason of his age and infirmity, and was allowed, *ut dicitur*, 500l. per annum pension from the Crown; he died in Kent, of which county he was; none succeeded him at his death, because Justice Dolben was sworn at his being dispensed with, about three years ago.

On Friday Jan. 5, 1682, in a matrimonial cause between Emerton, *alias* Hyde, *alias* Dunblane, *contr.* Emerton, before commissioners of delegates, and to the former commissioners a commission of adjuncts being procured, all the Judges who were therein named, and were then in town received a note subscribed by the Lord President of the Council, the Earl of Radnor, the Duke of Ormond, Lord Steward of the Household, Sir Leolin Jenkins Knight, Principal Secretary, **[476]** Doctor Hedges and Doctor Saint John, two doctors of the civil law, condelegates with the Judges, in these words,

We do appoint to meet and consult about a day for the hearing and determining this cause upon the ninth day of January next, in the council-chamber at Whitehall, between the hours of nine and eleven in the forenoon of the same day, and do require the proctors on each side to attend accordingly, dated this sixteenth day of December 1682.

At the receipt whereof the Judges were somewhat troubled, for that they heard nothing of it before, and it is to attend at White-hall whereas all commissions of delegates, wherein any of the Judges are named, have always been heretofore executed at one of the Serjeants Inns, because the Judges are constantly employed in the public affairs of the kingdom, in the business in their several Courts, and other things which cannot be done so conveniently for the subjects elsewhere; and also every summons upon such commissions used to be signed by one of the Judges named in the commission, which was herein wanting; and thereupon six of the Judges repaired together to the Lord Keeper North to inform him of the matter, and to desire his

directions, who seemed to advise that we attend according to the note, but put the Judges in hope that the ancient course should be observed in hearing the cause; he told the Judges that the like had been attempted in Henry Martin's time, under pretence, that because bishops were named in the commission, the commission ought to be executed at Doctors Commons, but the King ordered, that the Judges should not stir from their usual places of executing such commissions. This (*ut dicitur*) did now arise from the promotion of Sir Leolin Jenkins, who is a civilian, and would favour his profession as much as might be.

Poor.

On Wednesday January 17, 1682, at Justice-Hall at Old-Baily in London, a case was referred to the justices, which was this; one Fletcher a widow, having several children by her former husband, who lived in the parish of St. Buttolph without Aldgate, which parish lies in two counties, viz. London and Middlesex, marries a second husband, and then they put out the children to nurse at Enfield in Middlesex, and then the mother dies, and after her the father-in-law; the nurse applies herself for money to the parish of St. Buttolph, which hath one church-warden, and several overseers of the poor of the county of Middlesex, and City of London, and the parish rates are several; the woman **[477]** lived and died in that parish which lies in Middlesex, who contended with the other part of the parish in London, and upon application to the Quarter-Sessions in Middlesex, the justices of peace there ordered that the part of the parish which was in London should go equal charge in relieving these children; and that part of the parish which is in London not satisfied with the order, applied themselves to the gaol-delivery at the Old-Baily, and there resolved by Pemberton Chief Justice, Dolben and other justices there, that without any particular usage to the contrary, the parish in both counties ought to contribute their shares towards the relief of the children, because the statute of 43 Eliz. cap. 2 names only parishes; but in regard it was made appear that each part of that parish had distinct officers, and made distinct rates, and had used time out of mind to make distinct accounts to the justices of each county, the Court did not look upon each division as a several parish, and thereupon ordered, that that part of the said parish which lies in Middlesex shall pay the nurse, and provide for the future for the said children. And it was resolved, that no notice can be here taken of the place of the birth of the children, but of their last settlement, by 43 Eliz. cap. 2, because they are only poor children, and not vagabonds; but they which are rogues or vagabonds within 39 Eliz. cap. 4 shall be provided for by the place where they were born.

At the same sessions a woman was indicted as accessory after to a burglary committed by one Johnson in Leicestershire. Johnson had been tried and attainted, but procured his pardon, which hath been allowed: and now the woman prayed that she might be discharged: but resolved she must plead to the indictment, for though if the principal have either his clergy, or be acquitted, or obtained his pardon before judgment, the accessory shall not be questioned; yet if the principal be attainted, the accessory must answer, though the principal be pardoned.

[478] TERM. HILL. 34 & 35 CAR. 2, B. R.

Memorandum, the first day of this term Edmund Saunders, Esq; of the Middle Temple appeared at the Chancery-Bar, to a writ tested in the vacation to command him to take the state and degree of a serjeant at law, and was there sworn, and immediately went from thence into the Common Pleas Treasury, and there in the presence of all the Judges, except Levinz, who was sick, made his count, and had his coif put on, and went to the Common Pleas Bar, and made some motions, till the Lord Keeper came into the Court of King's-Bench, and then he was sent for to the Bar, and when he was there placed, the Lord Keeper made a very excellent speech to him, and then he came into the Court, his writ for Chief Justice was read, and having taken the oaths of obedience and supremacy, and oath of Chief Justice, he was placed Chief Justice of the said Court, in the room of Sir Francis Pemberton, who was the day before sworn Chief Justice of the Common Pleas at his own desire, for that it is a

place (though not so honourable) yet of more ease and plenty, as the Lord Keeper said in his speech to Saunders.

Memorandum, January 25, 1682. At the importunity of one Brumskil, who did formerly pretend himself able to advance the revenues of the Crown, the King commanded all the Judges to meet and consider of his proposals, which were in the general very extravagant, and totally rejected; but upon inquiry after the management of popular actions, we did find that the party who was plaintiff would frequently get an execution to levy his part, and either left the King's part unreceived, or made some private agreement with the sheriff or defendant, or else the sheriff received it, and never accompted for it, for that it was not in charge in the Exchequer, and thereupon all the Judges made this rule to be observed in all their respective Courts.

[479] That all clerks of assise and associates do return the *posteas* in all popular and penal actions and informations *qui tam, &c. ex officio*, into the respective offices whence they issue, and to receive their fees for the returning the same at the trial from the party for whom the verdict shall be given, and the master of the respective offices to whom the said *posteas* shall be returned by the said clerks of the assise shall send a note into the Exchequer to the clerk of the estreats there to the intent the sheriffs may be charged therewith.

Duncomb and Singleton *versus* Sir William Walter. Error in C. B. Action upon the Case. Middlesex.

Bankrupt. 1 Danv. Ab. 688, p. 1. 3 Lev. 57. 1 Vent. 370. Skin. 22, 87. 2 Show. 253.

Duncomb and Singleton bring an action upon the case against Sir William Walter, executor of David Walter, Esq; deceased, and set forth that the said David Walter the testator, 21 November 30 Car. 2, was indebted to John Staley in 1000l. for so much by the said testator of the said Staley had and received, and so being indebted promised to pay the same; and also that the said Staley for five years last past, before the said 21 November, was a goldsmith, and got his livelihood by buying and selling, and became indebted to Pigot in 200l. to Clayton in 600l. and being so indebted, the said 21 November began to conceal himself in his house with an intention to defraud his creditors, and became thereby a bankrupt within the meaning of divers Acts of Parliament. That 20 Febr. 31 Car. 2, at the petition of Pigot and other creditors, exhibited to the Lord Chancellor, a commission issued out to certain commissioners to inquire thereof, who after the death of the testator, viz. 14 May 31 Car. 2, by indenture assigned Staley's estate to the plaintiffs, by virtue whereof the plaintiffs are intitled to the said 100l. And the plaintiffs farther declare upon an *indebitatus assumpsit* for another 1000l. by the defendant received for the use of the testator. Upon *non assumpsit* pleaded, the jury find a special verdict, viz. that before the plaintiffs original writ sued out, viz. 1 November 1678, and by the space of five years then last past, the said Staley was a trader, and during that time became indebted to the said Pigot in 200l. to Elizabeth Clark in 1000l. and to the said Martha Clayton in 6000l. The said Elizabeth Clark made her will 5 July 1677, and made John Crew Esq; her executor, and died, after whose **[480]** death, and before Crew's probate of the said will, viz. 6 November 1678, the said Crew prosecuted a bill of Middlesex against the said John Staley and William Staley, returnable *die Jovis prox' post quindenam Sancti Martini*, for the said 1000l. on which day he was arrested, and put in sufficient security for his appearance, and so was delivered out of custody. That afterwards, viz. 18 November 1678, which was before the return of the said writ, the said John Crew proved the said will. That the said 18 November 1678, the said David Walter received the said 1000l. from the said John Staley, being before that time due to the said David Walter upon bond and judgment. That before the return of the said bill of Middlesex, viz. 26 Nov. 1678, the said John Staley voluntarily rendered himself in discharge of his bail in the suit against him by the said John Crew, and was then committed to the prison of the Marshalsea, for want of

bail. That the said debt due to the said Elizabeth Clark was a just and true debt, and the said John Staley being so in custody, 14 Febr. 33 Car. 2, did remain ever since his commitment, the said debt not being paid or compounded for. That the said Staley was, and yet is a subject of the King, born at Westminster. That 20 Febr. 31 Car. 2, at the petition of the said John Pigot on his and others behalf, a commission issued out of the Chancery *prout*, and that the commissioners 14 May 31 Car. 2, assigned over the estate of Staley to the plaintiffs *prout*. That the said 100l. mentioned by the said David Walter had and received, is the same mentioned in the declaration. But whether upon the whole matter the said John Staley was a bankrupt 18 November 30 Car. 2, *penitus ignorant & petunt advisamentum Curiæ*, and if he was then a bankrupt they find for the plaintiff, and if not, then for the defendant. And judgment was given in C. B. for the defendant; and now the plaintiff brings a writ of error, and assigns the general error.

The case in short is, Staley being a trader becomes indebted by bond and judgment to David Walter in 1000l. and to Elizabeth Clark in 1000l. and to several other persons in several other sums. 5 July 1677, Elizabeth Clark makes her will, and John Crew her sole executor and dies. 6 November 1678, Crew arrests Staley for the 1000l. who immediately puts in sufficient bail. 18 November 1678, Staley pays David Walter the 1000l. and then the same day renders himself to prison in discharge of his bail, and lies in prison to the time of the action, which is above two years, 20 February **[481]** 1678, a commission issues 14 May following, the commissioners assign Staley's estate to the plaintiff; and the sole question is, whether Staley was a bankrupt on 6 November 1678, which was the day of his arrest; for if so, then it is for the plaintiffs, because he paid the 100l. to David Walter after he became a bankrupt; but if he did not become a bankrupt on that day, then it is for the defendant.

The words of the statute of 21 Jac. cap. 19 are, *Being arrested for debt, shall after his or her arrest lie in prison two months or more upon that or any other arrest, or other detention in prison for debt. And in the said cases of arrest or lying in prison for such debt or debts, shall be adjudged a bankrupt from the time of his or her said first arrest.*

Dyosse for the defendant in the writ of error. Here is an arrest and lying in prison two months after, and so within the words of the statute.

1. *Object.* Here is not an immediate lying in prison upon the arrest, for here was bail put in.

Resp. The statute distinguishes not between the cases where bail is, and where it is not put in, and though the case may not be within the second clause, it will be within the first; for here was lying in prison two years.

2. *Object.* A man cannot be a bankrupt, but where there is a real debt due; but here Crew had not proved the will, and till then he could not claim the debt of the testator at the time of the arrest.

Resp. The money is due to the executor before probate, for he may release, as *Middleton's case* is, 5 Co. 28 a. And probate is only an allowance of the executorship, and an executor may before probate bring a writ, but not declare, 1 Roll. Abr. 917 A. pl. 2. And here the will was proved before the return of the writ; and where it is said an executor cannot sue before probate, it is meant he cannot sue effectually.

This statute doth not distinguish between a legal and illegal arrest; and if a bankrupt should not become so from the first time of his arrest, he might make over his estate, and then deliver himself up to prison in discharge of his bail, and so elude the statute.

Walcot Serjeant for the defendant. The question is, from what time Staley shall be accounted a bankrupt; and I conceive only from the time that he rendered himself in discharge **[482]** of his bail, viz. 20 November 1678. A tradesman's being arrested barely, makes not a bankrupt. *Et adjournatur.*

In the case of the town of Nottingham, it appeared, that at a common council of the said town, it was ordered that there should be a surrender made of the charter to the King, and thereupon the mayor pursuant to the said order did take out of the town-chest the said charter, and surrendered the same accordingly; and so it fell out, that in the said charter was contained not only the franchise of the corporation, but

also the grant of certain common to the inhabitants, and because the surrender was against the minds of a great number of the inhabitants who were discontented, and were opposers of the present government of the kingdom, they took advantage of this omission, and exhibited an information into B. R. and desired the master of the Crown-Office (in whose name the information was exhibited) to file it, but in regard it was matter of State, and of great concern, he this term desired the directions of the Court, who ordered that the Attorney General should be made acquainted therewith, who at another day appeared, and refused to meddle therewith, and so it was left to Mr. Astry to file or not to file, at his discretion, for the Court would not use any compulsory means for filing it, in regard they could not know whether such an information was necessary or no; and it is properly the office of the King's attorney to manage informations of such concernment.

ROW *versus* SIR THOMAS CLARGIS, KNIGHT, FOR WORDS. ERROR IN C. B.

Words. 1 Danv. Ab. 86, p. 29. 3 Mod. 26. 3 Lev. 30. Skin. 68, 88. 2 Show. 250.

The plaintiff in C. B. declares, that he was such a day deputy-lieutenant for the county of Middlesex, one of the King's Privy Council for the realm of Ireland, and stood for to be chosen burgess for the Parliament at Christ-Church in com. Hants, and that the defendant spake these words of him, viz. *He is a Papist.* Upon not guilty pleaded, verdict for the plaintiff, and judgment; and now Clargis brought a writ of error, and judgment affirmed by all the four justices, viz. Saunders, Jones, Dolbin and myself, and resolved, 1. That the words taken abstractively are actionable, **[483]** because the Acts of Parliament of 23 Eliz. 3 Jac. and 25 Car. 2 do expose a Papist to several penalties and incapacities. 2. *A fortiori*, as the words have relation to the quality of the person, for a deputy lieutenant is an officer of great trust; and though 'twas objected, that 'tis not an office of profit, and so no prejudice to lose it: it was answered, that 'tis of as much profit as a justice of peace; and yet the words spoke of a justice were adjudged actionable; and the times alter the law when the sense of words alter; for though formerly (*Papist*) was not actionable, yet now 'tis grown to be a word of more reproach. So healer of felons was not actionable till it appeared to be a concealer of felons: and to say of an attorney he is a knave, is actionable, though antiently *knave* was no more but servant. It was objected farther, that to have the word *Papist* to bear an action would be a means to discourage prosecution of Papists. To which it was answered, that railing is no prosecution; and we must not punish the innocent, because we cannot exceed in our expressions of the nocent.

And the law doth alter with the time; for before 21 E. 3, 23, an infant could not bring an appeal; and we find no precedent before that time of an appeal so brought, but now 'tis frequent; and judgment was affirmed.

ROSKELLEY *versus* REBECCA GODOLPHIN.

Mich. 34 Car. 2, Rot 599, B. R.

Executor. 3 Danv. Abr. 386, p. 7. 2 Show. 403. Skin. 214.

Debt upon an obligation dated 24 July 18 Car. 2, against the defendant, administratrix of John Godolphin, *durante minore ætate* of Rebecca his daughter, for 168l. The defendant pleads, that the testator became bound by obligation, dated 18 May 26 Car. 2, in 6000l. to Brook and Wallis (trustees of Rebecca the defendant, upon her marriage with the said John Godolphin) upon condition to pay to the defendant herself 3000l. within fourteen days after the death of the said John, if she should survive him, and says that she survived him, and that she hath not assets *ultra* 1000*l.* which she retains towards satisfaction of the said 3000l. The plaintiff demurs generally, and I conceive judgment ought to be given for the defendant, and that it is a good plea.

[484] 1. I do agree, that if John Godolphin had made a stranger executor, there

must have been an actual payment, or judgment upon the bond before this action brought, or else *pleinment administre* had not been a good plea.

2. If the payment here had been to be made to Brook and Wallis, though in trust for the feme, retainer could not have been pleaded, though the law seems contrary, 3 Cro. 754, *Huish* versus *Philips*, where a bond was to A. to the use of B. conditioned to pay B. money, 'twas a good plea, that the obligor tendered the money to B. because he was in a manner privy to the obligation, and so is Co. Lit. 209 a.

3. But here though the bond be to Brook and Wallis, yet the condition is that the executors of John Godolphin shall pay to the wife herself the money, and she is administratrix herself; now she cannot pay to herself, and therefore the payment must be by way of retainer.

Object. She is but administratrix *durante minori ætate* of Rebecca, so we cannot retain.

Resp. She may sell goods for payment of debts, 5 Co. 29, *Prince's case, & eadem ratione* she may retain to pay herself, Hob. 250, *Bryars* versus *Goddard*, administrator *durante minori ætate* may retain.

DOMINUS REX *versus* HIGGINS & AL'. TRIAL AT BAR. WORCESTER.

Challenge. 1 Vent. 366. Skin. 91, 101, 105.

An information in nature of a *quo warranto* exhibited against certain persons being citizens of the City of Worcester for using several liberties and franchises within the said city, setting forth, that King James 2 October 19 Jac. did incorporate the said City of Worcester by the name of Mayor, Aldermen and Citizens of the City of Worcester. That there should be a mayor, six aldermen, one sheriff, two chamberlains, twenty-four (of which the mayor and aldermen should be seven) to be capital citizens and counsellors, and forty-eight capital citizens, whereof the chamberlains should be two, and that the twenty-four and forty-eight should be called the common council, and that the aldermen should be elected out of the twenty-four. That upon the death or removal of any of the twenty-four, their place should be supplied out of the forty-eight. That the defendants and several others named in the information 1 November 32 Car. 2, **[485]** to the day of exhibiting the information, without any authority did claim to be mayor, aldermen, sheriff and citizens of the number of twenty-four and forty-eight, and by all that time did usurp upon the King, &c.

Higgins pleads, that *die Lunæ post Festum Sancti Bartholomæi anno* 32 *Car.* 2, he was chosen mayor, and the second Monday after Michaelmas took his oath for execution of his office *prout* letters patent require, and so justifies, &c. The King's Attorney General replies, that when elected mayor he was not of the twenty-four, and thereupon takes issue.

Edward Cooksey another of the defendants pleads, that he 9 July 13 Car. 2, by the commissioners upon the Act of Corporations was made one of the twenty-four; and that on Monday *post Festum Sancti Batholomæi* 32 *Car.* 2 he was elected alderman and sworn, &c. The Attorney General replies, that when the defendant was elected alderman he was not of the twenty-four; and issue thereupon.

Edmund Osdnal another defendant pleads, that he being one of the forty-eight, was 16 Jan. 1663 chosen of the twenty-four. The Attorney General replies, that when elected of the twenty-four he was not of the forty-eight; and issue thereupon.

John Millington, William Hughes and others plead, that 29 March 1677, &c. they were chosen of the forty-eight. The Attorney General replies, that when they took the oaths to execute the office of one of the forty-eight, they did not subscribe the declaration *prout* the Act of Parliament requires. The defendants rejoin, that they did subscribe; and issue thereupon; and a trial at the Bar upon all these issues.

The counsel for the defendants took a challenge to the array, because the jury was out of the City of Worcester; and it being suggested by the Attorney General upon the roll, that the sheriff of the said city was one of the defendants, he prayed a *venire facias* to the coroners, and that there were two coroners, and though both the said coroners were mentioned upon the record to have returned the panel, yet that in truth, but one only, viz. Trimnel, did return the same, and so not good; but the

Court unanimously resolved, that the challenge ought not to be allowed, because it appears by the record itself, that both did return the same; and that no challenge contrary to the record ought to be allowed.

Another challenge was taken to the polls, because the jurors had not any freehold within the city; and this challenge was debated by all the four Judges, and it seemed to **[486]** them all, that it can be no good challenge, because the statute of 2 H. 5, cap. 3, doth not extend to this case, for that is only in causes between party and party; nor doth 35 H. 8, cap. 6, reach thereto, because that statute cannot extend to cities and corporations, but to sheriffs of counties at large; for if a panel made in corporations, must have freehold jurors, they must have likewise six hundredors, which cannot be in any corporation of England; and so 27 Eliz. cap. 6. But the jurors of corporations are to be at the common law; and though it is said 3 Cro. 413, in *Blunt's case*, that there ought to be some freeholders, that cannot be intended in corporations, for in some corporations there are no freeholders at all, and so justice would fail; and by constant practice in all the trials at Guildhall, London, by Nisi Prius, no such challenge was ever made or allowed, and therefore it would be very mischievous after so long practice to the contrary to admit this challenge; and yet nevertheless, because the counsel for the defendants were not well satisfied with this resolution, I was desired by the other Judges of the Court to know the opinion of the Judges of the Court of Common Pleas, and I discoursed with them, and propounded the challenge to them; and Pemberton Chief Justice, Wyndham and Charleton (Levinz being absent *propter agritudinem*) did clearly concur with us, and I returned their answer so to the Court; and for not allowing these two challenges, the defendants counsel preferred a bill of exceptions, which they desired might be signed by us, that they might be afterwards enabled to alledge the same for error in Parliament, if occasion should be.

Vide 17 Ass. 15. In an inquest in an action of debt it was not allowed for a challenge, that the jurors had not sufficient land, because the freehold was not in demand.

Note; In the case of Sir Henry Vene it was resolved 14 Car. 2, B. R. that a bill of exception doth not extend where prisoners are indicted at the suit of the King. Syderfin Rep. 85.

[487] HITCHINS *versus* STEVENS.

Attornment. 1 Danv. Abr. 610, p. 10. 2 Jon. 217, 232. 2 Show. 233.

Debt for rent. The plaintiff sets forth, that A. was possessed of the lands for the term of ninety-nine years by the demise of B. and afterwards A. demised the premisses for twenty-one years to the defendant, who entered and was possessed, and afterwards granted the reversion to the plaintiff, and that so much was in arrear, *unde actio accrevit.* Upon *nihil debet* pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff had not alledged in his declaration, that the defendant did ever attorn to the plaintiff's grant of the reversion. And resolved good enough without it after a verdict, 2 Roll. Rep. 489, for 'tis apparent, that if the plaintiff had not given the attornment in evidence, he must have been nonsuited; and wheresoever it may be presumed that any thing must of necessity be given in evidence, the want of mentioning of it in the record will not vitiate it after a verdict; and so judgment was given for the plaintiff.

THE KING *against* THE INHABITANTS OF BITTON. GLOUC.

Fences. 2 Show. 255.

Resolved by Saunders Chief Justice, that cutting down of timber-trees by unknown persons *noctanter*, is not within the Statute of Westm. 2, cap. 46, for the words of the statute are, *fossatum & sepem prostraver'*.

SMITH *versus* BATTERTON.

Costs. 2 Danv. Ab. 222, p. 13. 2 Jon. 232. Skin. 100. 2 Show. 258.

Trespass *quare vi & armis* the defendant flung down certain stalls of the plaintiff in the market place of Highworth in com. Wilts. Upon not guilty pleaded, verdict was found for the plaintiff, but damages were given under 40s. and upon the Secondary's refusing to tax costs, as being a case within 22 & 23 Car. 2, cap. 5, pl. 236, it was moved by the plaintiff's counsel that costs might be taxed; and upon debate it was resolved by the whole Court, that the plaintiff shall have his ordinary costs, because the statute shall be intended to reach only to such actions in which the **[488]** freehold may apparently come in debate; but in this case the action is not *quare clausum fregit*, but only for destroying a chattel, and the freehold cannot come in debate, any more than if a man shall take his sword out and run a coach-horse into the guts, whereby he died, and the owner shall bring an action *vi & armis* for it, and recover under 40s. damages, yet he shall have his full costs.

SANDS *versus* EXTON.

Prohibition. Skin. 91. 2 Show. 300.

The whole proceedings of this case are as follow.

Carolus Secundus Dei gratia, &c. univeris & singulis Vice-Admirallis Justiciariis ad pacem majoribus vicecomitibus ballivis mareschallis constabulariis cæterisque officiariis & ministris nostris tam infra libertates & franchesias nostras quam extra ubilibet constitutis & præsertim Willielmo Jones gener. Supremæ Cur. Admiralitatis nostræ Angliæ Mariscall. ejusque deputato salutem. Cum dilectus noster Richardus Lloyd Miles Legum Doctor Surrogatus dilecti nostri Leolini Jenkins Militis Legum etiam Doctoris in Suprema Curia nostra Admiralitatis Angliæ præd. locum tenen. commissariique generalis ac Curiæ præd. Judicis & presidentis legitime constituti rite & legitime proceden. ad petitionem dilectorum nostrorum Thomæ Exton Militis Legum Doctoris Advocati nostri generalis & Samuelis Franklin arm. procuratoris nostri generalis præsentat dicto domino quendam ordinem sive rescriptum quoddam per nos fact. teneris sequen. viz.

[489] AT THE COURT AT WHITEHALL, DEC. 13, 1682. PRESENT THE KING'S MOST EXCELLENT MAJESTY.

Lord Archbp. of Canterbury, Lord President, Lord Privy Seal, Duke of Albemarle, Duke of Ormond, Duke of Beaufort, Lord Chamberlain, Earl of Chesterfield, Earl of Sunderland, Earl of Clarendon, Earl of Bath, Earl of Craven, Earl of Conway, Earl of Rochester, Lord Viscount Fauconberg, Lord Finch, Lord Bishop of London, Lord Chief Justice North, Mr. Secretary Jenkins, Mr. Chancellor of the Exchequer, Mr. Godolphin.

Whereas the Governor and Company of Merchants of London, trading to the East-Indies, did represent to His Majesty in Council, that the ship Expectation alias Commerce of London, was at Graves-end bound for the East-Indies to trade within the limits of the said company's charter; His Majesty having taken into consideration that the East-India Company have several contracts, treaties and articles of peace with several princes in the East-Indies, and that in case such are permitted to trade who have no such leagues or treaties with the said princes, acts of hostility may ensue, and the trade of the nation much prejudiced, was pleased to order the Right Honourable the Commissioners of the Admiralty to cause the said ship to be stopped until she shall be cleared, or that the owners shall give security in the Court of Admiralty, where His Majesty hath directed a prosecution of the said ship.

It is this day ordered by His Majesty in Council, that His Majesty's Advocate General and Proctor do take care forthwith that process be issued against the said ship Expectation, alias Commerce, for staying of her until security be entered in the

Court of Admiralty, that she shall not go nor trade with any infidel country within the limits of the East India Company's charter without His Majesty's licence.

FRANCIS GUYN.

[490] Et allegan. dictam navem sine authoritate vel mandato nostro propediem est vela datur. ad partes Indiæ Orientalis ad ibidem mercaturam exercend. infra limites diplomatis sive chartæ (Anglicè *the charter*) Societatis Mercatorum de London. negotian. ad Indias Orientales ejusdem mercatoribus authoritate nr'a concess. in præjudicium dicti diplomatis & contra intentionem ejusdem & præjudicium mercaturæ nationis nostræ Angliæ prout ex rescripto nostro plenius apparet & peten. warrantum decerni contra dictam navem ejusque apparatus & access. eandemq; navem ejusque &c. vigore ejusdem arrestand. & sub securo custodiend. arresto donec & quousque cautum fuerit in Suprema Curia nostra Admiralitatis præd. interposit' ut dicta navis non procedat nec mercaturam exerceat in aliquibus regionibus sive ditionibus aliquorum principium & populorum infidelium Christianæ religioni advers. infra limites dicti diplomatis sive chartæ dictæ Societatis Mercatorum de London. negotian. ad Indias Orientales existentium absque licentia sive authoritate nostra in ea parte prius obtenta juxta rescriptum sive ordinem nostrum prædict. decreverit dictam navem The Expectation, alias The Commerce of London, arrestand. fore & sub salvo & securo custodiend. arresto prout per advocatum & procuratorem nostrum general. præd. petitur vobis igitur conjunctim & divisim committimus & firmiter injungendo mandamus strictequeque præcipimus quatenus non omittatis propter aliquam libertatem vel franches. quin realit' arrestetis seu arrestari faciatis peremptorie dictam navem The Expectation, alias The Commerce of London, ejusque apparatus & access. ubicunque eadem invenietis eandemque sic capt. & arrestat. sub salvo & securo custodiatis arresto donec & quosque cautio fuerit interposita in Suprema Curia nostra Admiralitis præd. ut dicta navis non procedat nec mercaturam exerceat in aliquibus regionibus sive ditionibus aliquorum principium & populorum infidelium Christianæ religioni advers. infra limites dicti diplomatis sive chartæ dictæ Societatis Mercatorum de London. negotian. ad Indias Orientales existen. absque licentia sive authoritate nostra in ea parte prius obtent. juxta rescriptum nostrum sive ordinem prædict. Et hoc nullatenus omittatis dat. Londini in Suprema Curia nostra Admiralitatis præd. sigillo ejusdem magno decimo tertio die Decembris 1682. regnique nostri tricesimo quarto. Orlando Gee registerius. Concordat cum registerio ita testor Ed. Parre notarius publicus.

[491] Die Martis 19 Decemb. 1682. inter horas quartam & sextam post meridiem ejusdem diei coram venerabili & egregio viro Domino Richardo Lloyd Milite Legum Doctore Surrogato honorandi viri Domini Leolini Jenkins Militis Legum etiam Doctoris in Suprema Curia Admiralitatis Angliæ locum tenentis generalis & commissarii dictæque Cur. Judicis & præsidentis legitime constituto in cœnaculo infra hospitium d'norum advocatorum London. præsent. Edwardo Parre notario publico, &c.

Serenissimus dominus noster Rex contr. navem quand vocat. The Expectation, alias The Commerce of London.

Which day the Right Worshipful Sir Thomas Exton the King's Advocate, and Samuel Franklin, Esq; His Majesty's Proctor, did on the behalf of our Sovereign Lord the King propose that if Captain Sands, or any of the parties, having any interest in the said ship and lading will give security into this Court in the sum of 40,000l. that the said ship shall not go nor trade with any infidel country within the limits of the East-India Company's charter without His Majesty's licence, pursuant to any order of the King and Council lately presented to this Court bearing date the 13th of this present month of December, or otherwise will take out a commission of appraisement to appraise the said ship and the goods laden on board her, and give in bail in the double value of the said ship and goods according to the said appraisement, in case they will not unlade the said goods, or if they will take their goods out of the said ship (which the King's advocate and proctor offered them to do if they should think fit) then in the double value only of the said ship, and of her tackle, apparel and furniture, that in such case the said ship may be decreed to be released from the

arrest she now lies under, otherwise they prayed that she may still be continued under the said arrest until such bail be given as aforesaid in the presence of the said Captain Sands and Mr. Chapman, his proctor, dissenting and alledging, offering and praying as in the former act of this Court is contained.

Whereupon the Judges declared and offered, that any of the persons concerned in the said goods and lading may unlade and take their goods out of the said ship, if they please, and that, if they will so take them out, he will require bail in **[492]** no greater sum than in the double value of the said ship, and of her tackle, apparel and furniture, according to the appraisement to be made as aforesaid; and farther declared that if Captain Sands and the persons chiefly concerned with him in this business will affirm upon oath, that they did not design or intend to go or trade, nor will go or trade with the said ship in any infidel country within the limits of the East-India Company's charter without His Majesty's licence, that then he will take their juratory caution, and will decree the said ship to be released from the said arrest without requiring any other or further caution or security; which they refusing, and also refusing to give in bail as aforesaid, the Judge decreed that the said ship with her tackle, apparel and furniture should still continue under the arrest of this Court until such bail be given as above required. *Concordat cum originali quod attestor Tho. Bedford publ. dictæ Curiæ Registerii Deputatus.*

Upon these proceedings Sands moves for a prohibition upon the suggestion ensuing, viz.

Anglia, ss. Memorand. quod die Martis prox. post octabas Sancti Hillarii isto eodem termino coram domino Rege apud Westm. Ven. Thomas Sands Magister cujusdam navis, vocat. The Expectation, alias Commerce of London. Et dat Cur. *domini* Regis nunc hic intelligi & informari quod in statuto in Parliamento D'ni Richardi nuper Regis Angliæ Secundi post Conquestum apud Westm. in com. Midd. anno regni sui decimo tertio tent. inter alia inactitat. existit quod Admiralli & eor. deputat. de aliqua re infra regnum Angliæ nisi solummodo de re super mare prout tempore Domini Edwardi nuper Regis Angliæ progenitor. dicti domini Regis Richardi Secundi debite usum fuit nullatenus intromittent quodq; in statuto in Parliamento dicti domini Regis Richardi Secundi post Conquestum apud Westm. anno regni sui decimo quinto tent. (inter alia) declarat. ordinat. & stabilit. existit quod de omnibus contractibus placitis & querelis ac de omnibus rebus quibuscunque fact. seu emergen. infra corpus com. tam per terram quam per aquam ac etiam de wrec. maris Cur. Admiralitatis nullam habeant cognitionem potestatem jurisdiction. sed quod omnia hujusmodi contract. placita & querelæ ac omnia al' emergen. infra corpus com. tam per terram quam per aquam (ut supradictum est) necnon wrec. maris forent triat. terminat. discuss. & remediat. per leges terræ, & non **[493]** coram Admirallo nec per Admirallum nec ejus locum tenen' quovismodo prout per eundem actum inter alia plenius liquet & apparet cumque omnia & singula placita & cognition' placitor' & triation' validat' in lege aliquarum literarum patentium domini Regis nunc vel progenitor' suorum sub Magno Sigillo suo Angliæ confect' ac statutorum hujus regni Angliæ interpretation' construction' & exposition' ac cognition' triation' punition' & determination' omnium transgres. criminum & malefic' & offensar' & al' rerum quarumcunque super terram & non sup' altum mare fact. commis. emergen' seu perpetrat' ad dominum Regem nunc & Coronam suam Regiam specialit' spectent & pertineant ac per legem terræ hujus regni Angliæ coram ipso Rege vel justiciariis suis aut al' judicibus temporalibus in Cur' Regis & non coram Admirallo nec per Admirallum vel ejus deputat. sive locum tenen' quovismodo triari terminari & discuti debeant & semper hactenus consuever.'

Quodque idem Thomas Sands 1 Dec. nunc ult. præterit. & diu antea super terram & infra corpus com' scilicet apud London' præd. in paroch. Beatæ Mariæ de Arcubus in warda de Cheap possessionat. fuit de prædict. nave, vocat. The Expectation alias Commerce, cum apparat. & accession' adinde spectan' & pertinen' ut de bonis & catallis suis propr' et sic inde possessionat. existen' idem T. Sands navem ill' adtunc & ibidem præparavit & aptavit pro quodam voiagio mercatorio a portu de London ad insulam de Maderas & separalia alia loco in partibus transmarin' cum eadem nave fiend. ac adtunc & ibidem præparavit & aptavit pro quodam voiagio mercatorio a portu de London

ad insulam de Maderas & separalia alia loco in partibus transmarin' cum eadem nave fiend. ac adtunc & ibidem scilicet apud London' præd. in paroch. & ward. præd. diversa bona & catalla mercimon' & merchandisas ad valenc' 10,000l. & amplius abinde in partibus transmarinis merchandizandi causa transportand. in eadem nave oneravit pro salario commodo & proficuo ipsius T. Sands inde fiend. ac cum eadem nave post finem voiagii illius in Anglia redeund' Gubernator tamen & Societas Mercator de London' ad Indos Orientales negotian' necnon Thomas Exton Miles Samuel' Franklin Armig' Willielmus Joyner and Johannes Leech præmissorum non ignari sed machinan' ipsum Thomam Sands contra debitam legis terræ hujus regni Angliæ formam & effectum statutorum in hujusmodi casu nuper edit. & provis. indebite prægravare opprimere & fatigare & prohibere & retarde navem prædict. a voiagio suo prædict. prosequend. ac ipsum Thomam Sands de proficuo & advantagio voiagii illius impedire & deprivare necnon dictum dominum Regem & Coronam suam Regiam exhæreditare cognitionemque placiti **[494]** prædicti quæ ad dictum dominum Regem nunc & Coronam suam Regiam specialit. spectat & pertinet ad aliud examen in Cur. Admiralitat. trahere ipsi iidem gubernator & societas prædict. & Tho. Exton Sam' Franklin Willielmus Joyner & Leech postea scilicet 13 Decemb. anno regni dicti d'ni Regis tricesimo quarto apud paroch. Beatæ Mariæ de Arcub. in ward de Cheap London, causaver. & procuraver. ipsum præd. T. Sands & navem præd. sectari & prosequi in Alta Cur. Admiralitas Angliæ Judicis tent. de eo quod ipse idem Th. Sands cum nave præd. fuit designat. in quodam voiagio & navigare intendebat in partes transmarinas viz. ad Indos Orientales ibidem merchandizare & mercaturam exercend. quibusdam locis portubus regionibus & dominiis in quibus sola merchandizatio & negotiatio, Anglic *trading*, per literas patentes domini Regis nunc sub Magno Sigillo suo Angliæ præd. gubernator. ac societat. concess. fuit prout in Cur. Admiralitatis præd. allegat. & prætens. fuit ac superinde & sup' allegation. & prætension. ill in Cur. ill. fact. prætext. cujusdam warranti e præd. Suprema Cur. Admiralitatis Angliæ emanan. ipsi iidem gubernator & societas Tho. Exton Samuel Franklin Willielmus Joyner & Leech die & anno ult. præd. navem præd. ceper. & arrestaver. & capi & arrestari causaver. & procuraver. super terr. & infra corpus com. scilicet apud London. in parochia & ward præd. Ac eandem navem cum eisdem bonis & catallis in eadem adtunc & adhuc ibidem onerat. ut præfertur sub arresto præd. ex causa præd. continue abinde hucusque detinuer. & adhuc detinent ipsumque Tho. Sands in præd. Cur. Admiralitatis Angliæ coram præd. Richardo Lloyd Mil. Legum Doctore Surrogato Leolini Jenkins Militis dictæ Cur. Admiralitatis Angliæ Judicis comparere de et super præmissis respondere minus juste astringere ubi revera et de facto idem Th. Sands tempore caption. et arrestation. navis præd. et diu antea fuit magister ejusdem navis et eadem nave præparat. aptat. et onerat. fuit cum bonis et catallis præd. pro voiagio præd. super terram infra corpus com. scilicet apud London. præd. in paroch. et ward. præd. et non infra jurisdiction. Cur. Admiralitatis præd. Ac ubi revera et de facto prætens. causa pro caption. et arrestation. navis præd. accrevit super terram et non super alto mari nec infra jurisdiction' Cur' Admiralitatis scilicet apud London' præd. in parochia et ward. præd. Ac ubi revera prædict. Judex Cur. Admiralitatis nunquam habuit potestatem sive authoritatem tenend. placit. præd. nec audiend. et terminand **[495]** causam præd. Ac ubi revera et de facto præd. pretens. literæ patentes domini Regis nunc fact. et conces. et sigillat. fuer' super terram scilicet apud London præd. in paroch. et ward. præd. Ac licet idem Th. Sands omnia et singula præmissa præd. per ipsum superius in hac parte suggest. et allegat. in prædict. Cur' Admiralitatis coram præfat. Judice Cur' illius in ipsius Th. Sands et navis præd. exoneration. et dismission in præmissis in eadem Cur. Admiralitat. coram præfat. Judice sæpius placitavit et allegavit et ill. testimonio et veritate inevitabili probare obtulit idem tamen Judex Cur' Admiralitatis clamans et prætendens cognition. causæ et materiæ præd. sibi de jure spectare et pertinere placitum allegation. et probabation. ill admitterre seu recipere ac navem præd. amittere et exonerare penitus recusavit ac ad instance. et promotion. præd. gubernator' et societatis Tho. Exton Sam. Franklin Willielmus Joyner et Leech per quandam sententiam suam in ea parte habit. et fact. decrev' et ordinav' quod navis præd. continuaret sub arresto præd. quousque cautio al. ball. ad valenc. 40000l. imponeretur pro nave præd. in præd. Cur. Admiralitatis quod navis præd. non procederet nec mercatur. exerceret ad aliquem

locum regionem seu ditionem infra limites per prædictas literas patentes eisdem gubernator. et societat. concess. contra formam earundem literarum paten. in dicti domini Regis nunc et legum suarum contemptum et in retardation. voiagii præd. & ipsius Th. Sands ad grave præjudiciu. et depauperation. manifest. ac contra formam et effectum statut. in hujusmodi casu edit. et provis. Et hoc parat. est verificare unde idem Th. Sands auxilium Cur. dicti domini Regis nunc hic humillime implorando petit sibi remedium festinum et breve dict. domini Regis nunc hic de prohibitione præfat. Judici Cur. Admiralitatis ac al. Judici in hac parte compet. cuicunque ac etiam præd. Gubernator. et Societati Mercatorum London. ad Indos Orientales negotian. procuratoribus factoribus et agentibus sui quibuscunque necnon præd. Tho. Exton Sam. Francklin Will Joyner Leech et omnibus aliis officiariis et ministris ejusdem Cur. Admiralitatis in hac parte dirigend ad perhibend ipsis & eorum cuilibet ne ipsi vel eorum quilibet placitum præd. præmissa præd. quovismodo tangen. coram ipsis vel eorum aliquo ulterius teneant nec eorum aliquis teneat et ne præd. gubernator et societas factores procuratores et agentes sui necnon præd. Th. Exton Sam Francklin Willielmus Joyner & Leech quovismodo in placito præd. premissa præd. quovismodo concernen. versus ipsum Tho. Sands vel navem præd. in præd. Cur. Admiralitatis ulterius procedant necnon eorum aliquis procedat **[496]** quod in ipsius Th. Sands præjudicium vel navis præd. in voiagio præd. retardation. vel læsion. Coron. dicti domini Regis procedure valeat quovismodo et si quicquam in contrarium præmissor' fact. sit illi eidem Th. Sands emendari facerent nec quicquam in negotio præd. versus ipsum Th. Sands vel navem præd. ejusve apparat. sive accession. attemptet seu attemptent sed quod omnia decreta seu sententiæ si quæ versus ipsum Th. Sands seu navem præd. seu bona in eadem existen. de et super præmissis occasione præmissorum fulminaverit seu pronunciaverit sine dilatione relevari adnullari et frustrari causaret seu causarent et ipsum Th. Sands et navem præd. cum eisdem bonis et catallis ab arresto et restriction. præd. relaxaret et penitus absolveret ita quod idem Th. Sands in voiagio illo procedere valeat si voluerit et ei concedit, &c.

Memorandum, On Thursday April 20, 1683, 35 Car. 2, Sir William Dolben one of the Justices of B. R. received a *supersedeas* to his commission of being Judge of this Court. And April 25, 1683, being the first day of Easter term Sir Francis Withens Knight, council extraordinary to the King, and of the Middle Temple was sworn serjeant at law, and in the afternoon at the Lord Keeper's house sworn one of the Justices of B. R. He gave rings, *cujus inscriptio, lex placuit Regi.*

The ensuing case and argument I had from the Lord Chief Justice North, May 25, 1681.

CARTER *versus* CRAWLEY. IN PROHIBITION.

Distribution.

Robert Hamond died intestate leaving neither wife nor child, father nor mother, brother nor sister, nor uncle. The administration was granted to Agnes, the plaintiff's wife, the surviving sister of the intestate's father. The defendants are the children of Margaret the other sister of the intestate's father, who sue in the Spiritual Court to have a proportion upon distribution according to the late Act of 22 & 23 Car. 2, cap. 20, for settling of intestates estates, and the Judge did award distribution; whereupon they prayed a prohibition. And the defendants appearing to an attachment upon the prohibition, and denying the contempt, set forth this matter in a plea to have a consultation; whereupon the plaintiff demurs.

[497] The question is single, the intestate having neither wife nor child, nor father nor mother, but his next of kin being two aunts, one whereof was dead in his life-time, and the other having administration, whether the children of the deceased aunt shall be admitted *jure repræsentationis in loco parentis* to demand a share upon distribution, as their mother should have had if living.

It depends upon the exposition of the Act for Settling Intestates Estates, and is of great consequence; for whatever is determined by the common law to be the true meaning of this Act must be a rule to the Ecclesiastical Courts, for the Courts of

Common Law are entrusted with the exposition of Acts of Parliament, and we ought not to suffer them to proceed in any other manner than shall be adjudged by the King's Courts to be the true meaning of this Act; therefore if this Court shall award a consultation upon this point, it is final, and this sentence cannot be corrected by any appeal.

Because the Ecclesiastical Courts did before this statute exercise a kind of jurisdiction of distribution, of which notice is taken by the Act, as if it were legal; whereas by our law no such jurisdiction was allowed, but prohibitions were sent to restrain them therein, and this Act intended to restore this jurisdiction.

It will not be amiss to take a short view of the history of their practice.

Ecclesiastical Courts anciently grasped at a large jurisdiction *de debitis & catallis* upon pretence of taking cautionary oaths to perform contracts and such like, and then upon breach thereof did proceed *pro læsioni fidei;* but by statutes and mandatory writs they were contained within their due bounds not to meddle *de debitis & catallis* (which were temporal things) *nisi de testamentis & matrimonio.*

In the jurisdiction *de testamentis & de debitis & catallis* relating to them, their power was very large by the common law; for if there were no will appearing, the Ordinary had the absolute disposal of the estate.

If they would not pay debts with the estate, yet they were so far intrusted that they were not subject to suit until 13 E. 1, Westm. 2, c. 19, which subjected them to the suit of the creditors in the same manner as executors were.

Upon this their meddling with deceaseds estates, which was very beneficial before, became very troublesome, and to free themselves from it they were fain to put the administration **[498]** thereof into third persons hands, who might give them security to save them harmless from suits.

17 E. 3. When it was desired in Parliament, that administrators might have the power to sue, it was answered, that the Ordinaries might sue sith they were to answer; whereby it appears that Parliament would not discharge them of the burthen, or take notice of administrators otherwise than as their servants or attornies:

But 13 E. 3 eased them in this particular, for they being thereby bound to grant administration to the best friend of the intestate, and the administrators being made as executors, they retained only the safe jurisdiction of granting administration and calling the administrators to account.

The common law was hereupon to judge who were the best friends, and therefore if there were husband or wife, in default of them, son or daughter, in default of them or their children, father or mother, in default of them, brothers or sisters, in default of them or their children, uncles or aunts, the Ordinary was compellable to grant administration to them in their several orders.

They were bound to grant to the next friends, if they were loyal, but if they were many in equal degree, perhaps they were not bound to grant administration to all, but might choose the most fit person for avoiding confusion.

22 H. 8. This was made plain, for thereby they had a liberty expressly provided to refuse the wife, if they pleased; and if they were many in equal degree of the next of kindred, to grant administration to which they please, and refuse the rest, which liberty was a great advantage to their jurisdiction.

For they would choose him that was most obsequious to them, and when they called to account upon pretence of bestowing the overplus for the good of the deceased's soul (a device in those popish times to make profit to the clergy) they disposed the overplus as their own.

Upon the reformation that pretence vanished, but they thought it allowable to distribute the overplus amongst the kindred, according to the rules of the civil law, *de successoribus ab intestato.* And this was so reasonable, that they used that course without blame a great while, and inserted a clause into all their bonds for security to account to the Ordinary, that the overplus upon such account should be distributed as the Ordinary should appoint.

Which was more than they could justify, and it came to be questioned in *Slany's case*, Hob. 83, and Moor 864, but ended **[499]** by reference, and afterwards in *Took and Lawne's case*, Hob. 191. The administrators were willing to make a reasonable distribution; but their adversaries not being satisfied, appealed to the delegates, which

unreasonable opposition drove the administrators to the King's Courts, where it was resolved that he was not compellable to make any distribution at all; and accordingly it was resolved in *Fotherby's case*, 2 Car. 1. 1 Cr. 62. and *Levannus's case*, 6 Car. 1. 1 Cro. 201, whereby the law came to be settled and known, that they could neither compel administrators to make distribution by suit in the Spiritual Court, nor sue any bonds taken for that purpose.

The only way then left for them was this, whilst they were under deliberation whether they would grant administration to the wife or next of kin, and to which of the next of kin, they did treat with the parties, and consider what sum the overplus was like to amount unto, how that ought by their rules to be distributed, and they would prefer him to the administration that would beforehand perform such distribution by payment of monies, and giving security to persons unto whom it was appointed; and this practice held till the making of this Act whereon the question arises.

The occasion of making this Act was, because it was found very inconvenient for any administrator to pay before he received; it was hard for him to know what he might undertake before he had possession, and the Judge could not have a perfect knowledge of the true value of the overplus to give him in the measure of his distribution till after the administration ended, and the account of the estate taken.

There were public inconveniencies, which were urged to the Parliament by the civilians, who yet had another reason to desire the former methods might be changed; for the allotting distributions in this manner was but a barren jurisdiction that could not be drawn out in length; all disputes were ended *uno statu* without appeal, and the accounts of administrators were never contested when there was no adversary concerned to demand a share in the overplus upon taking them.

Having said thus much concerning their practice before the Act of Parliament, and the causes of making this law, I will now proceed to the exposition of it.

The statute is *introductivum novi juris*, and therefore ought to receive a strict interpretation in restraint of distributions, which are hereby introduced against the policy of former laws.

[500] Before the statute the administrator that had all the burthen of the administration had likewise the benefit, and when he had paid all the debts and legacies, was never more questioned upon his account, because no man could demand the overplus from him; but now by this law the overplus is given away, and he is to have no part of it, but as he stands related to the intestate, no recompence for his pains, no more than he should have had if another had been administrator. And here is not only *lucrum cessans*, but *damnum emergens*, for at the end of his administration he must give an account, which will be disputed by the parties concerned, and if he hath not acted very cautiously may bring a considerable loss upon him.

Methinks we should expound this Act as much in favour of administrators as we can in restraint of distributions and remote representatives, that are brought to participate of the benefit of the administrators thrift and good management.

But I admit that all Acts of Parliament are to be expounded according to the true meaning to be collected from the words of them, and that must be a rule in this case; therefore I will endeavour to find out that meaning, 1. By considering the reason of distribution, and the practice in the Ecclesiastical Court grounded upon that reason, as it was before this statute. 2. By considering the words of the Act relating to this clause.

As to the rules of Spiritual Courts in ordering distribution, I should have been glad the parties would have brought civilians to have informed us concerning the grounds of their law and practice in this particular.

Not having had that assistance, I have considered in the best manner I can upon the nature of the thing, whereupon I apprehend there are two motives of distribution, one in respect of the intestate, another in respect of the Ordinary that grants administration.

In respect of the intestate it may be thought an obligation upon every man to provide for those which descend from his loins; and as the administrator is to discharge all other debts; so this debt to nature should likewise exact a distribution, to all that descend from him in the lineal degrees, be they never so remote.

And because those which are remote have not so much of his blood, therefore the measure should be according to the stocks, more or less as they stand in relation to him.

Upon this reason representations are admitted to all degrees in the lineal descent.

[501] There is no such obligation to the remote kindered in a collateral line, therefore they are not regarded but in respect of proximity as they are next of kin, it being to be supposed, every man would leave his estate to his next kindered: but the children of those that are deceased come not within this reason, for they are a degree more remote.

In respect of the Ordinary it may be considered that those that are of equal degree and next of kin, be they never so many, ought to be looked upon by the Ordinary with an equal eye, therefore when he has preferred one to the administration, he ought to give some recompence to the others, that he may not appear partial, they being as capable to demand and have administration as the other. But the children of those which are deceased have not the same pretence; for they were not capable to contest the administration.

Another reason there is to exclude representations in remote degrees, that thereby the estate might come to be divided into so many and so small parts that the benefit would not be valuable.

I have heard civilians say, that representations are rejected in remote degrees of collaterals by their law upon this ground.

Now the case of brothers children is of a mixed consideration, 1. In respect of the obligation, for the intestate was a kind of parent to his brothers children, and in that respect marriages between them are prohibited. 2. There is no danger that the subdivisions should be very many and the estate reduced into very small parts; for brothers and sisters cannot be many, as cousin germans and other remote degrees may, therefore there may be reason to admit brothers children to distribution by representation, and reject all farther degrees.

Having touched the reasons whereupon I suppose distribution grounded, concerning the practice, I can only say what I have learnt by enquiry from civilians of my acquaintance, having had no other means to be informed of it, the Bar not having produced any precedents of the Spiritual Courts on either side.

In the case at Bar the order of the Spiritual Court is for a distribution to the brothers children of the collaterals, who are not the intestates brothers children; and by that it should seem as if their law (if we should let them alone) would carry on the distribution by representations to a more remote degree.

[502] But I have been informed by eminent civilians of my acquaintance, I suppose I may name them without their displeasure, Sir Leoline Jenkins, Judge of the Prerogative Court, and Sir Robert Wiseman Dean of the Arches, that it is the constant and clear practice of their Court to reject all representations of collaterals, except children of the intestate's brothers and sisters.

I am sorry the plaintiff in this prohibition did not seek redress by way of appeal, that we might have seen what would have been finally ordered in their law, by which we might have known how their law stood, as to this point, which might have given us some light towards the understanding this Act.

I must confess that I do acquiesce in the opinion of those learned men, and take their law to stand in this point for the exclusion of all representations to remote collaterals. I give little credit to the sentence in this cause: I remember the same Judge, the Archdeacon of Huntington, the other day ordered distribution amongst the kindred of the first intestate upon an administration *cum testamento annexo*, where the *residuum bonorum* was devised to the executor, who died intestate, whose next of kin ought clearly to have had it, which occasioned our granting a prohibition upon sight of the sentence. This being the same Judge, I have the less reverence for his opinion in the other matter.

I will now consider the words of the Act of Parliament, whereupon this question ariseth, they are these,

[*The residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them.*

Provided that there be no representations admitted amongst collaterals after brothers and sisters children.]

Upon these words, the question is thus, Whether in the collateral line only the intestate's brothers and sisters children can be admitted to have distribution *jure repræsentationis in loco parentis*, or whether representations are admitted in remoter degrees of collaterals to the children, of such as were brothers and sisters to the collaterals.

In short, whether the words *brother* and *sister* shall relate to the intestate, or to the collaterals.

I hold, that the words of the Act must be understood of brothers and sisters to the intestate, and not of brothers and sisters of remoter collaterals; for these reasons:

[503] 1. All other relative terms generally expressed through the whole Act have the intestate for their correlative, so (*wife*) is meant wife of the intestate, (*children*) are children of the intestate, (*heir at law*) is of the intestate, so that in the most plain and obvious sense, the intestate ought here to be taken for the correlative to the words brothers and sisters.

2. My second reason is, because the distribution is given by the Act for their relation to the intestate, and not for their relation to the collaterals, therefore the relation mentioned ought naturally to refer to the intestate, and not to the collaterals. There may be cases put wherein brothers and sisters children of collaterals may be no kin to the intestate, if they were by the half blood, and it cannot be pretended that such shall have a share in the distribution. Now why should the words be taken in the sense that comprehends those that have no title to distribution?

3. My third reason is, because as these words comprehend more than ought to have distribution in some instances, so they fall short and leave out many that by parity of reason ought to have distribution, and therefore this sense they would put upon the words is very improper.

As for instance.

Suppose the next of kin are nephews by several brothers, and some of them are dead, leaving children, these children are not brothers children to the collaterals, and cannot within the words claim any share; but if by chance any of them had had uncles surviving, then they had been brothers children to the collaterals.

So if the next of kin are cousin-germans, and some of them are brothers to one another, others are not; the children of such of them as had brothers that survived the testator shall have a share, but the children of such who had no surviving brothers shall have no share, which is most absurd, for they ought to have a share as they relate to the intestate, and not as they relate to the collaterals.

I must needs say it is hard to imagine the Parliament could oversee these absurdities which are so plain in consequence, and they had been so easily avoided, that we ought for that reason to believe, that they meant the relation to the intestates in this as well as other places.

If they had meant the relation should have been to the collaterals, how easily might it have been expressed so, and by words that would have brought in all cases in parity of **[504]** degree, as if it had been thus expressed (*Provided that there be no representations admitted amongst collaterals after their children*).

This had been without ambiguity or question, and it had extended to all cases *in pari gradu*, and to no case but where there was kindered to the intestate.

I cannot imagine the Parliament meant to let in representations in remote degrees, because they might so easily have expressed it in plain terms, and they would certainly have done it in this Act, which is carefully penned in other parts of it.

4. A fourth reason is, because the excluding representations in a remote degree agrees with the reasons upon which distribution is grounded. For, 1. Nephews and nieces to the intestate are of so near relation, the intestate having been as a parent to them, that they are of great regard, whereas remoter degrees have no regard but for their proximity (because there are none nearer) and therefore no reason to admit representations amongst them, to bring in a remote degree to share with those that are nearer of kin. 2. Again, nephews and nieces cannot be many, so that the division cannot come into very many parcels; but in a remote degree there may be very many of the same degree, and to admit a subdivision to the children of any deceased would make the shares of such children very inconsiderable, not worth demanding.

5. My fifth reason is, because by the opinion of the learned, the law and practice of the Spiritual Courts before this Act did exclude all representations of collaterals, after the intestates nephews and nieces.

The whole scope of the Act was to make their jurisdiction as to distribution legal, which before was condemned by the King's Courts, and the words of the Act (*legally representing*) (*pro suo cuiq; jure*) and (according to the laws in such cases) and (the rules and limitations set down) shew that there is a reference to their laws. Now if there were an opinion this way before the Act; there is great reason to believe this clause was founded upon that opinion, and to expound it that way. I never heard of any opinion that before the Act the representations were bounded to brothers children of collaterals. It may be the learned doctor who hath ordered distribution in this case, has done it upon an imagination, that this clause has changed their law in this particular, taking it in that sense that my brothers do that have argued against me.

[505] I shall now observe the objections that are made against me.

1. *Object.* They say, *Ad proximum antecedens fiat relatio*, and the next precedent relative is the word *collaterals*.

Sol. This maxim hath always this restraint, that it must agree with the sense, so that it admits an enquiry which relative best agrees with the sense, and we must judge according to the sense, and not by the order of words.

2. *Object.* They say it is strange this proviso should restrain representations of collaterals to one particular case, which were left under a generality before.

Sol. I see no cause of wonder, if it were so; but that which is called a generality, is by the words (*legal representatives*) and if by the course of their law representations were not admitted to other collaterals than brothers and sisters children, then those remoter degrees had no legal representations; so that this clause is but explanatory of the word (*legal*) in the sense of their law, our law having no notice of it at all.

3. *Object.* They say there is no inconvenience in the other exposition, but it seems reasonable that the nephews in all cases should have a share with the uncles.

Sol. I have already shewn by my reasons, that by the other exposition the symmetry and reason upon which distribution is grounded fails, and many absurd cases will follow upon it.

4. *Object.* Then they object that there are few Acts of Parliament that provide for all cases; there are *casus omissi* upon the most clear laws, and the sense of an Act must not for that be lost.

Sol. I confess a law clearly penned shall have its force in cases it does reach, though it does not reach all cases; but where a law is penned, that it may be expounded one way or other, and there is a question of the meaning of it, it is more natural to believe it was meant in that way that is clear, and that reaches all cases that are in parity of reason, than in that way that has absurd consequences, as this hath, both by including those which were not intended, and leaving out those which stand in the same degree, as I shewed before.

To conclude, I conceive this Act was intended for a plain rule, and I think it much better to interpret it in the most plain and obvious sense which will establish the succession of personal estates, according to reason and symmetry, than to strain to find out another sense for the sake of remote kindred, that are of no regard, which will produce apparent absurdities, **[506]** and subject personal estates to fanciful and intricate disputes, that will need another Act to compose and settle.

Having desired the opinion of the learned doctors of Doctors-Commons upon the question following,

Whether before the late statute of 22 Car. 2 for settling intestates estates upon ordering distributions, representations were admitted amongst collaterals in remote degrees? or, whether there were any bounds set by their law or practice beyond which representations were rejected, and what those bounds were? or, whether it was not merely discretionary as the Ordinary thought fit? I received this answer from them:

In making distributions of intestates estates amongst collaterals, our civil law, and the practice of the Ecclesiastical Courts have constantly observed these two rules.

The first is, *repræsentatio in filius fratrum & sororum tantum locum habet, ad ulteriores vero collaterales non extenditur.*

The second is, that in case there be no brothers nor brothers children, *vocantur ad successionem reliqui collaterales quicunq; in gradu sunt proximiores, remotioribus exclusis. Ita quod infallibiliter semper prior in gradu sit potior in successione*, whereby representation must needs be out of doors, the next of kin, whether one or more being only to be admitted to the distribution.

10 May 1681.

ROBERT WISEMAN,
THOMAS EXTON,
RICHARD LLOYD,
EDWARD MASTER,
WILLIAM TRUMBAL.

The REPORTS of SIR CRESWELL LEVINZ, Knt. late one of the Judges in the Court of Common Pleas, at Westminster, containing CASES HEARD and DETERMINED in the COURT of KING'S BENCH, during the time that SIR MATTHEW HALE, SIR RICHARD RAINSFORD, and SIR WILLIAM SCROGGS were CHIEF JUSTICES there; as also of certain CASES in other Courts at Westminster, during that time. Translated into English by Mr. SERJEANT SALKELD, and others of the Middle Temple. The Third Edition, Carefully Corrected. Vol. I. 1793.

[1] TERM. SANCT. MICH. ANNO 12 CAR. II. IN BANCO REGIS.

SLATER *against* SLATER AND HIS WIFE.

Husband and wife taken on an obligation by both, and she discharged. *Vide post.* 51. *Vide* 1 Salk. 115. 1 Mod. 8, 135. 1 Sid. 20, 395. 2 Keb. 355, 442. 6 Mod. 17, 105. *Habeas corpus*, where without motion.

Debt was brought against them on an obligation sealed by them both, and both were taken by *capias:* it was moved for an *habeas corpus* to bring them into Court, to the intent that the husband only might be committed in custody, and the wife discharged; (and it was held) by the Court, that this *habeas corpus* for removing the bodies might have been for them without motion; but where the party is committed for a crime, there it ought to be on motion.

HEATH *against* PAGET.

Assise of an office in B. R. S. C. 2 Keb. 3, 13, 19, &c. 1 Sid. 40. Palm. 285.

Assise of a freehold (laid) in Westminster, of the office of keeper of the writs and records of this Court, and shews it to be an ancient office grantable by the Chief Justice to any person for life, to be exercised by himself or his sufficient deputy; and that the office being void, Heath Chief Justice, granted it to the plaintiff: the defendant prays a day for excepting to the writ, and had it; and then took an exception (viz.) that the writ being sued in the times of the late troubles, was by [2] security and pledges, whereas the writ in Latin is *pone per vades & plegios*, and *vades* is sureties: and for this exception the writ was abated by consent. But as I have

heard, this exception was over-ruled in the Common Pleas the last term: and note, the writ in the Register, 169 b. is *pone per vadium, &c.* and in F. N. B. 177 it is *pone per vad', &c.* which may be *vades* or *vadium;* and thereupon a new writ was brought, returnable this term, in Latin, and the tenant prayed a special imparlance (with) *salvis, &c.* until another term: but by Twysden Justice, this is against an officer of the Court, who ought to be always present (in Court) and this writ is (to be) a speedy remedy; and thereupon time was given to the defendant for excepting to the writ, but not till another term, but to another day in this term: and then the exception was, that the writ in the teste was *duodecno* of this King, for *duodecimo*, and this was prayed to be amended, it being only an error of the clerk (or writer) and cited 8 Co. 160. 1 Cro. *Turner* against *Palmer* in a *quare impedit ecclesia* for *vicaria* amended. Hob. 118, *Brickhead* against *The Archbishop of York*, in a *quare impedit vaccaria* for *vicaria* amended, the instructions being right. And Hob. 249, in ejectment, *divisit* for *dimisit* in the writ was amended: but on the other side were cited F. N. B. 14. Hob. 128, *Oglethorpe* against *Maude*, 9 H. 7, 17. 5 Co. 121. Also, this is the substance of the writ, viz. the date, and it is the ignorance of the clerk in not duly dating the writ: and as to that which is said in 8 Co. 159 b. that false Latin in writs is not amendable, but a word that is no Latin is, Twysden and Wyndham Justices said, that the contrary thereof had been oftentimes adjudged, and the difference is, if the word be of the substance of the writ, be it (either) false Latin or no Latin, it is not amendable; but if it be not of the substance of the writ it is amendable, be it false Latin or no Latin; and this word, viz. the date, is of the very substance of the writ, for if it has no date it is not pleaded in another assize. And for this fault only the writ was abated by the whole Court, divers other exceptions of less force being over-ruled: and after in Trinity term on a new original brought the assize was tried here at Bar, and verdict and judgment for the tenant.

[3] TALBOT *against* BACON.

Battery by husband and wife, and taking of goods not cured by a verdict, finding not guilty as to the goods. *Vide* Hob. 184. 2 Cro. 665. Noy's M. S. Case 17. Hard. 166. Ld. Raym. 1208. Buller's N. P. 20. 1 Com. Dig. 108, 576.

Trespass (was brought) by the husband and wife, for the beating of the wife, and taking the goods of the husband; and on not guilty (pleaded, &c. a verdict was for the plaintiff for the beating, and for the defendant for the residue: and it was moved in arrest of judgment, that the action was not well brought as to the goods, and the severance (thereof) by the verdict had not cured it; and cited Hob. *Revel* against *Gray*, and 2 Cro. *Buckley* against *Hales*. And judgment was stayed, no body appearing on the other side.

HUDLAND *against* POVY.

S. C. 1 Keb. 127, 167. Obligation to perform covenants, and no covenants pleaded. *Vide post.* 77, 45. Raym. 27. 1 Sid. 105, 308, 456. 1 Mod. 35. 2 Mod. 285. 1 Keb. 130, 451.

In debt on an obligation, the defendant demands oyer of the condition, which was to perform covenants in an indenture, and then pleads, that there were not any covenants in the indenture; whereupon the plaintiff demurred and prayed judgment, (for that if there were no covenants the obligation is single) and had it, except cause (shewn, &c.)

DAYE *against* WEBB.

Assumpsit to purchase at the best rate he could. *Vide* 3 H. 4, 14. 11 H. 6.

In assumpsit the plaintiff declares, that in consideration of, &c. the defendant promised to purchase such lands at the best rate that he could, and assigned a breach, that the defendant had not purchased the lands; on which the defendant demurs: and it was now argued for him, that the declaration is not good, not having averred

that he could purchase them: and Twysden Justice held, the *assumpsit* or promise absolute, and that he had taken upon him to purchase them absolutely, but that the price was to be so reasonable as he could. (But by) Foster Chief Justice, he hath not undertaken to purchase them except the owner will sell; and he is only to purchase them at the best rate that he can, and therefore he is not to purchase them if he cannot. But judgment was ruled for the plaintiff, except cause (shewn.)

[4] MANBY AND RICHARDS *against* SCOTT.

[S. C. 2 Sm. L. C. 11 ed. 446. Referred to, *Moylan* v. *Nolan*, 1865, 17 Ir. C. L. R. 442; *Bazeley* v. *Forder*, 1868, L. R. 3 Q. B. 564; *Beale* v. *Arabin*, 1877, 36 L. T 249. Discussed, *Wilson* v. *Glossop*, 1887-88, 19 Q. B. D. 381; 20 Q. B. D. 354; *In re Rhodes*, 1890, 44 Ch. D. 107.]

Whether the wife's contract shall bind the husband or not. S. C. 1 Mod. 9, 124 to 243. 1 Keb. 69, 80, 87, 206, &c. 1 Sid. 109, 425. 1 Vent. 42. 2 Vent. 155. *Vide* 1 Salk. 116, 118, 189. 6 Mod. 239. Allen 61, *post* 6, 7.

In assumpsit on (issue) *non assumpsit*, a special verdict at Guild-Hall, before Mallet Justice, found, that Scott's wife departed from him without his consent, and lived twelve years separate from him, and then returned; but he then would not receive her, nor allow her any maintenance, and discharged (or forbid) tradesmen, particularly the plaintiffs, from trusting her with any wares: and that the plaintiffs being mercers, sold the wife wares to the amount of 40l. and that the prices were reasonable, and the things fit for her quality; and if the husband was obliged to pay for them they found for the plaintiff, and if not for the defendant.

This case was argued at the Bar three several times, first by Alleyn for the plaintiff, and Wylde for the defendant; secondly by Finch for the plaintiff, and Serjeant Beare for the defendant; and thirdly by Jones for the plaintiff and Serjeant Baldwin for the defendant, and afterwards by all the Judges at the Bench, viz. Foster, Chief Justice, Mallet, Twysden and Wyndham: and the whole Court agreed, that the verdict was sufficient, though it did not find what the goods were; for although what are fit and necessary, is to be tried by the Court, yet it is that Court before which the cause is tried, and not the Court here before which it comes to be adjudged on the special verdict: and that these goods were fit for her quality is agreed by (both) the jury and the Court where the cause was tried. But whether the husband should be charged the Court was divided in opinion; Twysden and Mallet held that he should be charged; for when she returned to her husband, and he would not receive her, nor provide a maintenance for her, if no body would trust her (so as) to charge the husband, she must starve, for she cannot earn her living by her labour, for whatever she gains by her labour the husband shall have; and therefore of necessity she must be trusted, and the things being necessary for her living, the husband ought to be charged for them, and the husband's prohibiting (forbidding) the plaintiffs to trust her, cannot deprive her of the liberty which the law gives her for preservation of her life; for the law for necessity dispenses with things which otherwise are not lawful to be done, as to throw down my neighbour's house **[5]** for preventing the spreading of fire, to throw goods out of a boat when it is overladen, and the like; and they agreed the case put by Fineux, 21 H. 7, 40, that the wife cannot provide bread for the family (so as) to charge the husband: but here the provision is necessary for the maintenance of her own life; and though alimony be recoverable in the Spiritual Court, yet if the husband be obstinate, and will not obey their sentence, how shall the woman live? And if he will obey it, yet how shall she live in the mean time? And (as to) the cases cited at the Bar of writs to the sheriff, for delivering to the wife reasonable estovers, those were in time of H. 8, and (have been) long time disused. And Twysden Justice held, that in this case the plaintiffs might have trover against the husband for the goods, if the contract be void, which all the others denied; the goods being delivered (by the plaintiff) and (he) not to rehave them: and the said two Judges held, that as the husband shall be bound in trespass for a trespass done by the wife, or (in) trover for goods taken by the wife,

so he shall be here for goods sold to her or relief of her necessity; and to maintain the opinion for the plaintiffs, were cited 20 H. 6, 26. Dyer 234. 11 H. 6, 30. Also 10 Co. *Bishop of Salisbury's case*, that a bishop may grant an office of necessity notwithstanding the statute. And 9 Co. 73. A *feme covert* excused in a ravishment of ward for necessity, because she has nothing to pay; and it is no advantage to the husband, for he is charged only for necessaries, and those he must have provided if the wife had continued with him, and divers other matters were said, and divers other authorities cited on this side.

But of the contrary opinion were Foster and Wyndham, and on this part it was argued, that the husband shall not be charged; for when she departs from her husband against his will, and remains so long absent, and returns again at her own pleasure, the husband shall not be obliged to maintain her after her return, any more than when she was absent; for if it were so, wives might leave their husbands in their youth, and return in their old age, when they cannot be so assisting to their husbands as before; and their society, assistance, and comfort to their husbands is one consideration of their maintenance: a *feme covert* cannot make any contract to charge her husband without (his) asssent, precedent or subsequent, expressed or implied; they did not deny, but that as circumstances **[6]** may be, an express or implied assent of the husband may appear to a jury, so that the contract of the wife may be the contract of the husband; as if the goods come to his house, or he appears well content with the use of them; but here the contrary appears, for the plaintiffs were forbid by him to sell to (or trust) his wife, and it does not appear that he ever had knowledge of this sale, and so could not approve thereof; and the jury having found only the forbidding and the sale, the Court is obliged to adjudge according to the law, that the contract is void, for a *feme covert* has not power of her self to make any contract: and it is not like to the case of infants, for their contracts are to some intents good, and may be made good by them at their age; but the contracts of *feme coverts* are absolutely void, for they have not any power or wills, but (are) subject to the will of their husbands; every man may trade with what tradesman he will, exclusive of all others; but by this means they shall (be forced) against their will to trade with such as their wives please. And the laws of England have provided for wives more reasonably than to make them their own carvers (viz.) to go to the Ordinary for alimony, the costs of which suit the husband shall pay, if the wife hath just cause of complaint. 1 Cro. *Green's case*, and to supply it in case of the husband's obstinacy, 8 H. 3, Rot. Claus. Memb. 19, *vel.* 39, *Fretchingfield's case*, & 4 H. 3, Rot. Claus. Memb. 3, where the husband was obstinate, writs *de estov. habend.* where directed to the sheriff to levy estovers, (*i.e.* maintenance) for the wife, of the husband's goods, which cases though ancient, are still law, although the law has now provided another remedy against the obstinacy of the husband, by *excom. capiendo.* And in maintenance of the opinions on this side, were cited 21 H. 7, 40. That she cannot charge her husband for victuals bought for the family without his command precedent, or assent subsequent. F. N. B. 120, G. The contract of the wife shall not charge her husband (any) more than the contract of the servant. 4 Co. *Forse and Hemling's case*, she can neither make a will, nor revoke a will made before marriage, because she has no will, and therefore the marriage is a revocation, for else the will would be irrevocable. 2 Cro. 640, Tracy against Dutton her receipt after marriage of the rent of her own land, shall be no discharge against the husband, although the tenant had no notice of **[7]** the marriage, 31 E. 1, tit. Debt. 663 & 3. 20 H. 6, 22. 27 H. 8, 24, 25. 13 R. 2, tit. Annuity 50. And those Judges held the prohibition (or forbid doing) by the husband (to be) material.

But the Court being thus divided, the cause for the great weight thereof, was adjourned into the Exchequer; and there, after divers arguments at the Bar, it was solemnly argued by all the Judges severally at several days at the Bench, where Tyrrell, Justice of Com' Banco, joined in opinion with Twyden and Mallet; all the rest, viz. Bridgman, Chief Justice of C. B. Hale Chief Baron of the Exchequer, Hide and Brown Justices of C. B. and Atkyns and Turner Barons of the Exchequer, and Foster Chief Justice, and Wadham Wyndham Justice of the King's Bench agreed, that the husband should

not be charged, but that judgment ought to be given for the defendant: and so it afterwards was on a motion in Banco Regis, and the judgment was there entered in Easter term, 15 Car. 2.

HERNE *against* ———.

On a *fi. fa.* against an executor, the sheriff returns no goods as to the debt, but levies the damages of the testator's goods, it is ill; and all subsequent proceedings thereon are also ill. *Vide* 3 Lev. 100. 1 Sid. 317. Hob. 4. Yelv. 18, 33. Cro. El. 592, 734, 822. Latch. 140. Palm. 443. 2 Cro. 4, 394. Mo. 246, 680. 1 And. 55, 160. Doug. 4. 2 Bac. Abr. 401, 443. 1 Term. Rep. 691. 2 Term. Rep. 126.

A *scire facias* against an executor, with a *fieri facias* for levying the debt and damages *of the testator's goods, if so much* (in his hands) and *if not*, then damages *of his own goods:* the sheriff returns, that the executor had not goods to satisfy the debt, but that he had levied the damages of the testator's goods; whereupon issued another *fieri facias*, surmising that the defendant had wasted the testator's goods, on which the sheriff returns, that he had wasted the goods: and this was traversed and tried, and verdict for the plaintiff, and on motion in arrest of judgment, it was stayed by the whole Court, for (that) the return of the writ was ill; for the goods of the testator ought to be charged with the debt, and not with the damages, except they are sufficient to satisfy both, but the damages are to be levied on the goods of the executor for the delay; and although that the trial and verdict be on the return of the second writ, and the first admitted (to be) good, and accepted by the plaintiff, and that it is the advantage of the defendant to have the costs levied of the testator's goods, yet all the proceedings on the second writ being founded on the return of the first, which is ill, all is ill. And by the whole Court judgment was stayed.

[8] THE KING *against* WARD EXECUTOR OF WENTWORTH.

Felo de se, is not murder within the exception of murder in a pardon.

It was found by an inquisition on a writ directed to the sheriff, that Wentworth, of his malice forethought, murdered himself; and this writ issued after the restoration of King Charles II. but the murder was done long time before. And now the question was, whether by the general pardon of all offences, forfeitures, &c. except murder, this murder was pardoned, or excepted, so that the King should have the goods? Foster Chief Justice, and Mallett (said) this is a fact excepted out of the Act, by the exception of murder, and that a *felo de se* is a murderer in the highest degree: and divers precedents were produced where it had been so taken; but all (of them) being *sub silentio*, Twysden and Wyndham held the contrary: they said, that *felo de se* and murder are distinct things, and distinctly treated of by all authors; and the reason why murder is excepted out of all statutes, is not because it is a Mosaical law, but a patriarchal law inforced by nature, that none shall destroy himself: but that the vengeance of blood is Mosaical, and given only upon the murder of another: but in the case of *felo de se* no vengeance of blood can be, but only a forfeiture of goods given to the King for the offences which he has done to the law of nature, and depriving the King of a subject; and the meaning of the exception of murder out of pardons is, (in order) for putting the murderers to death, which cannot be in this case; and so the Court was divided in opinion: but afterwards Mallett being withdrawn from his place, Kelynge coming in his room, joined in opinion with Twysden and Wyndham, and gave (his) opinion, that this murder was pardoned, and not excepted by the exception of murder; and so was the forfeiture for it also, the offence (itself) being pardoned: but where it was argued at the Bar, that the pardon being before the inquisition, and so before the goods came to the King, should enure to the executors as a release, though that the offence had not been pardoned; it was denied by all the justices; for the King's title was before the inquisition, and the goods forfeited to him immediately by the fact.

[9] THE KING *against* READ.

No new trial on a defendant's acquittal in criminal or capital cases: otherwise on a conviction. *Vid.* 1 Sid. 143, 153. 1 Keb. 124, 127, 138, 198, 213, 214, 233. Raym. 34. *Vide post* 124. 1 Sid. 153, 154.

Indictment of perjury, and the defendant acquitted, motion was for a new trial for the King, for that divers witnesses were absent, Wyndham Justice held it grantable, it not being touching life; to which it was answered, that new trials may be in criminal cases at the prayer of the defendant, where he is convicted (but) not at the suit of the King where he is acquitted, no more in criminal cases than in capital; and whereas two cases were cited, wherein new trials had been (granted) on the King's behalf; Twysden said, that was in the late troublesome times, and by the parties assent; and thereupon the Court would advise and gave time for searching precedents.

Note, That afterwards in Michaelmas term, 13 Car. 2, between *The King and Bowden*, an information of perjury, and the defendant acquitted, and motion was, for a new trial on affidavit, that one of the witnesses was absent by reason of sickness; and denied by the Court: (for) the party being acquitted, cannot be tried again; but after a conviction, a new trial may be had for the defendant on good cause: and in Trinity 15 Car. 2, *The King* against *Fenwicke and Holt*, information for perjury, and the defendant, acquitted, motion was for a new trial, on affidavit that some of the witnesses were kept away by practice of the defendant; and Wyndham Justice held it grantable, being in a case only criminal, and not capital: (but) Kelynge said, no case could be shewn of a new trial in a criminal case, more than in a capital; for the fame of the defendant shall not be often drawn in question for the same thing, no more than his life. And Foster and Twysden directed an information to be brought for the practice, and if it were found a new trial should be granted; to which Wyndham Justice agreed: and this case being moved again in Michaelmas 15 Car. 2, Foster, Twysden and Kelynge continued their opinions; (but) Wyndham was contrary, and said that in an information for the practice he would not have the same punishment that he would have for the perjury, and therefore held a new trial grantable. The *others* (said) the course of the Court is the law of the Court, and better it is that an [10] innocent person should suffer than the law changed. And *note*, in Hilary term, 15 & 16 Car. 2, in the case of *Sir John Jackson*, where he conveyed away the witnesses in an indictment of parjury, an information was brought against him for the practice, and he convicted and fined 1000 marks; and then as I suppose a new trial was granted, the information being brought by the direction of the Court to that intent; but I did not hear any rule for a new trial given at the time.

See 2 Jo. 163, and 2 Show. 165, *Rex* versus *Smith*, a new trial after a verdict for the King, on an information for perjury.

[11] TERM. SANCT. HILL. ANNO 12 & 13 CAR. II. IN BANCO REGIS.

PLUNKET *against* HOLMES.

Intrat. Hill. 1658, B. R. Rot. 521.

Devise to one for life, and if he die without issue living at his death, remainder to another in fee; *quære* if any executory devise, or a contingent remainder? S. C. Raym. 28. 1 Sid. 47. 1 Keb. 29, 119. 2 Danv. 519, 15. 1 Salk. 224, 225. *Vide* 4 Mod. 282. 3 Lev. 208, 434. 1 Salk. 228, 233. 2 Danv. 520. Fearne Con. Rem. 207, 303, 432.

In ejectment, not guilty (was pleaded) and a special verdict (found) on which the case was, a man seised in fee, devised the land to his eldest son Thomas for life, and if he dies without issue living at the time of his death, to Leonard, another son, and his heirs; but if Thomas had issue living at his death, that then the fee should remain to the right heirs of Thomas for ever: Thomas enters after the devisor's death,

and suffers a common recovery (under which the defendant claims) and dies without issue; whereupon Leonard enters and makes the lease to the plaintiff. This case was argued twice in this and the following term, by Scroggs and Alleyn for the plaintiff, and Jones and Finch, the King's Solicitor, for the defendant, and two questions (were) made. 1. If Thomas had by the will only an estate for life by the devise, with a contingent remainder to Leonard, or whether the fee was vested in Thomas, with an executory devise to Leonard? 2. If it be an executory devise to Leonard, if the common recovery has barred it? And for the plaintiff it was argued, that Thomas had a fee, for though only an estate for life be devised to him, yet by discent of the reversion the whole fee was in him, which merged his estate for life, and this is executed in him; and then the estate to Leonard cannot be any other than an executory devise, for when the whole fee is given or vested in one person, with a limitation of a fee to another upon a contingency, this cannot be a remainder, for one fee cannot remain **[12]** upon another, but of necessity must take effect as an executory devise: but when only part of the estate is disposed, as for life, or in tail, and the residue given to another on a contingency; as to the right heirs of J. S. who is in life, or to such (a person) as shall be living in the house at such a time, this is a contingent (remainder). But here the whole estate is in Thomas, either by the devise or by discent, and then the devise to Leonard, must of necessity be an executory devise which being to happen within the compass of a life, has been allowed; as in *Pell and Brown's case*, 2 Cro. &c. And as to the second (question) they also relied on *Pell and Brown's case*, where it is adjudged, that a recovery shall not bar in such case. But on the other side it was argued, and so resolved by the whole Court in Michaelmas term, 13 Car. 2, that Thomas took but an estate for life by the will, and the remainder to his heirs not executed; and though he be the heir to whom the reversion descends, that shall not drown the estate for life contrary to the express devise and intent of the will, but shall leave an opening as they termed it, for the interposing of the remainders when they shall happen to interpose between the estate for life and the fee; and (they) compared it to *Archer's case*, 1 Co. where though Robert the devisee for life was heir, yet the remainder to his next heir male was contingent, and so not an estate for life merged by the discent of the reversion: and so the estate of Thomas here being only for life, by this devise the remainder to Leonard was a contingent remainder, and barred by the recovery; and then the second point will not come in question, whether an executory devise shall be barred by a common recovery. But on the first point they all gave judgment for the defendant.

ANONYMOUS.

Custom to take apprentices laid in the *solet* only. S. C. 1 Keb. 376, 469, 512.

Covenant (was brought) and declared on the custom of London: that time out of memory, &c. every freeman (*solebat*) hath used to take apprentices, who by the same custom have used to be bound by their covenants to serve faithfully; and that the plaintiff took the defendant apprentice by indenture, whereby he covenanted to serve the plaintiff for seven years, and that he had not done it, but had departed from his service without licence. And on issue, that he had **[13]** served him according to the covenants, and had not departed: verdict was for the plaintiff; and it was moved in arrest of judgment by Jones, that the declaration being in the *solet* only, and not in the *debet* and *solet*, is not good; and cited 22 E. 4, 8, and 1 Cro. *The King and Bagshaw*. And if he be obliged by the covenant to serve at all, being an infant, it ought to be by the custom. To which it was answered and resolved by the Court, that the action being founded on the covenant, and the custom (being) but inducement, it is sufficient: and gave judgment for the plaintiff, *nisi, &c.*

RADFORD *against* BLUDWORTH.

One does an act of bankruptcy, and sells the land, and five years after does another act, on which a commission issues. S. C. 1 Keb. 11. 2 Sid. 96, 114, 176. *Vide post* 17.

In ejectment a special verdict (found) a merchant seised of lands, and indebted, in 1643 committed an act of bankruptcy; and in 1645 was outlawed, and in July 1649, sold the lands to the lessor of the plaintiff; and in 1649 was outlawed again. In 1653 a commission of bankruptcy was sued and in 1657 he declared a bankrupt; and the commissioners sold the lands to the defendant, who entered and gained possession, on which the lessor brought the ejectment. And *first*, It was objected, that the commission not being sued within five years after 1643, ought not to have issued at all; for when the statute of 21 Jac. restrains the suing of the commission to five years after the act of bankruptcy committed, it ought to be intended the first act of bankruptcy. But all the Court were against this, (and that) it might be sued within five years after an act of bankruptcy. *Secondly*, It was objected, that the verdict was insufficient, not having found that he permitted himself to be outlawed, with intent to defraud his creditors; as the words of the statute are, and he may be outlawed without his knowledge. To which Finch at the Bar answered, that in a special verdict it shall be so intended. But *thirdly*, The principal question was, whether by the commission issuing in 1653, and he being found a bankrupt thereon, it should now relate to the first act of bankruptcy committed *in* 1643; so that the sale by the bankrupt in 1648, should be now defeated by the vendees, by reason of acts of bankruptcy done in 1643, or in 1645; which were more than five years before the commission sued? And it was resolved by all the Court, that the sale shall not be defeated by any act of bankruptcy made before **[14]** the sale, if the act was not made within five years before the suing of the commission: for if a man does an act of bankruptcy in 1654, and continues in possession till 1658, and then sells, and after commits another act of bankruptcy; and in 1660, a commission is sued, the vendee is safe, no commission being sued within five years after the act of bankruptcy made in 1654; for the act to avoid the purchase must be done within five years before the commission, and also done before the sale.

And in Easter term 16 Car. 2, a man did an act of bankruptcy in 1651, and in 1657, did another act; and in 1658, made a lease of lands: in 1660, a commission issued, on which he was found a bankrupt, and the land sold, and there it was again resolved, that the commission was well sued within five years after the last act; although not within the five years before the commission, and also before the lease, the vendee of the commissioners should avoid the lease; which I myself heard and observed.

MAYOR AND COMMONALTY OF LONDON *against* BERNARDISTON.

Return on a *habeas corpus* to the City of London. S. C. 1 Keb. 32, 35, 39. 3 Sid. 178. *Vide* 6 Mod. 122. 1 Sid. 284. 1 Mod. 47, 48.

It was returned on a *habeas corpus*, that London is an ancient city, and that time out (of mind,) &c. there had been an ancient beam, called the King's beam, maintained by the city; to which all foreigners have used to bring all their goods usually sold by weight to be weighed, and their custom to make by-laws, and a by-law, (made) that every foreigner who sells any goods usually sold by weight without bringing them to the beam to be weighed, shall pay 13s. 4d. for every five hundred weight, to be recovered by the Chamberlain in the Sheriffs Court, and not elsewhere; and that no essoin, protection, &c. shall be allowed: and that Bernadiston being a foreigner, had 3300 weight of raisins, things usually sold by weight, without bringing them to the said beam to be weighed; and for this forfeiture he was sued in the Sheriffs Court; and this is the cause of the imprisonment. And on this return divers exceptions were taken and argued this term and the term ensuing, at divers times, by Jones, Glyn, and Becus, for the defendant **[15]** Bernardiston; and by Finch the King's Solicitor, Wylde

the King's Serjeant, and Allen for the mayor and commonalty. The *first exception* was, that the by-law for bringing all goods usually sold by weight was unreasonable; for they are oftentimes sold by lump, and then (there is) no need of weighing; and to put all foreigners to this charge, trouble and attendance to no purpose, was unreasonable; but if it had been, that all goods when they are sold by weight should be brought to the beam and weighed, it might be to some purpose, for preventing false weights; and compared it to the case in Mich. 1654, between *Alant and Janon*, where a custom to grind all the grains spent in his house was void; for he may use grain there without grinding: but if it had been to grind all grain ground and spent at his house, it might be good. But to this it was answered, and at length resolved by the Court, that the by-law was good, for this by-law was founded upon the customs of London, which are of such force, that they shall stand against negative Acts of Parliament; as where Magna Charta, cap. 36 says, *It shall not be lawful for any to give lands in mortmain*, yet they might alien in mortmain before their charter of 7 R. 2, as appears by 45 E. 3, 36. And this custom was reasonable in any place, for it is of great use for preventing of false weights between the buyer and seller, and it is also of great use for preventing deceit in the King's customs, by comparing the weight entered at the Custom-House with the weight at the beam, and such deceits are most usually committed by foreigners; and though that in truth they sell their goods by weight at their houses, they may say that they sold them by lump. And Twysden said, that the city had (an) interest in their beam, and are at charge to maintain it, and for servants to attend the weighing; and therefore 'tis reason that they should be compelled to weigh, and to pay for it, notwithstanding among themselves they agree by the lump. *2d Exception*, That the by-law was unreasonable in respect of the penalty and inequality thereof, for perhaps some of the goods are not of the value of 13s. 4d. the 500 weight, and others of the weight of 500 pounds, may be of the value of 500l. And Coke, in his 8 Rep. 147, says, by-laws with unreasonable penalties are void: but to this 'twas resolved, that the by-law was good notwithstanding this exception, for the **[16]** by-law ought to lay the penalty on the weight, for that is the thing provided for; besides, it would be endless to put the penalty on the value, and also uncertain; and the penalty is only a means to compel obedience, which every one may avoid who will bring his goods to be weighed; and a case was cited in *Sutton's case* in this Court, in 1652, where a by-law to pay a mark for a truss of hay sold unweighed, was adjudged good: and *Osborn's case*, where a penalty of 40s. for using of a cart was adjudged good, though perhaps he did not gain 4s. by it because the penalty is but to inforce obedience to the law, but if it had been to pay a great sum for the weighing, it might be otherwise. *3d Exception*, That this by-law took from the subjects divers priviledges that the law allows, as essoines, &c. But this exception was disallowed, for it is generally so in all by-laws; and so it was in *Waggoner's case*, 8 Rep. 4. *4th Exception*, That the by-law restrains the action to their own Courts: but this exception was also over-ruled, for there the facts and the persons are best known. *5th Exception*, That it does not appear that he had notice of the by-law, and he is a foreigner, who cannot take notice of their by-laws, nor is any appointed to give notice, nor any publication of the by-law appointed. But hereto 'twas answered, that this by-law is growing (springing) out of the custom, and every man who will trade in London ought to take notice of the customs of the city, which are the laws of the city; and afterwards in Easter term, 13 Car. 2, a *procedendo* was awarded, except better cause (shewn) within three days.

TOMPSON *against* NOEL.

A plea that answers only to part is ill. 1 Saund. 207, 309. *Vide post*, 31.

Covenant brought, and declares, that the plaintiff covenanted to go with a ship to D. in Ireland, and there to take in 280 men from the defendant, and to carry them to Jamaica; and the defendant covenanted to have the 280 men there ready, and to pay for the carriage of them 5l. a man, and says, that the defendant had not the 280 men ready, but that he had 180, and those he took and carried, and the defendant had not paid for them: the defendant pleads that he had the 280 men

ready, and tendered them to the plaintiff, and that he would not receive them, but says nothing [17] to the carrying of 180 men, nor to the non-payment for them, and for that it was not a plea to the whole but to the carrying only, judgment was given for the plaintiff upon a demurrer.

BATEMAN *against* HARVY.

A trader leaves off trade indebted. If he may be a bankrupt for those debts, though not for those contracted after. *Vide* 1 Sid. 411. 1 Vent. 5, 29, & *quære*, 166. 2 Keb. 452, 487, &c. *Vide ante* 13. 1 Vent. 5, 29, 166. 1 Sid. 411. 2 Keb. 453. Buller's N. P. 39. Cooke's B. Laws, 72.

Ejectment, and, on a special verdict the case was, Harvy being a merchant indebted to divers persons, left off trading being so indebted, in 1645; in 1647 he absconded, and a commission was sued, and he adjudged a bankrupt in 1653, the debts not paid wherein he was indebted when he left off his trade: and if he may be a bankrupt for those debts by absconding in 1647, was the question. 'Twas argued by Baldwin, Serjeant, for the plaintiff, and by Brown for the defendant, who said, that for calling him bankrupt in 1647, when he did not gain his living by buying and selling, as the statute is, he cannot have an action, and cited 1 Cro. *Colly* against *Mayne*, and 2 Cro. 578, *Upwike* against *Beks*. But the Court inclined that he should be a bankrupt as to those debts, but not as to debts contracted afterwards. But 'twas adjourned.

BOYLSTON *against* RADCLIFF.

Obligation to two, the one becomes bankrupt, his part is assigned to the other obligee. S. C. Raym. 6. 1 Keb. 167. *Vide* 1 Mod. 45. 1 Salk. 110, 111. 2 Show. 103, 238.

Debt on an obligation to Boylston and Stodder, entered in to them by Radcliff; and on a special verdict the case was, that Stodder became a bankrupt, and the commissioners assigned the debt to the plaintiff the co-obligee, who brought the action, being a creditor himself, and the assignment being for the benefit of himself and the other creditors: if by this assignment he alone might bring the action, was the question. And 'twas argued by Finch for the plaintiff, that he might, and that this was the only means for the recovery of the debt; for if it had been assigned to another, he alone could not bring an action on the bond for the moiety, and the action ought to be brought by virtue of the statute in his own name; though before the bankruptcy it ought to be brought in the name of the obligee; and now the whole interest is in the obligee Boylston, one [18] moiety in his own right, and the other moiety for the advantage of the creditors; and therefore he alone shall maintain the action in his own name, for he is obligee of the one moiety, and assignee as to the other, and being all one person, therefore it is to be sued by him alone; for after the assignment it cannot be sued by him and Stodder, and thereto Wyndham Justice inclined; but none being ready on the defendant's part, it was adjourned.

WEEDEN *against* BALDWIN.

A man seized of soccage land, and of the reversion after a life of *capite* land, devises all the soccage. S. C. 1 Sid. 55. 1 Keb. 9, 14, 95, 148. Raym. 39. *Vide* 8 Co. 85. 4 Co. 4 a. 9 Co. 133 b. 6 Co. 76. 3 Co. 31 b. 10 Co. 81, 84. Plowd. 344. Mo. 148, 177, 341, 356, 734. 1 And. 34. Keilw. 209. Dyer 72. Aleyn 2, 55. Cro. El. 100. 1 Leon. 76. 2 Leon. 35. Ley. 66. Noy. 117. 3 Leon. 79, 29. 2 And. 21. Co. Litt. 78 a. 111, 123. 1 Bulst. 165. Godb. 17. 1 Roll. Abr. 618. 1 Saund. 261.

In ejectment a special verdict (found) Baldwin seized of *capite* land to him and his wife, and to the heirs of the husband, and the husband being sole seized of soccage land in fee, devised all the soccage land to his wife for life, the remainder to the

lessor of the plaintiff in fee, and dies, the wife survives, and afterwards she dies; and the lessor being the devisee in remainder of the soccage land, enters and makes the lease to the plaintiff. And if this seisin of the remainder of the *capite* land be such a *having* within the statutes touching *capite* land, that the devise shall be void, as to the third part of the soccage land, was the question: 'twas argued several times at the Bar by Powys and Aleyn for the plaintiff, and by Howel and Jones for the defendant: and afterwards in Michaelmas term 12 (Car. 2) 'twas argued by all the Judges, and judgment given for the plaintiff for all the lands; and Mallet, Twysden and Wyndham, held clearly; that this *having* of this dry reversion was not any *having* within the statutes, which should restrain the devise of all the lands; for as the statutes of 32 and 34, give power to the subject to devise, they provide for the *saving* of the King's wardships, that where the devisor hath any *capite* land, he shall not devise more than two parts of the soccage land, but shall leave one third part thereof to descend to the heir; but this was not intended to extend to any case but where the heir should be in ward; but of such a dry reversion he should not be in ward at common law, and the proviso in 32 Hen. 8, which says, *When two hold lands to them and the heirs of one, and he that has the fee dies, his heir* **[19]** *shall be in ward*, is intended only as to the body, not to the lands; for there being in this clause a new affirmative law, it implies a negative, and shall not be extended beyond the strict words; and therefore if the heir had been within age at the time of the wife's death, the heir should be in ward for his body, but not as to his lands, because no wardship could be of them at the time of the death of the testator, the surviving wife being the King's tenant, and not the remainder-man: but Foster, Chief Justice, with all his force opposed this, and said, that as the proviso is a new law so are the statutes throughout, (they) giving power to the subject to devise his lands, which he could not do before: but they gave this power to devise with a restriction, and that is, that when he had *capite* lands, he should not devise more than two parts of the soccage; and he had in him this reversion, and it shall descend from him to his heir, and therefore he shall be in ward; and the judgments, statutes and incumbrances of the father shall bind it: he confessed, that for a meer dry remainder no wardship should be; but when it is a vesting remainder, importing an immediate advantage on the death of the tenant for life, as here, there it shall cause a wardship. But at length (tho' doubtingly) he agreed, that judgment should be entered for the plaintiff, according to the opinions of the other three.

DR. GODDARD'S CASE.

Mandamus for a Fellow of the College of Physicians. S. C. 1 Sid. 29. 1 Keb. 75, 84. *Vide post*, 23, 75. 1 Sid. 71. 1 Mod. 83, 84. 1 Keb. 14, &c.

A *mandamus* was moved for to the College of Physicians, for restoring him to a fellowship of the college, and some doubt was made, whether a *mandamus* would lie (for this) or for any fellowship in any of the colleges in the universities? But at last 'twas granted, and (said) that it should be considered on the return, whether it lies or not. And afterwards in Trinity term a return was made, whereby it appeared, that a fellow (here) is not, as fellow, member of a corporation, but is a kind of officer, as a manciple is to a college: and the return (was) adjudged good, and no restitution.

[20] BENNETT *against* ASTELL.

Assumpsit in consideration that he hath undertaken to do a thing, is a promise against a promise, and performance need not be averred. 1 Keb. 333. *Vide post*, 27, 70, 77, 87, 164, 293.

Assumpsit brought, and declares, that where the plaintiff had undertaken, that whereas the defendant was obliged to the coroner in an obligation of 1600l. for an appearance; which obligation the coroner had authorized the plaintiff to sue: that the plaintiff would not sue it; and where the plaintiff had an outlawry against A. for 400l. that (if) the plaintiff would permit the defendant to take the advantage of the said outlawry against A. to pay to the plaintiff 400l. and avers that he had admitted

the defendant to take the advantage of the said outlawry against A. yet the defendant had not paid him the 400l. After verdict for the plaintiff it was moved in arrest of judgment, that here are two considerations, and the plaintiff had averred the performance only of one. But (held) by the Court, insomuch as the plaintiff hath undertaken, that he will not sue the obligation to the coroner, it was a promise not to sue; and so he need not aver the performance thereof, it being a promise against a promise, as is *Nicholas* against *Ramhead*, Hob. 88, 106. And gave judgment for the plaintiff.

CHANTRELL *against* RANDALL.

Lease for forty years after death, surrender or other determination of an estate for life. *Vide post*, 77. 2 Lev. 108, 242.

In ejectment, on issue not guilty, and a special verdict the case was, a copyhold was granted to A. B. and C. for their lives, successively as they are named; then the lord grants and demises the lands for forty years after the death, surrender, forfeiture, or other determination of the estate of A. B. and C. Then A. and B. die, and C. takes a wife and dies, and the wife keeps herself in (possession) for her life, by the custom, as her free bench, and dies; and if the lease for forty years should commence from the death of the husband, or of the wife, was the question: for if it should commence from the death of the husband it is expired, if of the wife, it had still a continuance for twenty years. It was agreed, that the free bench is to many purposes a continuance of the husband's estate; but here the words of the lease for forty years **[21]** are, *To have, &c. from the death, surrender, forfeiture, or other determination* of the estate made to A. B. and C. and then the law supplies the words, *which shall first happen;* as was adjudged in this Court in Hillary term 1652, Rot. 1617, between *Stephens and Capel*, that the subsequent lease should commence from the first of the contingents which shall happen: and by Twysden and Wyndham it was held on the first argument, that the lease shall not commence till after the wife's death, and that the words *death, forfeiture, surrender*, were to be understood, *such death, forfeiture*, &c. as should determine the estate; and this by reason of the subsequent words, *or other determination* of the estate; and the first words are only an enumeration of the particular ways by which the estate might be determined; but if the estate does not determine by any of those ways, (as in the case at Bar, it does not by reason of the wife's *free bench*, which is a continuance of the husband's estate) the lease shall not commence till the death of the wife, by which the husband's estate is determin'd; and it cannot be reasonably intended, that the subsequent estate should commence before the continuance (determination) of the precedent, which by possibility might continue longer than the forty years, for the wife might out-live the forty years, and then the lease for forty years from the husband's death, would be vain and idle. But it was adjourned.

[22] TERMINO PASCHÆ, ANNO 13 CAR. II. IN BANCO REGIS.

ROBINS *against* COX AND WARWICKE.

An assignee of rent reserved on a lease for years, shall have debt for it. S. C. Raym. 11. 1 Keb. 1, 42, 71, 153, 250. 2 Jo. 2. accord.

In debt, plaintiff declares, that A. was seised of lands, and leased it to the defendant for years, rendering 30l. yearly rent, and after granted the rent to the plaintiff; to which grant the defendant attorned, and for 30l. being a year's rent, was the action brought: and after verdict for the plaintiff it was moved in arrest of judgment, that the action lay not for default of privity; for the privity of estate remained with the lessor, and no privity of contract passed to the grantee; and of such opinion were Foster and Mallett, on divers arguments at the Bar. But Twysden and Wyndham on the contrary, that the attornment of the tenant made a privity, for his attornment is a consent to the grant, and that the grantee shall have the rent: and by Wyndham, the privity of estate remains with the lessor; but the privity of

contract is transferred to the grantee with the rent; and divers cases were cited on both sides, *pro & contra*, but not coming up directly to the point in question, the Court was divided in opinion, and the case adjourned into the Exchequer-Chamber. But after this, the third part of Sir George Croke's Reports were published and there fol. 637, 651, in *Ard and Watkins's case* it was adjudged, that the devisee of a rent reserved on a lease for years, as here, might maintain debt for the rent. (Whereupon) the parties before any argument in the Exchequer-Chamber agreed, and the rent was paid without more (ado.)

[23] *Note*, The cases cited for the plaintiff were Bro. Det. 141. 2 E. 4, 11. Long quinto E. 4, 42. Yelv. 208. 1 Bulst. 151. Co. 7. *Lillingston's case*, Dyer 340. 5 H. 7. 18 Co. 4, 18. And on the part of the defendant were cited, 6 Co. *Bredeman's case*, 4 Co. *Ognell's case*, 1 Leon. 491, *Austin and Smith's case*, where this point came in question, but was not resolved.

Dr. Widdrington's Case.

Mandamus for a fellow of a college, does not lie where there is a visitor. S. C. 1 Sid. 71. 1 Keb. 2, 50, 61, 68, 79, 131, 150, 234, 458. *Quære* 2 Jo. 174. Raym. 31, 68. *Vide ante*, 19. *Post*, 65. 2 Lev. 14. Raym. 101. 1 Sid. 29, 40, 71, 169, 346. 1 Mod. 84, 85.

The Court was moved for a *mandamus* to restore him to a fellowship in Christ's College in Cambridge, which was opposed by Jones, because the universities have conusance of pleas by their charter, and the colleges have their visitors; and therefore no *mandamus* lies: but two precedents were remembered to have been cited by Arthur Trevor in *Dr. Godland's case*, of *mandamus's* granted in the like case, the one in the time of Edw. 2, and the other in the time of Edw. 3. To which Jones said, that no *mandamus* had been granted since those till within these ten years: but Foster, Chief Justice, said, that there was one about the end of Queen Elizabeth's reign, or the beginning of King James's; and thereupon the *mandamus* was granted: but the Court said, that if they returned matters proper for themselves to determine, this Court would send back the matter to them; and in Trinity (term) following a return of the writ was made; and some exceptions taken thereto for misnaming the corporation; and day was given to amend the return, and to make it so as they would stand by it: and in Michaelmas (term) following, the return was argued at the Bar, and the return was of the foundation of the college, and of some of the statutes of the founder, whereby he appointed the chancellor of the university to be their visitor; and thereupon it was only insisted, that there being a special visitor appointed by the founder, this Court had nothing to do in the matter, but that all appeals were to be to him and not to this Court, let the foundation be either spiritual or temporal; which was much controverted, whether it was the one or the other. And 'twas agreed, that if the master of a college be outed by wrong, an assise will lie, as is said in the end of *Canon's case* in Dyer; but not if he be outed by his proper Ordinary or visitor; and as the King may give licence to found a college, **[24]** so he may give power to make laws for the order and government of such college; and by those they shall be governed, and by no others, and the acts done by such governors shall be intended *rightly done*, and not examinable in this Court, 7 Co. 42. And although it was objected, that this Court hath the superintendency of all Courts Spiritual and Temporal to keep them within their jurisdictions, (which the Court agreed) yet seeing it did not appear, that they had executed their jurisdiction, but only outed a scholar, subject to their jurisdiction; they are not for that (matter) to appeal to this Court; for if so, the matters of all colleges and particular jurisdictions would be drawn hither; but if they are grieved they ought to appeal to their visitor, which if they had done, there would be more reason to hear them here; but to hear them now was to go by *leaping*, which ought not to be, for all proceedings ought to be by degrees, (or steps) as from one Ordinary to the next Superior Ordinary, and not at first dash to leap to the metropolitan, nor from the Common Pleas in Ireland, immediately to this Court; but first to the King's Bench in Ireland, and from thence to this Court; and the like: and afterward in Hillary term next following, all the Judges delivered their opinions,

that the *mandamus* did not lie on this return: but inasmuch as the return contained many false scandals of the doctor, the Court advised the doctor to bring an action on the case for those as for a libel; but they could not relieve him by a *mandamus*.

BERNARD *against* EVENS.

Contract to retain tithes for the life of the parson. S. C. Raym. 14. 1 Keb. 5, 21. 3 Burr. 1873. 3 Bac. Abr. 338. 5 Bac. Abr. 93.

In debt for tithes for four years, the defendant pleads an agreement between the plaintiff and him, that he should retain the land discharged of tithes during the life of the plaintiff, if he so long continued parson: issue (was) on the agreement, and a verdict for the defendant; and judgment for him after motion in arrest of judgment. For although *first*, a *lease of tithes* cannot be without deed. And *secondly*, that it cannot be a good lease for the uncertainty, as Co. Litt. 45 b. and 2 Cro. *Hawkes* v. *Brogfield*, Owen 103. Hob. 176. Yet this being only a *contract* for retaining the tithes, it is good, according to 2 Cro. *Honicomb* against *Sweet*. And by the whole Court judgment was for the defendant.

[25] GARRETT *against* LISTER.

Assent by an executrix to the devise of a term. S. C. 1 Keb. 15. 1 Sid. 37. *Vide post* 290.

Ejectment was brought, and in evidence to the jury at the Bar, the case was, that a man possessed of a long term for years, devised it to his wife for life; remainder to trustees for his son's life; remainder in trust for the heirs of the son's body; remainder to the son's right heirs, and makes the wife executrix; (and held) by the Court, (that) the wife took the term wholly as executrix in the first place, till she agreed to the devise; but it being proved, that she said, she would take the term according to the will, it was held by the Court to be a sufficient assent. And a case was cited, where in a like case, the wife's saying, that the son was to have the estate after her, it was resolved to be a good assent. But then the original lease could not be produced; but it being an ancient lease, the grandson of the lessor producing a counterpart found among the other evidences of his grandfather, it was allowed for evidence, though no witness was subscribed thereto: for Justice Wyndham said, he had seen many deeds of the time of Queen Elizabeth's reign, without witnesses: then a title being made to the term by one as administrator, and no letters of administration produced, the book of the Ecclesiastical Court where it was granted being produced, wherein was entered the Act or order of the Court for the granting thereof, it was allowed to be good evidence. And Twysden said, that it was so done in *The Earl of Manchester's case*.

VANE *against* MINSHALL.

Rent arrear on a lease to the wife whilst sole, is recovered against the husband after her death. S. C. 1 Keb. 20, 22. Raym. 6. 3 Lev. 403.

Debt for rent, on a lease made to a woman whilst sole, who (after) takes husband; the rent is arrear, the term expires, the wife dies, and the action is brought against the husband, to which he demurs: and it was argued by Wylde, that the action does not lie against the husband, because it being a thing in action, and not recovered in the wife's life, the husband is not chargeable any more than on her obligation. But by Allen, and so adjudged; the husband here is charged in respect of the perception of the profits **[26]** by himself, and therefore shall be charged after the wife's death; and it is not like the case put of an obligation; which was agreed to be law; wherefore judgment was for the plaintiff.

Note, In F. N. B. 121 C. is this very case.

WHITWICKE *against* OSBASTON.

Pardon with exceptions, where the party is to shew he is none of those excepted. S. C. 1 Keb. 20. *Post*, 120, 121. *Ante* 8.

Debt on the Act of General Pardon for speaking scandalous words of him contrary to the said Act, which prohibits such speaking under a penalty, for which penalty the action is brought; and after verdict for the plaintiff, it was moved in arrest of judgment, that divers persons are excepted in the Act, and the plaintiff has not shewn that he is none of the persons excepted: to which it was answered, that the body of the Act is general, and the persons are excepted by proviso; and then the plaintiff need not shew that he is not any of the persons excepted; but if in the body of the Act a pardon was of all persons except such and such, there he ought: but in this case of a proviso, if he be one of the persons excepted, the other party ought to shew it; as in the case of an obligation, or a feoffment on condition, the obligee or feoffee need not shew the condition, but it is enough for him to shew the obligation or feoffment, and the other party for whose benefit it is, is to shew the condition, if he will take advantage thereof.

MILFAX *against* BAKER.

Forfeiture of a copyhold, purged by an admission by a lord *pro tempore*, when. S. C. 1 Keb. 25, 26. 2 Danv. 207.

In ejectment, in evidence to a jury at the Bar, resolved; *First*, That if a copyholder commit a forfeiture the lord may grant the copyhold estate to another before any seizure; for it is a determination of the will, and the estate is immediately in the lord, as in his reversion. *Secondly*, That a lord *pro tempore* of any legal title, though it be at will, by admission of a copyholder after a forfeiture committed, hath dispensed with the forfeiture, not only as to himself, but also as to him in the reversion, for he may make voluntary grants; 4 Co. 23 b. 24, and such **[27]** new grant and admittance amount to an entry for the forfeiture and a new grant. But a *lord* by tort or by disseisin, cannot by such admittance purge the forfeiture as to the rightful *lord*.

THINNE *against* THINNE.

Indenture to suffer a recovery of a manor, and of all lands reputed parcel, the recovery is suffered of the manor. What lands reputed parcel shall pass. S. C. 1 Vent. 51, 52. 1 Sid. 190. 1 Mod. 251. 2 Mod. 235. 1 Keb. 26, 591, 691, 716.

Assumpsit on a feigned issue directed out of Chancery, for trying whether certain lands did pass by a common recovery, and if the entail of them were thereby barred. And on the evidence, the case was, a man seized of the manor of Lavington, and of divers other lands there, which in truth were not parcel of the manor, but purchased by the lord of the manor divers years before, and after the purchase reputed parcel; and being so seized, with intent to make a tenant to the *præcipe*, bargains and sells the manor, and all lands parcel or reputed parcel, to A. against whom a *præcipe* was brought, and a common recovery suffered by name of the said manor, with voucher of the lord; and if this recovery should bar the entail as to the lands (that were) not parcel, was the question. It was agreed; that they passed by the bargain, by the name of reputed parcel. But it was insisted, that they did not pass by the recovery of the manor: for tho' by recovery of the manor, a manor in reputation, tho' it be not in truth a manor, shall pass, as *Sir Moyle Finch's case*, 6 Co. is, because otherwise the recovery should be void: but here where there is a manor in fact to answer the name of a manor in the recovery, other lands, which are not parcel, but in reputation, shall not pass; and tho' the lands have been used with the manor, now fourscore years, and reputed parcel, yet they shall not pass by the recovery of the manor with its appurtenances, as it is so; for the word *appurtenances* shall not pass a thing that is not parcel; and there may be a difference between a fine and a *præcipe* for a common recovery, where the demand ought to be of certain things by certain names. And

Justice Twysden said, that he had seen the opinion of all the justices at one time, that the fine in *Sir Moyle Finch's case*, did not pass the reputed manors: but that Sir Edward Coke, after he came to be Chief Justice, caused it to be adjudged as he reports it: and he said, it was well he did so, for it would concern the settlements of very many **[28]** estates: and therefore this case here was found specially. And afterwards in Michaelmas term, 15 Car. 2. It was argued at the Bar by Jones of the one side, and Winnington of the other; and the Judges were then of divers opinions; and in Easter term, 16 Car. 2, it was argued again by Finch of the one part, and Serjeant Glyn of the other, and the Court took time till the end of the term to deliver their opinion, and then all agreed, and Hyde, Chief Justice, delivered the opinion for all of them, that the lands reputed parcel, passed by the recovery as well as the other (lands) and so they did in a conveyance in the case of the King; for he had made grants of the manor of St. James, which is not a manor, but in reputation. And common recoveries are common assurances, and the indenture of bargain and sale, which made the tenants to the *præcipe*, and declared the intent was to suffer a recovery, not only of the manor, but also of all lands, parcel, or reputed parcel (thereof;) and these (lands) have been reputed parcel for 80 years: and they made no difference between a fine and a recovery of a manor, where it is nothing but a manor in reputation, nor where it is a manor indeed, and other lands, besides the manor, not parcel, but so reputed both shall pass by the fine or recovery, the indenture shewing the intent to pass the manor and all lands reputed parcel.

CARPENTER *against* MARSHAL.

Grant of dutchy lands may be without attornment, but to a feoffment livery must be.
S. C. 1 Sid. 189. Ray. 90. 1 Keb. 37. N.'s Lutw. 392. *Vide* 2 Lev. 24.

Ejectment was tried at the Bar, and found specially; where the case was, a lease for years, being made by the King of dutchy-lands lying out of the County-Palatine; afterwards King James I. in the seventh year of his reign, granted the reversion by the dutchy-seal of the County-Palatine; and the Great Seal to one, under whom the plaintiff claims, but no attornment was had. King Cha. I. reciting the said grant, and that it was void, granted the reversion under the dutchy-seal to the defendant to whom the lessee attorn'd; and the lease being determined, the lessor brought ejectment against the defendant, who had got the possession; whereupon the sole question was, whether the land passed by the first patent, being dutchy-lands, lying out of the County-Palatine, **[29]** without attornment? And it was argued in Hillary term 15 & 16 Car. 2, by Jones for the plaintiff and Weston for the defendant; and in Easter term the 16th by Maynard for the plaintiff, and for the defendant; and it was agreed on both sides, that the Great Seal, and the County-Palatine seal, signify nothing in the case. For by the stat. 37 H. 8, c. 16, lands with in the County-Palatine, must pass by the County-Palatine seal; and lands out of the county by the dutchy-seal: but the objection was, that the lands of the dutchy being severed from the Crown by the statute of 3 H. 5, n. 15, and 1 H. 7, Sess. 1, n. 2. That at the passing of those lands, livery and attornment are necessary, as in the case of a subject; for the King has those lands as duke, and not as King. But afterwards in the same Easter term, it was resolved by all the Court, that the lands passed by grant of the reversion without attornment; and the grant under the dutchy-seal is a grant by record, and passes the reversion, as a fine, viz. to divest the estate without attornment: but not to make a privity to found an action of waste, &c. according to the 4 Inst. 209. But if the King will make a feoffment thereof, livery ought to be made, as in the case of a subject; for this the King may do by attorney: and judgment was given for the plaintiff.

GRAVES *against* SAWCER.

Case lies not by one tenant in common against another for disposing of the whole.
S. C. Raym. 15. 1 Keb. 88. Noy, 14, *con.* 3 Leon. 228, acc. Pop. 96, 97. Cr. Jac. 91. Mo. 395. 3 Com. Dig. 266.

Case, for that whereas he was possessed of the sixteenth part of a ship in common with the defendant, the defendant to defraud him of his part, had disposed of the

whole, and sent him to India without his assent. And after verdict, judgment was stayed, because no such action lies by one tenant in common against another: nor as Lit. sect. 222 says, where one tenant in common disposes of the whole, has the other any remedy; therefore not by action on the case: nor is the supposal of fraud material in the case, for between tenants in common, there cannot be fraud, as Wyndham said; for by the law, each has the power to dispose of the whole.

[30] SMARTE *against* EDSUN.

Judgment against two, one dies. Execution in the personalty, if against the survivor only. In the realty, if against him and the heir of the other. S. C. Raym. 26. 1 Keb. 92, 123.

Judgment in debt was had against two, one dies, the plaintiff brought a *scire facias* against the survivor only; the defendant pleads, that the other hath left lands and an heir, to whom they were descended, and demands judgment, whether he should be compelled to answer without the heir's being warned; whereupon the plaintiff demurred, and judgment was given, that he should answer, for the judgment is against the person: and tho' that now by the statute, which gives the *scire facias* and *elegit*, he may charge the lands to make it real: yet it is at his election to pursue in the personalty, if he will. 29 Ass. 27. 29 E. 3, 39. 1 E. 3, 41. But if he will take execution on the lien real, there the charge ought to be equally against both, and a *scire facias* against both. But it was said, that if he brought a *scire facias* against both, and had judgment thereupon, he might have a *fieri facias* against the survivor only, or an *elegit* against both.

Note, This cause depended till Michaelmas term, and then it was ruled to answer after divers arguments.

DOROTHY CHUTE *against* ———.

Covenant to stand seized with a power to make leases generally. *Q.* If good.

Debt on a lease for years, where the case was, that Chute, the plaintiff's husband, covenanted in consideration of marriage to stand seized to the use of himself for life, remainder to the plaintiff for life, remainder to his own right heirs, and a proviso was for making leases, and that he made the lease in question to the defendant, rendering rent, and died; and for this rent, the wife brought the action, and had a verdict. But on the motion of Jones judgment was stayed; because the power being general to make leases, and not particular to any particular person, nor on any particular consideration, no use could arise upon the covenant to stand seized, as it might upon a feoffment or fine, as is resolved in Co. *Mildmay's case;* and therefore in this case the lease is void, and then no rent is due.

[31] PRIDEAUX *against* WEBBER.

Trespass, assault, &c. and no answer to the battery. *Vide ante* 16, & 1 Saund. 207, 209. B. 423.

Trespass for an assault, battery and imprisonment, 1° May 1657. The defendant pleads, that the trespass, assault and imprisonment aforesaid, were done the 29th of October 1655, and pleads the Statute of Limitation: the plaintiff replies, that certain rebels (not naming any) had usurped the Government, and none of the King's Courts were open; the defendant rejoins, and confesses the usurpation, and further pleads the Act of pardon of all things, and acts of hostility done under the usurped authorities; and further pleads the Act for confirming all judicial proceedings in the late times; and further pleads a warrant to imprison him, *et hoc parat. est verificare, &c.* whereupon the plaintiff demurs. And now by Bear Serjeant, for the plaintiff it was argued, that the plea in bar was ill in not answering to the battery; but to this it was answered, and so resolved by the Court in Hillary term following, that (the words) *transgressio prædict'* is an answer to the whole. *Secondly*, It was argued by Bear, that the Statute of Limitations is not pleadable, because there being a stop of

justice, and no legal Court, held, none was bound to prosecute, especially for such an imprisonment as here in those times. *Thirdly*, It was objected by him, that the rejoinder is multifarious and impertinent, in pleading two statutes. And *fourthly*, In not concluding on the statutes *prout patet per recordum*. But Afterwards in Hillary term it was adjudged for the defendant, and that the Statute of Limitations was a bar, and the bar being good, and the replication insufficient, it is not material what the rejoinder is; and judgment was given for the defendant by the whole Court. And the reason they gave that the Statute of Limitations was a good bar, (be it so, as it was pleaded, that the Courts were not open) was, because there is not any exception in the Act of such a case; and infants had been bound (thereby) if they had not been excepted.

[32] SERJEANT *against* FAIRFAX.

Issue improper or immaterial, where a repleader shall be or not.
S. C. 1 Keb. 33, 39, 89, 90. *Vide* 6 Mod. 2, 3, &c.

Debt against lessee for years for the rent, the defendant pleads, that he before the rent was due for which the action is brought, had assigned the term to another, of which the plaintiff had notice; the plaintiff took issue on the notice, and a verdict being for the defendant; it was moved by Allen for the plaintiff, that no judgment ought to be given, but a repleader (awarded) because the issue was taken of a thing immaterial; for it is not the notice of the assignment of the term, without agreement of the lessor, or acceptance of the rent by him from the assignee that discharges the lessor, but his agreement thereto, or acceptance of the rent from the assignee does it; and he cited *Nichols's case* in 5 Co. where issue taken of payment on a single bill being found for the plaintiff, he shall have judgment; but if it had been found that he had paid, judgment should be arrested; and the difference, he said, is when the issue is found against the pleader, judgment shall be for the plaintiff, but if for him, not. (But) Justice Twysden said, that if an improper issue is taken, and verdict given (thereon) judgment shall be given thereupon, be it for the plaintiff or defendant; and cited 2 Cro. 575. But an immaterial issue is, whereupon the verdict the Court cannot know for whom to give judgment, whether for the plaintiff or for the defendant, as in Hob. 175. And with him the Chief Justice and Wyndham wholly agreed, and awarded a repleader. See 2 Cro. 585. 3 Cro. 227, 228, & 2 Cro. 5.

[33] ANDREWS *against* HERNE.

Assumpsit to pay, &c. If Charles Stuart were King of England within twelve months, he being then in exile. S. C. 1 Keb. 56, 65. 1 Danv. 41, pl. 12.

Assumpsit in consideration of 20s. paid to the defendant by the plaintiff, to pay the plaintiff 20l. *if Charles Stuart should be King of England within twelve months then next following;* (this being when the King was in exile, and about six months before his restoration). After verdict for the plaintiff 'twas moved in arrest of judgment, that here is no consideration, for he was then King of England at the time of the promise; but if it had been, *if he should be King of England six months hence*, it might have been good, because of the accident that he might die without six months: but held by the Court, that the consideration is good, for the words are to be taken according to the subject matter; the King was at the time of the promise out of possession, and the promise is to be intended, if he should be in possession within the twelve months.

WINDSOR *against* SAYWELL.

One outlawed in a personal action, aliens before seizure.

In ejectment and special verdict, the case was; Gorge seised of lands in fee, confessed a judgment to the lessor of the plaintiff, he being then outlawed in a personal action; but before any seizure of the lands, levied a fine to a stranger; and afterwards the lessor sued execution of the lands by *elegit:* and it was argued by Glyn

and Wylde, the King's Serjeants, that no execution may be had after the outlawry; and they cited the case of one *Pickering*, to be so resolved in the Exchequer. Jones and Allen on the other side argued, that nothing accrues to the King by an outlawry in personal actions, but only perception of the profits, Hob. 20. Plowd. Com. 541, and that he could not in such case plough or sow the land; and Allen said, he was of counsel in *Pickering's case*, and the case was, that after inquisition, but before return thereof, the person outlawed made a bargain and sale of lands, and it was adjudged for the King, but principally for default in the pleadings; for he said there were only two Judges in Court, and those divided in opinion as to the principal matter. And afterwards at another day, **[34]** the Chief Justice and Twysden saying, they had spoken with Hale Chief Baron, and the other Barons of the Exchequer, who told them, that the course of the Exchequer is, that by a feoffment before seizure, the King is outed of the pernancy of the profits; but not by a feoffment after seizure. And thereupon they gave judgment for the plaintiff.

[35] TERM. SANCT. TRIN. ANNO 13 CAR. II. IN BANCO REGIS.

GOODWIN *against* CLARK.

A settlement to the husband for life, remainder to the son in tail: and if he dies without issue male, remainder to his daughters for 500 years, he dies leaving a son, who dies without issue. S. C. 1 Sid. 102. 1 Keb. 73, 78, 169, 247, 462. *Vide The D. of Norfolk's case* in Chancery Cases, 3 part.

Ejectment and special verdict. A settlement was in consideration of marriage, and 1000l. (paid) for the use of the husband for life, remainder to his son in the usual manner, and if he (the husband) should die without issue male, to the use of the daughters for a term for raising 1500l. for their portions. The husband left a son and a daughter, and afterwards the son died without issue, whereby the lands remained over to another, according to the settlement, and the daughter brought ejectment. This case had been adjudged two several times before in several Courts, the one time for the plaintiff, the other for the defendant; and the sole question was, if the husband leaving a son, who after dies without issue, whether the husband shall be now said to die without issue male be within the intent of the settlement, so that the term should arise to the daughter? For it was said for the defendant, that he did not die without issue male, for that he left a son, tho' this son afterward died without issue; and the intent of the settlement was well satisfied by the leaving of a daughter in satisfaction of the portion: but it cannot be intended, that when, or at what time whensoever, the issue male fails, the daughters should have portions, for that may happen 100 years after, when the sons are dead, and so no benefit or advantage to the daughters. It was also said to be ill in the creation, if it should be so intended to arise at such a distance of time, viz. whensoever there should be a failer of issue male. But to this it was answered, **[36]** that whensoever the issue male fail, the husband is said to be dead without issue. 8 Co. *Bulmer's case*, and 38 E. 3, 26. Dyer 4 & 349, were cited to this purpose. And as to the benefit or advancement of the daughters, it was said, that this expectation is an advantage for them to be advanced in marriage: and as to the creating of the term, it was said, that a term may as well be created to arise upon a failure of issue male, as a power to sell on the failure of issue male, which hath been adjudged good in the case of *Vincent and Lee* in Moor. Rep. 147. 3 Cro. 26. 1 Leon. 285. 3 Leon. 106. Co. Lit. 113 a. And as to the objection of a perpetuity, it is nothing, for the son, who had the estate precedent, might bar it by a common recovery. And of this opinion were all the Court, except Mallet. And after divers arguments at the Bar by Serjeant Nudigate for the plaintiff, and Wylde the King's Serjeant for the defendant in this term, and in Michaelmas term following, by Aleyn for the plaintiff, and Kittlewel for the defendant, and in Easter term, 14 Car. 2, by Finch the King's Solicitor for the plaintiff, and Jones for the defendant; judgment was given in Easter term, 14 Car. 2, for the plaintiff.

STEPHENS *against* BRITRIDGE.

Husband tenant for life, remainder to the wife for life; remainder to the heirs of their bodies; they levy a fine with warranty, it doth not discontinue nor devest the estates, nor is the warranty any bar. S. C. Raym. 36, 37. 1 Sid. 83. 1 Keb. 321. 2 Danv. 577.

In ejectment on not guilty, and a special verdict, the case was, Sir Francis Wortley, seised in fee, covenanted on his intended marriage with the woman which he afterwards married, to stand seised to the use of himself and his heirs till the marriage, and after the marriage, to the use of himself for life, remainder to the heirs males of their bodies begotten, remainder to the lessor of the plaintiff, being a daughter by a former venter, the remainder to his own right heirs. The marriage took effect, and they had issue only one daughter, wife of the defendant; and afterwards he and his wife levied a fine with warranty to the defendant's wife; and both Sir Francis and his wife were dead without other issue: whereupon the lessor brings ejectment; and the question is, whether this warranty being descended on the plaintiff shall bar him? And in order thereto, two questions were made; *First*, If the fine made any discontinuance? *2dly*. If it was no discontinuance, yet whether it **[37]** made no divesting of the estate in remainder to the lessor? For if so, it was said for the defendant, that it made room for the warranty to operate thereupon, and to become a bar. And for making it a discontinuance it was much insisted, that the estate-tail was executed in the husband and wife; and the case of *King and Edwards*, in 1 Cro. was strongly relied on; and it was said, that the interposing estate of the wife could not prevent the execution of the estate-tail, for the remainder in tail being next to the estate for life to the wife, merged it; and it being so merged, nothing then interposed between the estate for life to the husband; and therefore that ought to be merged also by the remainder in tail, and so the estate-tail was executed: and this was the substance of the arguments for the defendant, for whom it was argued this term by Winnington, and the following term by Maynard. But on the other side it was argued this term by Allen, and the next term by Jones, and resolved by the Chief Justice, Twysden, and Wyndham, that the fine did not make any discontinuance, nor the warranty any bar. *First*, Because the estate was not executed, being by the same deed. 2 Co. *Wiscot's case*, but it is a mean (intervening) remainder between the husband's estate for life, and the estate-tail, viz. the estate to the wife; and it cannot be intended, that when a remainder for life is limited to the wife, that it should instantly merge by the remainder in tail, to the heirs of the husband and wife; and the case of *King and Edwards* cited on the other side, does not come up to this case; for (there) the husband and wife were jointly seized to them and the heirs of the body of the husband, and so the estate tail was executed in law; (but) here the wife had an estate in remainder for life; and then it is no more in effect than *Bredon's case*, that where a particular tenant and him in remainder levy a fine, it is no discontinuance, but each grants that which he lawfully may; and the estates being here in the same persons, it is all one as if they were in divers; and if the estate-tail be not a discontinuance, the warranty cannot be a bar, 10 Co. *Seymor's case*: and the Chief Justice and Wyndham held, that there is not any displacing or divesting of the remainder to the lessor, but that the fine operates only as a grant of him that has for life, and of the remainder in tail, which they might lawfully grant, and not disturb any estate in remainder; and if it made any displacing of the estate, **[38]** yet Twysden said, that it was only at the election of him in remainder, as where he shall bring a *formedon*, and admit himself out of possession, there perhaps the warranty might have been pleaded in bar; but here he has entered and does not admit the estate to be out of him, and thereupon he brings his ejectment; and (he) cited 7 H. 5, 2. And they seemed to rely in some sort on the case in Littleton, sect. 0, where a wife being tenant for life, a confirmation to the husband and wife shall not enure to the husband, but as in remainder, and *Peck and Channel's case* in 3 Cro. where a woman tenant for life, married the remainder-man in tail, and then they levy a fine, this shall not discontinue the tail; and in Trin. term. 14 Car. 2 judgment was given for the plaintiff by the Chief Justice, Twysden and Wyndham; but Mallet being very aged, was of a contrary

opinion, but gave no good reason for it. And *note*, Twysden in this case said, that the use to the wife in this case was good, being by way of remainder, viz. to himself for life, the remainder to his intended wife; but if the limitation had been to himself, and such a woman as he should marry by way of present limitation, it had not been good: but *quære*, of this opinion, for it seems contrary by the case in Dyer, 274 b. and it seems the case cited in Littleton does not come up to this case, for the husband cannot by any acceptance (of another estate, &c.) destroy the freehold of the wife.

ALEWORTH *against* ROBERTS.

A judgment in dower is compleat without damages, and error lies thereon. S. C. 1 Sid. 188. 1 Keb. 85, 171, &c. 2 Danv. 681.

The demandant in dower *unde nihil habet* had judgment, and the writ of seisin was executed; the tenant brought error, and the judgment was affirmed, but pending (the writ of error) the tenant aliens the land and dies, and now the demandant brings a *sci. fa.* against the heir of the heir, and against the alienee; suggesting that her husband died seised; to which the tenants severally plead this matter, whereupon the demandant demurs: and it was argued this term and Michaelmas term following at the Bar, by Strode and Seis Serjeants for the demandant; and by Powys and Allen for the tenant, and afterwards in Easter term 16 Car. 2 judgment was given for the tenant. The Court agreed, that the judgment is a compleat judgment at common law without the damages, which are given by the Statute of Marlbridge, and that it is enough for the wife to suggest the dying seized of the husband after the judgment in dower, for recovering the damages; but the Statute of Marlbridge, which gives the **[39]** damages, gives them against *deforciatores* (*i.e.* expellers by force) and that neither the alienee, nor the heir of the heir are in that case; the heir (it is true) shall be charged with damages if he be in life, but not his heir or alienee; but they are lost by the death of the heir, and are not a lien upon the land which passes therewith: and if they should be recovered, from what time shall they be recovered? Not from the death of the husband, because neither of them had the land at that time; nor from the time of the death of the heir against whom the judgment was; for neither of them was the deforceor, but the heir who is dead, and against whom the judgment was, is the deforceor; and they said, this was not like the case of tithes on the statute of Edw. 6, which they agreed are not lost by the death of the tenants who ought to pay them; for there the duty is certain, viz. the value to be trebled in an action of debt; but here the damages are wholly uncertain, and in nature of damages to be recovered in trespass.

ANONYMUS.

Special bail in an action for words.

In an action on the case for calling a person a quality whore, whereby she lost her marriage: it was ruled on motion, that the defendant should find special bail, although generally in actions for words no special bail is usual; yet on the circumstances of the case, the Court may compel the defendant to find special bail. And so in cases of executors, though they do not find bail in ordinary cases, yet in special cases they shall find bail; as where it appears that they have wasted the goods, &c.

See 1 Mod. 2, & 6 Mod. 230. Special bail denied, though in gross batteries.

[40] BLUCKE *against* MOLE.

Copyholder surrenders the reversion without attornment or notice. S. C. Raym. 18. 1 Keb. 93.

In replevin, a copyholder in fee leases, rendering rent, and then surrenders the reversion of two parts to the defendant; and for rent arrear he distrained and avows, and shews the lease and the surrender, but does not shew any attornment nor notice of the surrender; for which the plaintiff demurs: and the Court on argument were of

opinion, that the distress in this case was sufficient notice. Hob. 207, 208. And it is not like to the case where a forfeiture is to be taken for the breach of a condition. 5 Co. 113 b. Also here the estate passes by the surrender and admittance in Court, which are public acts, of which every tenant may take notice, and no attornment necessary, because no means to compel it, Co. Litt. 321. And judgment was given for the avowant, except, &c.

COOKE *against* FOUNDS.

[Not applied, *Delmer* v. *M'Cabe*, 1863, 14 Ir. C. L. R. 384. Referred to, *May* v. *Platt* [1900], 1 Ch. 620.]

Covenant that he is seized in fee, according to the indenture whereby he purchased, the covenant is absolute. S. C. 1 Keb. 91.

Covenant brought, and declares, that the defendant bargained and sold to him certain lands (which he had purchased of Woolaston and other trustees, in the late times for the sale of delinquents estates) and covenanted, that he was seized of a good estate in fee according to the indenture made to him by Woolaston, &c. and assigns for breach, that he was not seized of a good estate in fee; the defendant pleads, that he was seized of as good an estate as Woolaston, &c. conveyed to him; whereupon the plaintiff demurs, and judgment was given for him, for the covenant is absolute; that he is seized of a good estate in fee, and reference to the conveyance by Woolaston, serves only to denote the limitation and the quality of the estate, and not the defeasibleness or indefeasibleness of the title.

[41] BASSET *against* MORGAN.

Marriage or no marriage triable by jury, so is the legality of marriage in personal actions.

Debt on an obligation, conditioned for paying to the plaintiff at his marriage, or age of twenty-one years, which should first happen: the defendant pleads, that the plaintiff has not yet attained the age of twenty-one, and that he was never lawfully married; the plaintiff takes issue, that he was lawfully married, and this is found by the jury for the plaintiff. And it was moved in arrest of judgment, that the issue being on the legality of the marriage, ought to have been tried by the Ordinary, and not by jury; though a marriage or no marriage is triable by jury, 2 Cro. 102. But the Court held, that the material part of this issue was, married or not married; for the condition of the obligation is, to pay at his marriage, and though the defendant has put *lawfully* in his plea, whereby the plaintiff might have demurred, and has not, but has taken issue thereupon; yet this being in a personal action, where the right of marriage does not come naturally in question, as in dower or other real actions (it does) the trial is well enough. Another exception was taken, that the replication does not say that he was married *tempore brevis*, and so it may be after the action commenced; but this was not allowed, for after verdict it shall be intended to refer to the time of the writ.

DAY *against* GUILFORD.

[S. C. Raym. T. 19; 83 E. R. 11 (with note).]

Judgment against the father tenant for life or in tail, *sci. fa.* against the heir, and he returned warned, suffers judgment by default. S. C. Raym. 19. 1 Keb. 112, 141. 1 Sid. 54. 2 Sid. 12.

In ejectment, on not guilty, a special verdict. The father tenant for life, remainder to his son in fee, the father acknowledges a statute and dies; and a *sci. fa.* was awarded against the son, who was returned *warned;* but made default, and judgment was against him by default, and the lands delivered on an *elegit* to the plaintiff's lessor. And it was argued for the plaintiff by Serjeant Wylde, that by this judgment by default he being warned, and a *sci. fa.* returned, the land of the son is bound without

remedy; and cited *Barcock and Thompson's case* to be so adjudged in 1652, which see in Style's Reports, to which the Court inclined, and Twysden Justice cited the case of one Gilbert and Ragg, where a *scire facias* was sued upon **[42]** a supposed judgment, where there was none, and on *scire facias* returned, and judgment by default, the party was left without remedy; but Wyndham doubted: for here the estate of the son was never liable, and therefore he might have an assise if he be outed; (but) *by the other three*, (though) the estate of the heir in tail is not liable to the judgment against his father; yet if a judgment in a *scire facias* after a *scire feci* returned, be had against him by default, he shall be bound without remedy: and afterwards judgment was given for the plaintiff, *except, &c.*

[43] TERM. SANCT. MICH. ANNO 13 CAR. II. IN BANCO REGIS.

PALMER *against* STANAGE. ROT. 1310.

Avowry for rent due at a later day no bar of a rent due at a former day. S. C. 1 Keb. 95, 113. Raym. 21. 1 Sid. 44.

In replevin, the defendant made conusance for a rent-charge due at Michaelmas 1658, as bailiff of J. S. The plaintiff pleads in bar, that the defendant had at another time made conusance as bailiff to J. S. in a former replevin brought by J. D. then tenant of the land; for the rent due to J. S. at Michaelmas 1659, on which the conusant demurs; and it was argued for the plaintiff, that the conusance made for a rent due at a latter day, was a discharge of the rent due at a former day; and that there is no book against this, except Fitzherbert's Abridgment, Barr. 79, where he also says, that an acquittance for rent due at a latter day, is no discharge of rent due at a former day, which is contrary to all the other books; and therefore he is not to be much regarded in the other point; and tho' the former conusance was made upon another person, it is not material, seeing it was made by the same person, and in the same right. But the whole Court, except Mallett, (who held, that if an acquittance be an estoppel, a conusance on record is much more so) held the contrary; and that Fitzherbert, Barr. 79, is good law in this point of avowry, and it would be the same thing if the former conusance had been made on the same person, and they differenced in this case from the case of an acquittance, which is a voluntary act of the party, and therefore is an estoppel by force of his hand and seal; but this is a compulsory act, whereto he is compelled by the bringing of the replevin: and **[44]** Foster, Chief Justice, said, that the avowry for rent due at a latter day, cannot be a discharge of rent due at a former day, any more than a recovery in an action of debt for rent due at a latter day, can be a bar in an action of debt brought for rent due at a former day; and they said the case would have been all one if J. S. himself had avowed at both the times: and gave judgment for the conusant. *Except* (cause shewn) on the Monday following.

WEBB *against* BETHEL.

Covenant to convey according to the draughts agreed, needs no tender of wax, &c. for he hath taken it upon himself. S. C. 1 Keb. 122.

Assumpsit, in consideration the plaintiff had promised to pay the defendant 700l. for the reversion of a manor, the defendant promised to seal two instruments for the assurance thereof, with warranty, &c. according to two draughts agreed on before between them; and altho' the plaintiff had tendered him on the first of March two instruments in writing, according to the draughts aforesaid; and on the third of March requested him to seal them, yet he had not sealed them, nor conveyed the reversion of the manor. After verdict for the plaintiff, on *non assumpsit* (pleaded) it was moved in arrest of judgment by Serjeant Beare; 1st, That he ought to shew the instruments to the Court, that they may judge of them. 2dly. He does not shew that he tendered him wax, pen, ink, &c. as he ought. 3dly. That the request was not well made, it being at another time, and not when the tender was: but judgment

was given by the whole Court for the plaintiff. For as to the first, the instruments were agreed before, and therefore he need not shew them to the Court. As to the second, there needs not any tender, for the defendant has taken upon himself to do it. And as to the third, the request after the tender is the better (way), for so he had time to read and consider them. And Justice Wyndham said, Where conveyances are before agreed, and to be sealed according to that agreement, so that there is no need of counsel, the defendant is to do it at his peril. And where one is to grant a reversion, he has time to do it any time during his life, if it so long continues a reversion, if he be not hastened by request; here was a request, and the conveyances being (before) agreed, there needs no tender. But if one be to seal a conveyance generally, there the counsel of the purchaser is intended to draw them, and then the purchaser ought to render them. *Quære*, for it was not denied by any.

[45] CAPONHURST *against* CAPONHURST.

Grant of so much of his term as should be to come at his death. S. C. Raym. 27. 1 Keb. 164, 130, 183.

Debt on an obligation conditioned for performance of covenants in an indenture, whereby the defendant's testator being lessee for years of a long term, assigned so much of the term as should be to come at the time of his death to the plaintiff, and covenants that he should enjoy it, and makes the defendant his executor, and dies; and assigns a breach, that the defendant, after the testator's death, outed him; and after verdict for the plaintiff, it was moved in arrest of judgment by Bigland, that the assignment of so much of his term as should be to come after his death, was void; and then the covenant is so also, for the covenant cannot subsist without an estate; and that the assignment was void; he cited, 1 Co. *The Rector of Chedlington's case*, and *Gravenor's case* in Dyer, and 2 Cro. *Child and Bayley's case*. And that the covenant is so also, he cited Yelv. 18, *Sophrani* against *Scarro*, and so held the Court as to those matters. But then it was moved by Jones, that the obligation is then single; for if the condition refers to a thing which is not, it is all one as there were no condition, and to this the Court inclined: but afterwards, as I heard, for I was not present, they held, that the covenant and the obligation being both for the corroborating of a grant, which was void, they were also both void; and gave judgment for the defendant.

HENNINGS *against* BRABASON.

Lease for 80 years, if A. should so long live; and from the death of A. for 31 years more, all is but one term. S. C. 1 Keb. 154.

In ejectment on a special verdict, the case was, The Earl of Meath 23 Sept. 13 Car. 1, leased the tenements in question to Underwood: to hold to him for 81 years from Michaelmas next following, if A. should so long live; and from and after the day of the death of A. for 31 years, the lessee enters the said 23d of September before the commencement of the term, and continued in possession till the year 1643, and then the lessor re-entered, the lessee being out of possession assigns the term to the lessor of the **[46]** plaintiff, who being kept out of possession, brought an ejectment and recovered, and the judgment (thereon) was delivered by Bridgman, Chief Justice; and first, he said, that the term not being to commence till Michaelmas, it was till then a future interest, and the entry by the lessee before was a disseisin; and his whole continuance in possession till 1643, was a seisin by disseisin, and not a possession by virtue of the lease. The second question was, What estate this term for 31 years was? And he held it a continuance of the first term, and an addition thereto, and not a remainder or a future interest; but 31 years added to the former, all being under one *habendum*. But some of his brothers, he said, differed from him in this matter: but he took it so, as the most strong against him: and altho' the 31 years are not from the time of the death of A. but from the day of his death, it is all one, for the whole day whereon he died is part of the first 81 years, if he should so long live, and the next 31 years shall be adjoined thereto, and no fraction of a day,

but the last day of the 81 years, and the first day of the 31 shall be conjoined, and make up one entire term; and it is not to be supposed that he should survive the 81 years, and so finish one term before the other shall commence; for it is to be supposed, that he was 21 when he took the lease; and David says, *that 70 years is the age of a man*, and long terms are considered in law, for they make a mortmain, and of them shall be a wardship. But if the power had been only for 30 or 40 years, then it would be otherwise, for those might be supposed to determine before the life of a man, and not a term for 80 years; and so he concluded, that both the terms being to the same person, makes only one term, as a lease to one for three years, and so from three years to three years, makes but one term of six years: but if the 31 years had been to another person, this would be a remainder or future interest; and he said, that all his brothers agreed with him, that it could not be presumed that the lessee would survive the term of 80 years. Then 3dly, Admitting it to be one and the same term, which is the most strong against him; for if the 31 years was a future interest, as his brothers took it, then it would be more easy to maintain that the judgment ought to be given for the plaintiff, for then the lessee was never possessed thereof, and then the entry of the lessor cannot turn it to a right, and it is then well assigned **[47]** out of the land. But taking it for a certain term, yet he said it was not turned to a right by the entry of the lessee; for that he never was possessed by virtue of the term, but only by disseisin; and the lessor had reason, and might enter to purge the disseisin; and he put the case, if a stranger had after Michaelmas, entered and disseised the lessor, this could not turn the term to a right, into which the lessee had never entered; no more shall it where the lessor himself enters, wherein the lessee hath never entered; and so he concluded, that his whole term was at the first a future interest, and that the lessee was never possessed thereof, and so the entry of the lessor cannot turn it to a right; *and so it is well assignable at a place out of the land.* But some of the other Judges, as it seems, took the last thirty-one years to be a distinct term, and a future interest, and never displaced; and so that term (of which the question is, for the eighty-one years determinable as aforesaid was ended) was well assignable. And judgment was given for the plaintiff.

BRICE *against* CARRE, EMERSON AND OTHERS, EXECUTORS OF J. S.
COMMON PLEAS.

Covenant lies on a writing, by which the defendant covenants to be accountable for 100l. S. C. 1 Keb. 155.

Covenant on a writing sealed, by which the defendants testator acknowledges himself to be accountable for all such monies as should be charged by him on A. to be paid to B. and says, that he charged *so much* on A. to be paid to B. and that he had not paid it; for which he brings this action against the defendants, his executors; and it was moved by Serjeant Bernard, that *covenant* did not lie on such words in a deed, but it ought to be *account;* and cited 1 Cro. *Gury* against *Reason;* and though now account lies not against executor, yet that shall not be turned into *covenant* against the executor, which was not a covenant against the testator. But (by the Court) it well lies, and so would it do on any words in a deed, purporting an agreement for the payment of money: then he moved, that there is not any notice given how much the money was, and that it was not paid over. But thereto the Court answered, that he having undertaken it, and the person being certain, so that he could inform himself; and the agreement **[48]** not being to pay it on notice, the defendant is obliged to take notice himself. And gave judgment for the plaintiff.

ANONYMUS.

Trover *de uno pullo.* S. C. 1 Sid. 60. 1 Keb. 124, 176.

Trover was brought, and among other things declared *de uno pullo:* after verdict judgment was stayed, for that as to the word *pullus*, it is uncertain what was intended thereby; for *pullus* is Latin for the young of any thing, and if it had been with an

Anglice a colt, it had not been good, but it ought to be *pullo equino, Anglice* a colt: then the plaintiff moved to discontinue that he might commence another action. But it was said by the Court, this cannot be after a verdict, by the stat. 2 H. 4, 7. (*Quære.*)

WEBB *against* MARTIN.

Promise to do a thing on request, the action arises on the request, and the Statute of Limitations not pleadable to the promise. S. C. 1 Keb. 177, 197. 1 Sid. 66. Statute of Limitations pleaded to two things, where not pleadable to one, is ill for the whole.

Assumpsit, in consideration that the plaintiff would deliver to the defendant such a deed; the defendant promised that he would re-deliver it to him on request; and also in consideration that he had upon request delivered to him another deed, the defendant promised to pay him 40l. and alledges, that he had delivered to him the first deed; and although at such a day afterwards he made request, yet he had not re-delivered the first deed, nor paid the 40l. The defendant pleads the Statute of Limitations, and that he did not promise within six years before the action brought; whereupon the plaintiff demurs, for the cause of action as to the first (deed) did not arise on the promise, but upon the refusal after request, and the request was within six years. And so held the Court. Then it was moved, that the payment of the money was to be without request, and therefore the plea was good as to that: to which it was answered, that the plea being intire to both parts of the declaration, and being ill in part, is ill in the whole; whereupon it was adjourned. But at a day afterwards the Court held the plea ill in the whole, for the reason alledged; and they cited a case between *Bridges and Ade*, to have been so adjudged. And gave judgment for the plaintiff for the whole.

[49] JONES *against* PHILPOTT.

Remitter by entry of one who comes in by way of use. S. C. 1 Keb. 187. 1 Sid. 63.

In ejectment on a special verdict, the case was, Husband and wife tenants in special tail, of the provision of the husband, the remainder to the heirs of the husband, make a feoffment in fee, having two sons, to the use of themselves for their lives; the remainder to the second son in fee; the husband dies, the wife enters and infeoffs the second son in fee; and wife dies, the elder son enters: and it was adjudged by the whole Court, that his entry was lawful, for that the wife on the death of the husband was remitted; for although that she coming in by the statute by way of use, could not be remitted by the limitation of the use by the statute, according to *Townsend's case*, in Plowd. Com. yet her entry being lawful, she is remitted by her entry; and then if this second feoffment made by her makes a discontinuance, the entry of the elder son was lawful, as for a forfeiture; by the statute of 11 H. 7. And if it was not a discontinuance (as they held, that it was not, being made to him in whom the reversion in fee was well lodged by the first feoffment) nor forfeited, then the entry of the elder son is lawful, as heir to the first intail, the first discontinuance being purged by the remitter of the wife; so that take it either way, let the second feoffment by the wife be a forfeiture or not, the entry of the elder son was lawful.

[50] BARROW *against* HEWITT.

A *habeas corpus* to the Justice of Chester, returned by the Chief Justice. S. C. 1 Keb. 187, 165, 210. 1 Sid. 64. See 6 Mod. 61.

A *certiorari* was issued to the Justice of Chester, or his deputy; and returned and subscribed by such a one Chief Justice; and it was moved to be an ill return, because not by the same person to whom directed; whereto it was answered by Buck, that justice is the substance, and chief is no more than ornament; and he cited 2 Cro. 368,

& Hob. 135, 138, and a case lately in this Court, between *Harrison and Munford*, where a writ was directed to the Justices of Ely, and returned by the Chief Justice of Ely, and adjudged good. And after divers motions the Court held the return good in this case.

RAMSY *against* ATKINSON.

A promise within the jurisdiction, in consideration of a thing not appearing to be done within the jurisdiction is ill. S. C. 1 Keb. 128, 190. 1 Sid. 65. 1 Vent. 28. 2 Danv. 301.

Error of a judgment in the Palace-Court in an *assumpsit*, wherein the plaintiff had declared, that the defendant, in consideration that the plaintiff at his request, had taken pains to procure him a lease of a messuage in Holbourn; he promised at Southwark, within the jurisdiction of the Court, to pay him 10l. and had not paid it. And the error assigned was, that it is not alledged, that Holbourn where the messuage is, is within the jurisdiction of the Court; and the jury is to try not only the promise, but also the consideration, viz. the pains in taking the house, and this they cannot do if it be not within their jurisdiction; and for this cause after argument, the judgment was reversed.

[51] THE LADY CHAWORTH'S CASE.

Husband and wife taken in execution, and she discharged. S. C. 1 Keb. 194. *Vide ante* 1 Mod. 8, 135. 1 Keb. 189, 198, 637. 2 Keb. 355, 442. 1 Sid. 29, 395. 6 Mod. 17, 105.

Her husband Mr. Smith had confessed a judgment against himself and his wife, as for a debt due by the wife whilst sole; whereas upon examination it appeared, that the debt was contracted after the coverture, and this done by practice for taking the wife in execution; but now it appearing, that the husband was taken in execution also, the wife was discharged; for the husband being in execution, the wife shall not be so also, supposing the contract to have been before the marriage. But this being done by practice, the Court said, if it could be made appear who was guilty of the practice, they would punish them.

[52] TERM. SANCT. HILL. ANNO 13 & 14 CAR. II. IN BANCO REGIS.

BILL *against* NEAL.

Words spoken of a justice of peace. S. C. 1 Sid. 67.

Action on the case, for that the defendant said of him, being a justice of peace, *He is a fool, an ass, a beetle-headed justice.* After verdict, it was moved in arrest of judgment, that the words are not actionable, for they sound only in *disability* and not *criminally.* But on the other side it was said, that the words are scandalous of him, and import his unfitness to be a justice of peace, and are a cause to remove him from his office; and they cited 1 Cro. *Peal* against *Jones. Dunce of a lawyer, and he will get little by the law*, which were adjudged actionable. And in the same book, *Cawdry* against *Highly*, words spoken of a physician, *He is a drunken fool, an ass, never was scholar, nor fit to speak to a scholar*, adjudged actionable; and here those words charge the plaintiff with indiscretion, and render him incapable of the office of a justice of peace. But it was adjudged by Foster, Chief Justice, Wyndham and Twysden against Mallet, that those words are not actionable, and cited 2 Cro. 58, *Biscoe* against *Hollis*, as a stronger case than this, and *Hammond and Kingsmill's case* in this Court, 7 Jac. 1, where, for saying of a justice of peace, *He is a debauched man, and unfit to be a justice*, it was adjudged, no action lay; and Justice Twysden said, that words which found in *disability* only, are not actionable, except they are spoken of one who gains his living by that thing (profession) wherein the words do disable him. Mallet held these words actionable, being spoken of a magistrate. But all agreed, that the defendant deserved to be bound to his good behaviour for his **[53]** sawciness of a magistrate.

Whereupon the counsel of the plaintiff moved immediately, that he might be bound to his good behaviour; but thereto the Court answered, that the Court could not do it without a *supplicavit* first made, and before the *supplicavit* there ought to be a bill of the complaint filed. But Foster, Chief Justice, said, that if any would sue to him for a warrant for the good behaviour, he would grant it; but as to the action, they gave judgment for the defendant.

SHEPPARD *against* WAKEMAN.

One claims a contract of marriage with a woman, by which she lost her marriage. S. C. 1 Keb. 255, 269, 303, &c.

Case, where the plaintiff was to be married to such a one who intended to take her to his wife; the defendant falsly and maliciously to hinder the marriage, writ a letter to the said person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved, that the action did not lie, the defendant claiming title to her himself, like as *Gerrard's case*, 4 Co. for slander of title. But after divers motions, the plaintiff had judgment, for it is found to be malicious and false; and if such an action should not lie, a mean and a base person might injure any person of honour and fortune by such a pretence.

ANONYMOUS.

Londoners to serve on a jury out of Londin, where the King is party.

A man being cheated in a tavern in London, and having given a judgment for the money, moved here to have the judgment reversed for the fraud; and the Court for the present ruled the execution to be stayed till the matter be examined: and Foster and Twysden advised the party to bring an information against the cheat, and also against the vintner in whose house it was, in this Court: for they said, that the privilege of Londoners not to be returned of juries out of the city, extended only to cases between party and party, and not (to cases) where the King is party.

[54] NEAVE *against* NELSON.

Privilege of the party pleaded to the jurisdiction after a special imparlance. S. C. 1 Keb. 195, 221, 256. 1 Salk. 1.

Debt in the King's Bench against an attorney of the Common Pleas, who imparls specially, with saving to himself all exceptions, and afterward pleads his privilege, whereupon the plaintiff demurs. And it was objected, that privilege is not pleadable after such an imparlance: but if he would have reserved liberty to plead to the jurisdiction of the Court, he ought to have shewn it specially in his imparlance; and not only as here (*salvis, &c. tam ad breve quam ad billam, &c.*) but also to the jurisdiction; the others are only as to the person and the action, and not to the jurisdiction of the Court; and cited 7 H. 6, 37. 22 H. 6, 7, also the plea is not averred as it ought. Wyndham and Twysden held at this time the plea to the jurisdiction, receivable on this imparlance: but it was adjourned. And afterwards in the following term, a *respondeas ouster* was awarded for the fault of the plea in wanting an averment; but nothing further was spoken of the special matter. But afterwards in Michaelmas term, 18 Car. 2, in this Court, entered Trin. 18 Rot. 121, between *Trussel and Maddox*, it was adjudged, that a plea to the jurisdiction is not to be received after such an imparlance, which you may see hereafter reported at large, p. 188. (*Sed quære.*)

SAYER *against* GLEAN. IN THE COMMON PLEAS.

Bottomry bill with excessive interest. S. C. 1 Sid. 27, 28. 2 Danv. 77, pl. 15.

Debt on an obligation conditioned, that if a ship sent to sea, or the goods (therein) or the obligor returns safe, to pay him the sum, beyond the use allowed by the statute

for the loan of 100l. and also the 100l. And upon demurrer it was objected, that it was an usurious contract, and the bond void, because the payment depended upon so many things, one of which in probability must happen. Though if it had been on the return of the ship only, it might be good. But it was resolved by Bridgman and the whole Court, that it was a good bill of bottomry, and tolerable by the usage among merchants, and allowable by reason of the great perils of the sea, and not like to the case in 5 Co. where the condition was to **[55]** pay within six months, if one of the three persons were in life; for by the same reason then it might be so for ten lives. *Secondly*, The defendant here having pleaded, that the obligor died before the return, and the plaintiff having demurred thereupon without assignment of any breach, it was objected, that the plaintiff could not have judgment. But to that it was answered and resolved, that the defendant having pleaded a collateral plea, and that being defective, had saved the plaintiff the labour of assigning a breach, and had given the plaintiff the advantage of putting himself on the judgment of the Court, whether the plea be good or not; and this before he comes to make any replication, Yelv. 78. But if the plaintiff had admitted the plea, and made a replication, which shewed no cause of action, it would have been otherwise (said Bridgman.) *Thirdly*, It was objected, that the defendant had election to pay upon which of the contingents he would, and of one of them he is deprived by the death of the obligor, and therefore is excused of all. But to this it was answered and resolved, that all those things being contingent and uncertain which of them would happen, the law supplies these words, *which shall first happen;* and it shall be expounded, to pay at which of the contingents shall first happen; and so foreclose the election of the obligor, and give it to the obligee to take the action on which of the contingents shall first happen: and it is not like the case where one is obligee to pay a sum at Michaelmas or Lady-Day, if he were then in life, and he died after Michaelmas and before Lady-Day, as Bridgman said. And judgment was given for the plaintiff.

FOSTER *against* FOSTER.

Agreement to convey to the son, will not raise a use. S. C. Raym. 43. 1 Sid. 82. 1 Keb. 160, 225, 274.

Ejectment, and upon a special verdict, the case was, Margery Foster being seized, there was a deed made between her and her son William Foster, in this manner. Articles of agreement for conveyance of, &c. the tenements in question. *Imprimis, The said Margery in consideration of* 20l. *hath bargained and sold, demised and granted, and doth hereby bargain and sell, demise and grant, &c. to Matthew Foster, the tenements in question, to have and to hold to him and his heirs* **[56]** *for ever, she to have it during her life, and also she to have his barn during her life for her third part, &c.* And the jury find, that the articles were made as well in consideration of natural affection, as of 20l. but no execution by livery or inrollment; and afterwards she made feoffment of those lands to Nicholas Foster the defendant, against whom Matthew Foster brought the ejectment; and the question was, whether those articles amount to a covenant to stand seized to the use of Matthew? And it was after argument adjudged in Trinity term, 14 Car. 2, for the defendant, that the articles did not raise any use, but rested only in covenant, and as preparatory agreements: it was agreed, that though the 20l. is the consideration express, yet the jury may find the other consideration of affection. And Twysden said, that a covenant in consideration of 20l. to stand seized to the use of my son, is not good without inrollment, but a covenant in consideration of 20l. and affection, is good without inrollment, because both considerations are express; but all agreed, that in this case no use should arise, and that the deed rested only in agreement. And this appears, *first*, from the title, viz. *articles, &c. Secondly, She to have all for her life;* which is but an agreement that she should have it. *Thirdly, That she should have his barn;* this rests only in covenant, and if the estate should pass to her by way of use, and she have covenant only for the barn, it would be unequal.

COUNT OF STANDFORD *against* NEDHAM.

Venue not changed *in scand. mag.* S. C. 1 Keb. 514. 1 Sid. 143.

In scandalum magnatum, and the action laid in London; the defendant moved to change the *venue*, for that he was prohibited to stay in London, having been in arms against the King: but the motion was denied, for the plaintiff is a Peer of the Parliament now sitting at Westminster, and has election to lay his action where it is most convenient for himself; and the rather in this case it ought not to be removed, because this action is as well on behalf of our lord the King, as himself.

[57] THE KING *against* ALICOCK.

Indictment for treasonable words.

He was convicted of treason for speaking those words, *The King is a bastard, his mother is a whore, he is gone to convey the whore out of the kingdom*, (the King being then gone to leave his mother at Portsmouth, in order for her transportation to France) *but may come short home, if I meet him I will kill him;* and on the trial at the Bar the Court held the words treason: but it appearing that the witnesses were of ill fame, and inhabiting in a scandalous part of the city, where the defendant had oftentimes disturbed them, being four or five, and some of them women of ill fame; and it being proved that they had conspired to rid him out of their way, the jury found him not guilty. See the stat. 13 Car. 2, stat. 1, cap. 1.

BROWN *against* BROWN.

Covenant general restrained by a particular covenant subsequent.

Covenant on an indenture, whereby the defendant grants a fee-farm-rent to the plaintiff, which he had purchased of the late trustees for the sale of the King's tenements, and covenanted, that he was seized in fee, and had good right to sell; and assigns a breach, that he had not good right: the defendant pleads, that it was further agreed in the same indenture, that all the covenants in the indenture should not extend further than to acts done by the vendor and his heirs, whereon the plaintiff demurs; and there being a remote agreement in the end of the deed, far distant from the other covenant, it was adjudged, that it had qualified the first covenant, and restrained it to acts done by the covenantor himself only; as in *Nokes's case*, 4 Co. whereupon it was adjudged for the defendant.

[58] HARRIS *against* KNIPE.

An award of mutual releases, without any other thing on one part, yet good.

Debt on an obligation to perform an award, and in the first part of the award it is awarded, that all suits and controversies shall cease, &c. and though in all the award afterwards nothing is well awarded, but only on one part; yet it was agreed by the Court, that this is a good and mutual award on the first party only.

LADY DACRE'S CASE.

Ejectment of a stable, orchard, cottage, &c.

Ejectment was brought among other things *de uno stabulo:* after verdict it was moved in arrest of judgment, that an ejectment does not lie of a stable; but on view of precedents in the Common Pleas, of recoveries suffered of a stable, it was resolved it well lay; as also of an orchard, and of a cottage. And Twysden said, that though an ejectment would not lie of a croft, yet it will lie of a croft called Black Acre; for this is certain enough to be delivered in execution; and so, he said, it was adjudged in one *Fairbeard's case.*

HUNT *against* HURLEWOOD.

Damages in the whole above the particulars, good, if the jury give no more than the particulars.

Assumpsit of several particulars of divers values, which amount to 69l. 9s. but by a miscasting at the foot it was made to amount to 70l. 14s. And after verdict this being moved, it was resolved, that the jury not having given more damages than 69l. 9s. it is well; but otherwise it had been, had they given above the 69l. 9s.

[59] COLLINGWOOD *against* PACE IN THE EXCHEQUER-CHAMBER.

[See S. C. 1 Ventr. 413.]

Devise to the heir of one who is alive, or to the heir of an alien, is void. 1 Sid. 193. 2 Sid. 23, 51, 108, 194. Vaugh. 274. 1 Keb. 65, 174, &c. 2 Jo. 10. 1 Vent. 413, &c. 2 Vent. 1. Hard. 224. Hob. 29. Raym. 163, 330. 2 Mod. 291. 2 Jon. 99, 212. Mo. 860. 3 Lev. 330, &c. 2 Danv. 515.

In ejectment in the Common Pleas on a special verdict, the case was, that Ramsey, an alien Scot, before the Union, had issue four sons, viz. Robert, Nicholas, John and George, Robert had issue, three daughters now living. Nicholas had also issue two sons Patrick and William yet in life. John had no issue; George had issue the lessor. John being seized of the lands in question, devised them to the heir of Nicholas and his heirs. John and Robert being before naturalized by Act of Parliament, with words, that they should inherit to any ancestor lineal or collateral, as fully to all intents and purposes, *as if they had been natural subjects born in England.* John and his wife are dead, and also George. Patrick the elder son of Nicholas, enters as heir of Nicholas, claiming by the devise, against whom the lessor brought ejectment, as son and heir of George, and brother and heir of John. And this case being argued in the Common Pleas, two points were made; 1. If the devise to the heir of Nicholas was good? And resolved by Bridgman and the whole Court, that the devise was void, first, because Nicholas was alive, and none can be heir to a living person. 2dly, Nicholas being an alien cannot have any heir by our law; an heir he might have in Scotland, but not in England, where the lands are which this devise concerns; and so it was agreed by all, that the defendant had no title. But then the question was; 2dly. Whether the plaintiff had any title, or whether the lands should escheat? And thereupon the question was, if John and George being aliens, sons of an alien, may be heirs or inherit to one another by the Act of Parliament, being naturalized as aforesaid? And it was held by Bridgman and Tyrrel, that they cannot inherit to one another, according to the opinion of 1 Co. Inst. 8 a. because they do not derive any inheritable blood from their father; and *Hobbie's case*, Noy 158, 159. But they agreed, where a man had two sons and afterwards is attainted, the sons shall inherit to one another, because they had inheritable blood derived from their father and mother before the attainder, which cannot be extinguished by the attainder afterwards; and for this reason each of them might inherit from their mother such **[60]** lands as came by her. But if the attainder had been before the birth of the sons, it would have been otherwise. And they agreed with the others, that the being of daughters of Robert the elder brother, would not prevent the descent, as it would have done, had they been at once (together) legal heirs and attainted. And the Court being divided, Hide and Brown, Justices of the Common Pleas, being of the contrary opinion, the case was adjourned into the Exchequer-Chamber before all the justices of England, where Kelynge, then a Justice of the King's Bench, joined in opinion with Bridgman and Tyrrel, who adhered to their former opinion. But Hyde, then Chief Justice of the King's Bench, and Brown, still Justice of the Common Pleas, retained their former opinions, and with them joined in opinion, Hale Chief Baron, Twysden and Wyndham Justices of the King's Bench, and Atkins and Turner Barons of the Exchequer; and they held, that by virtue of the Act of Naturalization, John and George were inheritable the one to the other, and so the lessor, son of George, was inheritable

to those lands as heir to George; and they held, that if an alien has two sons born in England, the one shall inherit to the other, tho' neither of them could inherit to the father, for the descent between them is immediate, and they shall make their title in a *mortdancestor, &c.* as heir to the brother, without mentioning the father: and this answers the objection, which was made on the other side, and strongly insisted on, that altho' the Act enables them to inherit to any ancestor lineal or collateral, it is restrained by the words *as if they were born in England:* and Bridgman and those of the other side, saying, that two brothers born in England of an alien father, could not inherit to one another; all the Judges of this side denied it, and for this cited *Godfry and Dean's case*, 2 Cro. and they denied that which is said in Co. Lit. 8 a. which is not there spoken as the opinion of Coke himself; but he says, *that some have said*, that if the father be attainted, and afterwards have two sons born, the one shall not inherit to the other, because they never had any inheritable blood derived from their father; and the words of the Act of Parliament which say, *He shall be inheritable to any ancestor lineal or collateral*, would be vain, if he being descended from an alien father could not have any ancestor. And afterwards in Easter term, 16 Car. 2, judgment was given for the plaintiff by the opinions of the said seven Judges against the said three, that the one brother shall inherit to the other by virtue of the said Acts of Naturalization.

[61] TERMINO PASCHÆ, ANNO 14 CAR. II. IN BANCO REGIS.

THE KING *against* OKEY, BARKSTEAD AND CORBET.

Persons attainted, tried whether the same persons, &c. S. C. 1 Keb. 244. 1 Sid. 72. Keel. 13, 14.

They having been attainted by Act of Parliament for the murder of King Charles the First, being three of his Judges, which sate in the High Court of Justice, as they called it; and having escaped, and retaken, and being brought to the Bar, and demanded, whether they were the same persons in the Act mentioned; they said they were of the same names, but there might be divers persons of the same name: but they (further) said, that the Court ought not to proceed against them without having a record of their attainder here in Court, as was done in *Sir Walter Raleigh's case*, where the indictment, tho' long before, was (made) a record of this Court, and produced. And thereupon the record of the Act of their attainder being removed by a *certiorari* into Chancery, and thence sent hither by a *mittimus*, was read unto them; whereupon they pleaded, that they were not the same persons, and issue was taken thereon, and a jury returned immediately to try it, which was done, and they (were) not permitted to challenge peremptorily, for they are not now to be tried for the treason, but (only) of the identity of persons; and the jury found them the same persons; and thereupon sentence of execution was immediately given, and three or four days afterward they were executed at Tyburn.

[62] THE KING *against* KIMBERTY AND MARY NORTH.

[Distinguished, *Mogul Steamship Company* v. *MacGregor*, 1889-92, 23 Q. B. D. 630; [1892], A. C. 25.]

An indictment lies for conspiring only, without other act done. S. C. 1 Keb. 203, 254.

They were indicted for conspiring to indict J. S. for having begot a bastard on the body of the said Mary, with intent to extort money from him. After verdict and motion in arrest of judgment, it was resolved, that the indictment lies for the meer conspiracy, without any indictment or other act done, as 9 Co. 56 b. *The Poulterer's case;* but the Court would consider what punishment they should have.

And *note*, afterwards in Hillary term, 15 & 16 Car. 2, B. R. *The King* against *Sterling*, an indictment for conspiracy to depauperate the excise-men, was adjudged good.

NEVILL *against* HANCERTON.

[Referred to, *Robinson* v. *Duleep Singh*, 1879, 11 Ch. D. 832.]

One justifies the inclosing of common, for the enlarging of his curtilage. S. C. 1 Sid. 79. 1 Keb. 314, 283.

Case (was brought) and declares, that he had common in three acres, and the defendant had enclosed two of them: the defendant pleads, that he had a house there, and made the inclosure for the enlargement of his curtilage; whereupon the plaintiff demurred, and took these exceptions to the plea, viz. 1. That it is not said to be an ancient messuage; for which cause Twisden said, the plea was not good. But Wyndham *contra*, it being for enlargement of a curtilage, for the lord may build a new house for his herdsman, and afterward enlarge the curtilage, 2 Inst. 476. 2dly. That it was unreasonable to inclose two acres out of three. To which it was answered, that the quantity is to be considered with the quality of the person. 3dly. That it is not averred that sufficient common was left; to which Twisden inclined, Wyndham *contra*, said, that it was to be averred only, where the inclosure was for the improvement of the land, and not where it was for the enlargement of the curtilage. But afterwards in Trinity term, the plea was agreed by all (the Court) to be ill, because it was not said, that the messuage was for his own habitation, or of his shepherd; for he might (perhaps) build a great messuage to lease to a nobleman, which might require a greater curtilage than the lord himself or his herdsman: and therefore judgment was given for the plaintiff.

[63] PORTER *against* HARRIS.

Covenant brought against two, and judgment by default against one, the other pleads performance, which is found, the plaintiff shall not have judgment against the other.

Covenant was brought against two for not building a house for the plaintiff according to their covenant; judgment was against one by default, the other pleads performance, and it is found for him; whereupon it was moved in arrest of judgment, that no judgment nor writ of inquiry of damages, could be against him against whom the judgment was by default: because although in trespass, one may be guilty and the other not, yet in covenant, debt or other contract where it is joint, the one cannot be convicted without the other; and here by the verdict for one of the defendants, that the covenant is performed, it appears now, that the plaintiff had not any cause of action, and therefore shall not have judgment, as *Tillies and Woodie's case* is, E. 4. and so should it be, although the defendant against whom the judgment is by default had confessed the judgment. It was also resolved, that the defendant should have costs on the verdict against the plaintiff, for now it is a verdict against him, and that he should have neither costs nor damages against the other.

EARL OF SALISBURY'S CASE.

Seizure of copyhold until, &c. good without custom; but not a seizure as forfeited without a custom. S. C. 1 Keb. 287.

In evidence to a jury at the Bar, (on a trial) in ejectment, the question was, whether the heir of a copyholder, not coming in to be admitted on proclamation, if the lord might seize the land without a particular custom to do it? And it was held, that he might seize until the tenant came in to be admitted without any custom but to seize as forfeited, he could not without a custom. Another question was, if in the proclamation there ought to be particular mention of all the lands by name, as they are named in the copy, or if a general proclamation to come in and be admitted to all the lands of his ancestor (were sufficient)? and this was intended to have been found specially. But afterwards the parties agreed in Court.

[64] SIR HENRY HERBERT *against* PAGETT.

An officer chargeable for defaults in his office which he could not hinder. S. C. 1 Sid. 77. 1 Keb. 288.

In case, plaintiff declares, that where a judgment was had against the plaintiff in case for words, and the judgment entered with a *capiatur* instead of *misericordia*, he thereupon brought a writ of error to have the judgment reversed; but that the defendants being Keeper of the Writs and Records of the Court, kept them so negligently, that the record was amended, and made *misericordia;* and on (issue) not guilty and trial at the Bar, although it appeared that all the attornies of the Court had privilege to view the records without controul, and that sometimes they viewed many of them at the same time, so that it was almost impossible to observe them all; and that many times the attornies amended their judgments at any time, if there were not a rule to the contrary; and an ancient attorney swore, that it had been oftentimes done even after a writ of error brought, before the record removed; and thereupon it was insisted by the defendant's counsel, that the defendant could not take notice what they amended, or ought to amend: yet by Mallett and Wyndham it was held, that though here appeared no neglect or want of care in the defendant, yet he having taken upon him to keep the records, he is at his peril to answer for all the misusage that is in the records, and so is chargeable in the action. Twisden held the contrary, that he ought not to be chargeable, for that by no industry he could prevent it; but forasmuch as the declaration recited, that the writ of error was from the Chief Justice, &c. directed to another Chief Justice, &c. but mis-directed: all agreed that it was a variance, for which the plaintiff ought to be non-suited, and so he was.

[65] ORTON *against* FULLER.

Words. S. C. Raym. 51. 1 Keb. 293, 303.

Case was brought for words, that the defendant said, *The plaintiff says I am a perjured rogue; he is a perjured rogue as well as I:* After verdict for the plaintiff it was moved in arrest of judgment, that the words are not said positively (of the plaintiff) but relatively to the defendant; and it is not averred that the defendant is a perjured rogue; as for saying *He is as very a thief as any is in Warwick gaol,* an action does not lie without an averment that a thief was there. But it was said by the Court, the defendant had supplied the want of an averment, in saying, *as well as I,* whereby he had confessed himself to be a *perjured rogue;* and afterwards in Trinity term judgment was given for the plaintiff.

QUEEN'S COLLEGE CASE, *alias* DR. PATRICK'S CASE.

A *mandamus* does not lie to a college where there is a visitor. S. C. Raym. 101. 1 Sid. 346. 1 Keb. 289, 294, 298, 551, 610, 665.

Dr. Patrick being duly elected, as he thought, to the Mastership of Queen's College in Cambridge, but denied to be admitted, and sworn by the senior fellow, being of the party of another who stood in competition with Dr. Patrick; the doctor prayed a *mandamus.* Twysden and Wyndham held, that it did not lie, for Twysden said, he knew they had a visitor. But by Foster Chief Justice, Let the writ go, and upon the return it will appear whether they have a proper visitor; and the writ was granted; but that not being returned, the next term an *alias* was granted and returned, and many exceptions were taken to the return, the most part whereof afterwards appeared not to be material. But in Hillary 15 & 16 Car. 2 the case was argued at the Bar by Jones for the doctor, and by Finch the King's Solicitor, for the college; and now the return was opened at large, viz. that they were incorporated by Hen. 7, *ad Studend' & Orand'* and to consist of a president and nineteen fellows, and that all differences between the president and fellows, should be referred to, and determined by the chancellor of the university and the major part of the heads of

the colleges there. And they further **[66]** returned the patent 2 Jac. 1 whereby the statutes of the colleges in the university are confirmed, and thereby it is appointed, that where no other is visitor, the chancellor shall be visitor if he be present, and if absent, the vice-chancellor, if he be present and appointed; and that Dr. Marten the late president died such a day, and that Dr. Patrick was elected president by such a number of the fellows, and one other by such another number (being the greater) and admitted; and that the chancellor was then absent, but that the vice-chancellor was then present in the university, and that Dr. Patrick had not appealed: and it was much controverted, whether this were a spiritual or a temporal foundation, *ad Studend' & Orand'*, and not agreed, some of the Judges holding the one way, and some the other: but the principal point was, that here being a visitor appointed, whether this Court could meddle with the matter, be the corporation either spiritual or temporal, for the return was in some things agreed not to be very good? And the principal matter was argued at the Bar, in Trinity 15 & 16, and in Michaelmas the 16th; and in Trinity the 18th of Car. 2. And in Hillary the 18th it was argued at large by all the Judges, and Kelynge now Chief Justice (who before had been counsel for Patrick) and Moreton the puisne Judge held, that the *mandamus* well lies, and that a peremptory *mandamus* ought to go for admitting Doctor Patrick, and an attachment against the senior fellow, for a contempt on this return, and not admitting him before. But Twysden and Wyndham held the contrary; and that here being a visitor appointed, this Court had nought to do in the matter, for the founder intended that his college should be free of all foreign suits, and that all controversies should be determined within the university, to the intent that they might the better follow their studies: but by this means, if they should come hither upon every controversy, the order and rule of the universities should be overthrown; and the visitors are the proper judges of their laws and statutes, and not this Court. And the Court being thus divided, it was considered whether this being a cause of the Crown-Side, might be adjourned into the Exchequer Chamber, and it seemed to some that it might, but it was not.

[67] *Note*, The exceptions principally insisted on were; *First*, That it is not returned, that the vice-chancellor was appointed visitor, and by the return (it appears) he is not (to be) visitor if he be not appointed. And the return is, that the chancellor was absent, and the vice-chancellor present: but it does not say that he was appointed. And *2dly*, they have not returned any cause, wherefore they refused to admit Dr. Patrick: but return the special matter as aforesaid, but do not say which of them was duly elected, and yet they return, that Dr. Patrick had not appealed.

Note, The parties being agreed, the return in this case was afterwards agreed to be vacated, because it could not be taken off the file.

[68] TERM. SANCT. TRIN. ANNO 14 CAR. II. IN BANCO REGIS.

SIR HENRY VANE'S CASE.

A copy of indictment and counsel denied in treason. S. C. 1 Sid. 84. 1 Keb. 304, 315, 319, 324.

He being excepted out of the general pardon, was indicted of high treason committed before the King's restoration; and after that the indictment was read, he desired it might be read again, which was done: but then he desired it might be read in Latin, which was denied, it being never done. Then he desired a copy thereof, and counsel, which was denied: but the Court said, that if he took any legal exception, he should have a copy of so much thereof as concerned the exception, and counsel to argue it. And then being tried and found guilty, and being brought to the Bar at a day afterwards, he tendered a bill of exceptions, which the Court refused to accept; for a bill of exceptions does not lie in criminal cases, but only in actions between party and party. And he was afterwards executed on Tower-hill by beheading only.

AT GUILD-HALL.

Duress cannot be, where the party is in prison by the King's writ. *Vide* 1 Sid. 43, 74.

Audita querela on a release given after judgment; the issue was, that the release was made by *duress;* and it being tried before Bridgman, Chief Justice of the Common Pleas, the evidence was, that the defendant not having good cause of action, caused the plaintiff to be arrested and detained in prison till he made the release, with menaces, that he should lie there *and rot,* if he would not seal a release; whereupon he made the release, and was presently discharged: and held by Bridgman, that he **[69]** being in custody of the law by the King's writ, it was not any *duress* to be pleaded in avoidance of the deed, but being arrested without cause of action, he had his remedy by action on the case: but he offered to have it found specially, if Baldwin would pray it, but he did not do it, and (so) the jury gave their verdict, that the release was good.

ANONYMUS.

A writ tested the term that the judgment was given, where the action was commenced before. *Qu.* if good. *Q.* Raym. 244.

Error of judgment in the Common Pleas, and want of an original assigned, and upon diminution alledged, the judgment being of Hillary term, with an imparlance of Michaelmas term, and the judgment being of Hillary term when the original is given, tho' in the Common Pleas an original sued returnable the same term, that the judgment is given, is good; yet it is not so to be allowed here, where the record is all made up of the same term, as they generally do without an *alias prout patet, &c.* But in this case, seeing the record is here certified with an *alias prout patet, term. Michaelis,* so that it appears the action was commenced before the original, it cannot be intended the original in this action, but in some other by Twysden; whereto the Court agreed, and reversed the judgment.

LITTLEBOY *against* WRIGHT.

Words spoken within the palace jurisdiction, loss of marriage without the jurisdiction. S. C. Raym. 63. 1 Sid. 85, 95, 105. 1 Keb. 328.

Case (was brought) for saying of the plaintiff within the jurisdiction of the Palace-Court, *She is a hackney whore,* whereby she lost her marriage: and after verdict and judgment for the plaintiff in the Palace-Court, error was brought here, and the judgment reversed, because it is not shewn, that the loss of marriage was within the jurisdiction of the Court, and that is the cause of the action, and not the speaking of the words only; and if the action be brought within two years after the loss of the marriage, the Statute of Limitations is not pleadable, tho' the words were spoken ten years before, if the words are not actionable, without the loss of marriage.

[70] TERM. SANCT. MICH. ANNO 14 CAR. II. IN BANCO REGIS.

OLIVER *against* EVENS.

A. promises B. to deliver him a deed; B. promises A. on the delivery to pay him 60l. A. ought to averr performance of the delivery. S. C. 1 Keb. 333, 342.

Assumpsit, and declares, whereas the plaintiff had purchased a lease of certain lands, then in the defendant's possession; the defendant in consideration that the plaintiff had promised to the defendant to pay him 60l. the first of February 1661, the defendant promised the plaintiff to deliver to him the said lease on the payment of the 60l. and also to deliver to him the possession of the land the first of April next following; and assigned a breach, that he did not deliver the possession of the land the said first of April. After verdict for the plaintiff, it was moved in arrest of

judgment by Aleyn, that tho' here is a promise against a promise, yet the lease being to be delivered on payment of the money, the plaintiff ought to aver that he had paid the 60l. for otherwise he is not to have the lease delivered to him: to which the Court agreed; but they held, that the delivery of the possession of the land is another thing and distinct, and to be done at another time; and therein is the breach alledged, and that ought to be done be the 60l. paid or not; but if the breach had been for not delivering of the lease, it had been as Aleyn said. But the breach being for not delivering the possession of the land, they gave judgment for the plaintiff.

[71] BUNTON *against* BATEMAN.

Case for disturbing a seat in the church, without a prescription to repair. S. C. 1 Sid. 88, 201. 1 Keb. 345, 370, 386, 420, 433, 457. 1 Wils. 326. 1 Term Rep. 428.

Case for disturbance of a seat in an aysle of the church, and prescribes, that he and all the tenants of such a house, had all the seats in the said aysle; and after verdict it was moved in arrest of judgment, that he had not shewn any cause or consideration for the prescription, as to repair, &c. And it was moved several times, and much debated, and divers cases were cited on the one side and the other as Hob. 69. *Buckly & Bailie's case*, 2 Cro. 366. *Francis* v. *Lee, ibid.* 605, *Davis & Dee.* And on the other side were cited Co. 3 Inst. 202. *Corven* against *Pym*, 1 Inst. 121, 122. 12 Co. Rep. *Corvin & Powis's case* there reported; and 2 Inst. 489. And some would make a difference between a seat in a church and an aysle, for an aysle may be on his own soil: and after many debates it was at length adjudged for the plaintiff, on this difference, viz. it is good in an action of the case against a disturber, but not in a prohibition, as many of the cases before cited are; also, in case where one claims a right against the Ordinary, he ought to shew a title by repairing, &c. but not in case against a trespassor or tort-feasor; and thereupon judgment was given for the plaintiff, whereupon a writ of error was brought in the Exchequer Chamber, and the judgment affirmed there in Easter term, 16 Car. 2.

SCOT *against* STEPHENSON.

Assumpsit where one was obliged for the defendant's testator, and forced to pay the money. S. C. 1 Sid. 71. 1 Keb. 346.

Assumpsit, that whereas Sanders was indebted to divers persons and the plaintiff obliged for him, and forced to pay them; the defendant being Sanders's executor, in consideration the plaintiff would forbear to sue him for the money, promised to pay him: after a verdict for the plaintiff on the issue *non assumpsit*, it was moved in arrest of judgment, that here was no consideration; for it does not appear that Sanders had promised or was obliged to save him harmless; and *Borden and Thyn's case* in Yelverton 40, [72] and *Smith and John's case*, Owen 132, were cited. But by the Court, there was equity, that Saunders should save the plaintiff harmless, and a suit in equity is a suit, or perhaps he might be charged by (a writ) *de plegiis acquietandis*, and therefore they held the consideration good, and gave judgment for the plaintiff, except cause (shewn to the contrary) on Monday next, &c.

WINN *against* LLOID.

Entry (alone) no plea in a writ of error, but entry and feoffment, and entry and lease is. S. C. 1 Keb. 54, 351, 388, 459, 717, 748, 809, 914. Raym. 16, 55, 70, 96, 134. 1 Sid. 213. *Post*, 130, 146.

Error of a common recovery in Wales, and a *scire facias* against the demandant in the recovery; but then it being shewn that others were tertenants, a *scire facias* issued against them also, and the sheriff returned J. S. and J. D. tertenants. J. S. came and pleaded an entry by the plaintiff in the error, into part pending the writ.

J. D. pleads, that he is lessee for years to one Owen, and demands judgment if he shall be compelled to answer without the said Owen: the plaintiff demurs to both; and as to the first it was resolved by the whole Court, that entry by the plaintiff in the error is no plea, for he might have a writ of error before any possession recovered against him, when he is possessed of the whole for reversing the judgment, although he cannot have restitution of that which he had never lost. But an entry and feoffment is an extinguishment of the writ of error, for that he hath (thereby) departed from his title, and an entry and lease is a suspension of the writ of error for the time; and as to the second (plea) it was said, *first*, that to say he is only lessee for years, where the sheriff has returned him tertenant, is contrary to the record: it was also said, that the tertenant cannot plead in abatement of the writ of error, but only in bar, as a release, &c. in maintenance of his title; for the *scire facias* against him is not to hear the errors, but only to hear the process and record; and thereto Twysden and Wyndham inclined. And afterwards it being moved again, and the matter appearing to be for delay, the pleas were both over-ruled, and a *respondeas ouster* awarded.

[73] WHEATLY *against* THOMAS.

An Act of Parliament, that the heirs of one attainted shall inherit. S. C. Raym. 53. 1 Keb. 349, 395, 436, 549, &c.

Ejectment by Francis Brook, lessor of a third part of lands in Cooling, and on not guilty tried at the Bar, a special verdict found George Brook, Lord Cobham, seized of the manor of Cooling, had issue William, Duke, Charles, Calisthenes, and John, and three other sons, and devised the manor to William for life, remainder to the first and all other sons of William, and the heirs males of the bodies of every of the sons of William; with like estates for life to each of the other seven sons of the Lord Cobham, and the heirs males of their bodies; the remainder to the heirs of the body of William; with like remainders to six of the younger sons of the Lord Cobham in tail; the remainder to the right heirs of Edward, the eighth son of the Lord Cobham: William the eldest son had issue Henry and George, both which were attainted of treason, 1 Jac. 1, and afterwards by Act of Parliament, 3 Jac. 1, reciting their treason, it is enacted, *that all their estates, rights, &c. shall be forfeited and vested in the King, saving the rights of others;* provided and be it enacted, *that the manor of Cooling shall be and remain to Duke Brook, and the heirs male of his body,* the remainder to Charles in like manner, remainder to Sir William Brook, (who was father of the now plaintiff) the son of George in like manner; remainder to Calisthenes, son of the Lord Brook in like manner; remainder to Sir John Brook, another son of the Lord Cobham in like manner; *and for default of such issue, to and for such other persons and estates as are limited by the will of the Lord Cobham.* And afterwards in the seventh year of King James I. by another Act of Parliament it was enacted, *that Sir William Brook, son of George, who was attainted, and father of the lessor, should be restored in blood to be heir to any ancestor lineal or collateral, as if George had never been attainted:* and it is further found, that Duke, Charles, Calisthenes, and all the other sons of the Lord Brook are dead without issue male; and Henry without issue, and that William the son of George, had issue only three daughters, one of which is lessor of the plaintiff, who entered into the third part, and devised it to the plaintiff, as appears, &c. and (conclude) if for the plaintiff, for the **[74]** plaintiff; and if not for the defendant: and it was argued this term by Serjeant Baldwin for the plaintiff, and Jones for the defendant; and Mich. 15 Car. 2, by Serjeant Glyn for the plaintiff, and Finch the King's Solicitor for the defendant. And the only question was, whether those daughters, the issue male being spent, should inherit as heirs of the body of William, the son of the Lord Cobham, notwithstanding the attainder, either by virtue of the proviso of the statute 3 Jac. or if not by that only, if by that and the statute 7 Jac.? And for the defendant it was argued, that the statute 7 Jac. signified nothing in the case, and that they could not take by the proviso in 3 Jac. for if they should take the estate thereby, they ought to take as purchasers, and that they could not do, not being heirs, for by the attainder the blood was corrupt, and they cannot be heirs to any person: and although by 7 Jacobi, the blood of their father was restored, it came

too late, for he was not heir at the time of the Act, 3 Jac. when the grant by the proviso of 3 Jac. was made; and that in the end of the proviso, it is only for default of the issue male of Duke, Charles and William, and the others there named, that it shall remain, and be to such persons, and for such estates as is limited by the will of the Lord Cobham; and by the will it is limited to the heirs of the body of the Lord Cobham; and this neither William nor his heirs could not be at the time of the making of the Act of 3 Jac. and the Act of 7 Jac. comes too late to make them heirs by relation to the time of 2 Jac. To which it was answered, and afterwards in Trinity term, 16 Car. 2, adjudged by the Chief Justice, and Twysden and Wyndham, that by virtue of the stat. 3 Jac. without the aid of 7 Jac. they should have the land: and the Act enacting, that it should go according to the will of the Lord Cobham, is all one as if the will had been recited, and had been expresly so as in the words of the will, 9 Co. *Abbot of Strata Marcella's case*, a grant *per tot tanta talia, &c.* as good as if all the particulars had been expressed; and when the statute says, that the lands shall be and remain as is limited by the will of the Lord Brook, and that it is to the heirs of the body of William, when the Parliament intended to grant, they intended the grantee should take, and therefore if they are not heirs, it has made them heirs as to this purpose; as where a lord grants to his villein, he thereby enables the villein to take it. **[75]** And 10 H. 7, 13, the King by his grant may enable his subject to take; and so by the intent of the Act it appears what persons shall have the land, and then by the same intent they are made heirs; and they said, that the Act of 3 Jac. had so qualified the attainder, as to the manor of Cooling, so that as to it, it is as if no attainder had been; and an Act of Parliament may capacitate a man to have an heir, or to be an heir, that otherwise could not have or be an heir. And they held, that by this Act, the persons themselves attainted, if in life, might have and enjoy the manor of Cooling: and Wyndham said, with whom the Chief Justice agreed, that if a manor be given by Act of Parliament to the heirs of J. S. who is attainted, this shall enable his son to take it. But Kelynge at this time puisne justice held, that the statute of 3 Jac. worked by way of reviver of the old estates where there are persons capable, and not as a grant of new (estates) and that the blood being corrupt at the time of the Act of 3 Jac. none could take as heir at that time, and therefore the plaintiff could not recover: but he and all the rest agreed, that the statute of 7 Jac. signified nothing in the case; but all that is done, is by the proviso in the statute 3 Jac. And the Ch. Justice, and Twysden and Wyndham agreeing that that was sufficient, gave judgment for the plaintiff.

HURST'S CASE.

Mandamus for an attorney. S. C. 1 Sid. 94, 151. Raym. 56, 94. 1 Keb. 349, 354, 387, &c.

A *mandamus* was prayed to restore him to an attorney's place in the Court of Canterbury; but it was denied, because it is but a private employment; and a *mandamus* lies only for offices concerning the public: but they agreed it had been granted for a schoolmaster, and for a church-warden, and for a parish-clerk, because they are public offices: but it was said at the Bar, that it had been granted for an attorney, for he is an officer concerning the public justice, and is compellable to be attorney for any man, and has a freehold in his place. Whereupon the Court gave day to produce such a precedent, and at the day a precedent was produced in 1651, for restoring an attorney of the Borough Court of Southwark; but that being in the late troublesome times, the Court did not regard it: but afterwards in Trin. 15 Car. 2 he had a *mandamus* in **[76]** this same case. And in the same term another *mandamus* was granted to restore an attorney of the Court of the liberty of St. Martin's le Grand, London.

MOLINS *against* WERBY.

Error in fact and in law is double, but must be specially demurred to.
S. C. 1 Sid. 94. 1 Keb. 355, 388.

Error of a judgment in the Palace-Court, held before James Duke of Ormond; and the error assigned was, that the Duke was not in Court, (the Court being held before one Wynne his deputy, according to the grant). Second error, that the judgment was given for the plaintiff, where it ought to have been for the defendant. Whereupon the defendant demurred; and now for the plaintiff it was said, that the assignment of the error is double, the first being error in fact, the second error in law; and error in fact and in law cannot be assigned on one writ: but as to the first, it was said, that it is not assignable, being contrary to the record. And as to the second, it was said, that he ought to have demurred for the doubleness, otherwise he shall not have advantage thereof on a general demurrer: to both which the Court agreed; and it being moved again, the Court held the same opinion in both the said points; and then it was touched, that a judicial place to hold a Court by deputy cannot be, and so held Foster, Chief Justice, and Twysden. But Wyndham held otherwise, and said, that many recorders are made to hold Court, &c. by themselves or deputies; and so said Wylde at the Bar, and that he so held his place of Recorder of London at that time. Foster said, that is by the custom of London: but surely many other recorders hold their Courts by deputies; so does the Recorder of Northampton, which is the Earl of Manchester, and holds the Courts by his deputy Harvy at this time. And the steward of the Borough-Court of Southwark holds it by deputy.

[77] VERNON *against* ALSOP.

Obligation conditioned to pay, &c. and if he fail to be void. S. C. 1 Sid. 105. Raym. 27, 68. 1 Keb. 356, 415, 451, 625. 2 Danv. 25.

Debt on an obligation, conditioned to pay 7l. by 2s. a week till the 7l. were paid, and if he failed of the payment of the 2s. at any of the days wherein it ought to be paid, the obligation to be void, or else to remain in full force. The defendant pleads, that he did not pay 2s. on one of the days wherein it ought to be paid. The plaintiff demurs, and it was argued by Pawlet, that whereas by the first part of the condition he is to pay 7l. by 2s. a week; the latter part, that if he does not pay the 2s. at any of the days, is repugnant and void, for it appears plainly by the former part, that the intent was to have the money paid; and cited 3 Cro. 780. Also by his plea he hath confessed that the money ought to be paid, when he says, that he did not pay on one of the days wherein it ought to have been paid. Wyndham, Justice, held, that either all the condition is void for repugnancy, and then the obligation is single and without a condition, or else the first part of the condition is good, and the latter part is void for the repugnancy. But it was adjourned: and afterwards the same term it being moved again, the Court held, that the condition should be taken distributively, by referring particulars to particulars, viz. that if he paid the 7l. the obligation should be void; but if he failed of paying the 2s. at any of the days, it should be in full force; to which the rest agreed; for the obligation shall not be of no effect, if by any means it may be made good.

BASSETT *against* LEWIS.

A lease to commence after the end of another, where there was no such lease.
S. C. 1 Keb. 260.

Error of a judgment in a *quare impedit*, in Wales, where the plaintiff being nonsuit, the defendant made title to have a writ to the bishop, viz. that the Dean and Chapter of St. D. were seized, and presented J. S. and granted the advowson for years to Richard Williams, from the time that the advowson then granted should determine; and it was assigned for error, that it was not known when the advowson

granted did determine, and therefore the advowson granted to Williams for years, was void for the incertainty [78] when it should commence. Whereto it was answered by Aleyn, that then the grant to Williams shall commence immediately at the time of the grant: to which the Court agreed, and affirmed the judgment.

Note, The plaintiff in the *quare impedit*, had averred, that there was not any grant *in esse* at the time of the grant to Williams; but the Court held the grant to be good without the aid thereof.

ANONYMUS.

Administration of goods in divers peculiars, belongs to the metropolitan.

It was held by Twysden and Wyndham, Justices, that where a man dies intestate, having lands in divers peculiars, that the granting of the administration does not belong to the Ordinary of the diocess, but to the metropolitan of the province, for they are excepted from the Ordinary's jurisdiction.

PETLER *against* YALEMAN.

Bounds of vills triable by the Ecclesiastical Courts, but not of parishes. 1 Sid. 89. 1 Keb. 369.

A prohibition was prayed for that the bounds of two vills, viz. D. and S. in the parish of Abingdon, were in question, viz. the one claimed the tithes in question, as lying in the vill of D. and the other claimed them as lying in the vill of S. within the same parish: but the prohibition was denied by the whole Court; for tho' the bounds of a parish are not triable in the Ecclesiastical Court, yet the bounds of vills in the same parish are triable there.

CONIERS *against* SMITHE.

Breach assigned, that the lessee did not pay the rent due at the said several feasts during the term.

Error of judgment in an action of covenant in Durham, where the action was brought on a lease for twenty-one years, and the lessee covenanted to pay 20l. yearly by equal portions at Michaelmas and Lady-Day, and assigned a breach, that he did not pay the rent due at the aforesaid several feasts during the [79] term aforesaid, and judgment was by default, and a writ of inquiry of damages; and then judgment *quod recuperet*, and the error assigned by Aleyn was, that the breach was not well assigned, but he ought to have assigned the breach particularly; for which cause (he said) it was erroneous: but after several debates the judgment was affirmed in Hillary term following, and adjudged that the breach was well assigned, for perhaps it was never paid at any of the days.

WISEMAN *against* COTTON.

Lands disgavelled by Act of Parliament, yet the custom to devise remains. S. C. Raym. 59, 76. 1 Sid. 77, 135. 1 Keb. 288, 372, 492, 505. Hard. 325. 2 Danv. 441.

On a trial at Bar in a feigned issue, directed out of Chancery: the question was, If the lands in question having been gavelkind, and disgavelled by Act of Parliament in the time of Edward the Sixth are that notwithstanding devisable? And the case was found specially, that Roper being seized of the lands in question, which were then gavelkind and departible, it was on his petition enacted by Parliament, that his lands should be disgavelled to all intents and purposes, and descendible as lands at common law, to the eldest son only: and it was objected, that the custom to devise, is a custom of gavelkind, and that by disgavelling the land the custom of devising is as well taken away as the custom of partibility; for it is a custom incident to gavel-

kind; and cited the Statute of the Customs of Kent, 13 E. and 4 E. 1, Com' Banco, Rot. 2. Fitz. Aid, 129, 144. Rast. Entries Dower Demand 6. 2 E. 4, 19. 5 E. 4, 8. Mich. 16 Jac. Com. Banco Rot. 3063. Mich. 21 Car. 1, Rot. 497. F. N. B. 198, &c. And that all their customs, to devise, to have dower, to lose dower, to be tenant by the curtesy, &c. are included in the custom of gavelkind; so that by the pleading of gavelkind, it is sufficient without pleading of any such particular customs, to devise, to have dower, &c. Also by the words of the Act, the lands are not only *to be disgavelled*, but to be so *to all intents and purposes*, by which words all the particular customs are taken away, if they had not been so by the general words before. But after two several arguments at the Bar, it was afterwards in Easter term, 15 Car. 2, adjudged, that **[80]** by this Act of disgavelling, the custom of devising was not taken away; for by Foster, Twysden and Mallett, it is a mere collateral custom, and no part of the custom of gavelkind; and it is not enough in pleading, to say that the lands are gavelkind, without pleading the custom to devise, which proves it a meer collateral custom to gavelkind; and although the words of the Act are, *that it shall be disgavelled to all intents and purposes*, yet the words subsequent are, *and shall descend as lands at common law*, which restrains the foregoing general words by this particular conclusion, according to 8 Co. 154 b. To which Wyndham also agreed, but he held it to be a custom of gavelkind. But they all agreed, that the Act being made upon Roper's petition, and it being a privilege at common law to devise lands, it could not be supposed that he petitioned to destroy a privilege of devising which he had by the custom of Kent, but only to take away the partibility of the estate, whereby many families by a division of their estates, were reduced to a more inferior degree: and all agreed, that the custom to devise, remained notwithstanding the Act for disgavelling, and gave judgment accordingly.

DARKIN *against* DONE.

Error assigned that the plaintiff died before judgment. S. C. 1 Sid. 93, 131, 143. 1 Keb. 368, 375, 416.

Error of a judgment in ejectment, that the plaintiff was dead before the judgment given. Plea by attorney, that he was living at the time of the judgment, and issue thereon and verdict found that he was dead. It was objected by Aleyn, that the judgment ought not to be reversed, but a *scire facias* (to go) against the executors of the plaintiff; for now it appears, that the attorney who pleaded that he was living, did it without authority; for he could not be attorney to a dead man. But a case was cited in Rastal's Entries, tit. Brief, Division Mort, where such pleading is as here. And said by the Court, that it was not known to the Court when the plea was pleaded, but that the party was alive, and therefore the Court could not deny to receive the plea; and now though it appears by the verdict, that he who pleaded it could not be attorney, yet by the **[81]** same verdict it appears also that the plaintiff was dead, and therefore by the opinion of Mallett, Twysden and Wyndham, the judgment was reversed, Foster Chief Justice, being of a contrary opinion, because though it appears by the verdict that the plaintiff was dead, yet it does not legally so appear, the verdict itself not being legally obtained.

MOLE *against* WALLIS, OR BOLD *against* WARREN.

Matter pleaded as at common law, cannot be maintained by a custom. S. C. Raym. 60.

Covenant on an indenture of apprenticeship to serve him seven years which he had not done, but departed: the defendant pleads infancy, the plaintiff replies the custom of London, for infants to bind themselves apprentices; the defendant demurs; and whether this was a departure? was the question. And Wyndham and Foster Chief Justice at one time seemed that it was not, it being laid in London, where the custom is known; and Foster cited a case, where infancy being pleaded to a feoffment, the plaintiff replied the custom of gavelkind in Kent, that an infant might make a

feoffment at fifteen, and the action being laid in Kent, it was resolved to be good: Twysden and Mallett on the contrary said, that which is pleaded generally as the common law, cannot be maintained by a custom, but is a departure, and cited Yel. 14, Plowd. Com. 105. Mich. 6 H. 7, pl. 4. Hill. 21 H. 7, pl. 29. 2 Cro. 494. Hutt. 63, 64. But they agreed, that if one pleads a statute, and the other says that it is repealed, the other may say that it is revived by another statute; or if a man pleads a statute, and the other says that it was to continue but till such a time, which is expired, the other may say, that the first statute was afterwards made perpetual, because it is only a fortifying of the first matter. And in Hillary term following, the party (plaintiff) prayed leave to discontinue.

[82] CRAWFORD *against* MIDDLETON.

Words, one told me that he carried such a one to gaol for felony, where no body told him so. S. C. 1 Keb. 344, 353, 377. 1 Com. Dig. 182, 187. 4 Bac. Abr. 509.

Case for that the defendant carrying one Woodford to Lincoln gaol for felony, when he came to Lincoln, falsely and maliciously said of the plaintiff, that he met one upon the road, who said to him, *What, are you carrying Woodford to gaol? I shall follow you shortly, and bring with me Heneage Crawford (the plaintiff) for stealing a mare.* After verdict for the plaintiff on issue not guilty, it was moved in arrest of judgment. *First*, That the words are not actionable, not being any direct affirmative that the plaintiff had stole a mare; and cited Hob. 177, *Steward* against *Bishop*, *He is in Warwick gaol for stealing of a mare;* adjudged not actionable for that reason. But to this it was answered, that it was adjudged 1 Cro. 195. 2 Cro. 154, 247, 736, contrary to that in Hobart. And so held all the Court here (except Mallett) that the words are actionable: and the Court now questioned, whether the case in Hobart were law or not? Then it was moved, that it is not said in the declaration, that in truth no body met him upon the road, and so spoke to him; whereto it was answered by Aleyn, and agreed by Twysden, that it being laid to be falsly and maliciously, and so found; it is a proof that no body said so to him. But Foster, Wyndham and Mallett were against this, and held the declaration ill for want of the averment, that in truth no body said so to him; for that had been traversable, and the defendant might have pleaded thereto that another so told him; and so put the plaintiff to bring the action against such other; and they gave a rule, that the plaintiff should take nothing by his bill. In this case Twysden mentioned a case tried before Hobart, which he himself heard; where the plaintiff brought an action against one, for falsly and maliciously saying of him, *that he heard he was hanged for stealing of an horse;* and on the evidence it appeared, that the words were spoken in grief and sorrow for the news; and Hobart caused the plaintiff to be non-suit, for it was not maliciously; which all the Court here agreed to be done according to law.

[83] NICHOLAS *against* PULLIN. VIDE INFRA.

One pleads an execution without a judgment. S. C. 1 Keb. 379, 380, 413. A plaintiff evicted without shewing title. 3 Bac. Abr. 715. 5 Com. Dig. 44, 83. Term Rep. C. B. 275. 1 Term Rep. 671. *Vide post*, 302, 312.

Covenant, and declares, that the defendant leased to him such lands, and covenanted to save him harmless against all suits, evictions or expulsions. The defendant pleads, that J. S. outed him by an *habere facias possessionem*. The plaintiff demurs, and the plea was ruled by the Court to be ill for two causes; 1st. For that he pleads an expulsion by an execution, without shewing any judgment. He ought to have said, that J. S. brought an ejectment whereupon were such proceedings, and that it was adjudged he should recover, and thereupon issued the *habere facias possessionem, &c.* 2dly. He ought to have shewn that J. S. had a legal title before the lease on which he brought his action, for the covenant only extends to expulsions upon an elder right: and perhaps in this case J. S. might recover by virtue of a lease made to him by the plaintiff himself.

PULLIN *against* NICHOLAS. VIDE SUPRA.

A negative pregnant, when good, &c. 1 Com. Dig. 332. Stra. 925.

Debt on an obligation to perform covenants in an indenture of lease made by the plaintiff to the defendant, whereby the defendant covenanted that he would not deliver the possession to any but the lessor, or to such persons as should lawfully evict him. The defendant pleads, that he did not deliver the possession to any but such as lawfully evicted him. Whereupon the plaintiff demurs; and it was objected, that the plea was ill, and a negative pregnant; that he ought to have said, that such a one lawfully evicted him, to whom he delivered the possession, or that he did not deliver the possession to any: but for the defendant it was said, that the plaintiff had not assigned any breach, and therefore could have no judgment; for it was said by them, that he ought to have replied and assigned a breach; whereto it was said for the plaintiff, that he **[84]** having pleaded an ill plea, had necessitated the plaintiff to put himself in judgment of the Court upon the plea; and cited Yelv. 78, 152, 153. And Wyndham held the plea ill, for it was in the conusance of the defendant, whether he had delivered the possession to any or not, and for what causes, and therefore he ought to shew it. Twysden on the contrary (said), the plea was pursuant to the words of the covenant, and therefore sufficient; and that the plaintiff ought to have replied, that he had delivered it to such a one and shewn a breach. And afterwards in Michaelmas term following, it was argued again; and then for the plaintiff was cited 2 Cro. 559, 560, that the plea was not good. But now all the Court held the plea pursuing the words of the covenant, good, being in the negative; and that the plaintiff ought to have replied and assigned a breach; which not having done, he could not have judgment, and therefore they gave judgment against him.

THE KING *against* GILLIFER.

Where one is compellable to take an apprentice. Raym. 65, 67. Blackburn's Cases 18, 19.

It was moved by Aleyn to quash an order of the justices of peace of the county of Derby, for compelling a man against his will to take an apprentice on the stat. 43 El. c. 2. First, For the order does not say it was a poor child. 2dly, It is not shewn what trade the defendant used, husbandman or what. 3dly, For the matter, the justices had not power to compel a man to take whom they would to be apprentice, for so they might impose upon me my mortal enemy; and of this opinion, he said, were Brampton and Rolle in their times, and so was Twysden now. But Foster, Mallett and Wyndham on the contrary said, injustice was not to be supposed in the justices, and as the statute obliged the justices to put our children apprentices, so it obliged the masters to receive them; and they confirmed the order, and directed an information on which they would deliver their opinions more at large, when it appeared what the defendant had to say for his excuse.

[85] HOUSE *against* LAUNDER.

Plea of no award, rejoinder, a void award, is a departure. S. C. 1 Keb. 414. *V.* 2 Saund. 34, 189. N. Lutw. 117, 144.

Debt on obligation to stand to an award: the defendant pleads no award: the plaintiff replies, and shews an award and a breach. The defendant rejoins, that a new cause of action arose after the submission, and before the award, and they awarded mutual releases to be made at the time of the award made, and nothing further is awarded on one side but the release, and so the award was void; on which the plaintiff demurred, and it was adjudged for him, for the rejoinder is a departure; for when he pleads no award, it shall be intended no award at all; and then to shew and confess an award in fact, but (saying) that it is void in law is a departure; and they cited *Rugles* against *Witherly*, Trin. 15 Car. 2, B. R. Rot. 604, as so adjudged, and the like between *Dean and Isham*, the following term adjudged.

LAWSON *against* WIDDRINGTON.

Condition to pay 50l. the 10th of January next ensuing on three months warning. S. C. 1 Keb. 380, 415. Raym. 61. Lutw. 124. 2 Danv. 68, pl. 8.

Debt on obligation to pay 50l. the 10th of January next ensuing on three months warning: the defendant pleads the action lay not, because the defendant did not give three months warning before the 10th of January next ensuing the sealing of the obligation. The plaintiff demurs; for the money being to be paid on a certain day on three months warning, the defendant is to give the warning to be ready to receive it. 2dly, If the plaintiff is to give the warning, the plea cannot be but in abatement, because the action is brought before the money is due and not in bar, (for) so the money would be lost; and then a plea in abatement commencing or concluding in bar is ill; and cited Bro. Brief 77. 36 H. 6. 3 Cro. 102. The Court at this time thought the warning ought to be given by the plaintiff, for otherwise, if the defendant would never give warning, the money should never be paid; and it was adjourned. But afterwards it being moved again, the Court held, that it shall be taken that the obligor is to pay the **[86]** money on the 10th of January next ensuing, giving the plaintiff three months warning thereof; for the words shall be taken the most strongly against the obligor; and they ruled judgment for the plaintiff, unless cause were shewn before the end of the term.

BENTLEY *against* HORE.

Sufficiency of the bail taken by the sheriff is not traversable. S. C. 1 Sid. 96.

Case for an escape on mesne process: the defendant pleads, that he let the prisoner go on sufficient bail. The plaintiff demurred, and it was argued, that the plea was not good, because he had laid no venue where he took the bail, and the sufficiency of the bail is traversable. But by the Court, the sufficiency of the bail taken by the sheriff is not traversable, for the bail is only for security of the sheriff to save him against amerciaments: for by the stat. 23 H. 6 he is obliged to let the party to bail by sufficient mainpernors; and the statute was made for the ease of the subject that he should be let to bail, which sheriffs had refused to do before the statute: but then the statute provides for the security of the sheriff, that he should take reasonable sureties, and yet if he takes one surety only, it has been adjudged sufficient. And Twysden said, that it was held by Rolle and Glyn, when they were Chief Justices here, that the statute 23 H. 6 was a general law, of which the King's Courts ought to take notice without pleading of it.

RUSSEL *against* LEE.

A single bill by an infant for necessaries, is good. S. C. 1 Keb. 382, 416, 423. 2 Danv. 768 c.

Debt on a single bill: the defendant pleads that the bill was made by him when within age: the plaintiff replies, that it was for victuals and necessary clothes delivered to him, and suitable to his quality. The defendant demurs, and now it was argued for him, that the bill was void as well as an obligation; but that a contract or promise for necessaries was good. 2dly, It is not averred that they were delivered to him to his own use, 2 Cro. *Ives* against *Chester*, where this exception is allowed good. But on the other side it was argued, that his single bill for necessaries is good; but not an obligation with a penalty; and they cited Co. Lit. 172 a. and 3 Cro. 920, and so held the Court; and to the 2d exception, **[87]** it was said, that in Popham's report of the case of *Ives and Chester* it was disallowed; and so held the Court here, viz. that the exception was not good, for when the things are delivered to him, and suitable to his quality, it cannot be intended but that they were for his own use, and gave judgment for the plaintiff *nisi*.

ANONYMUS.

Barber a trade within 5 Eliz. S. C. 1 Keb. 329, 411, 422.

Action was brought on the statute 5 Eliz. for using the trade of a barber; Twysden at first doubted whether it were a trade within the statute. But at length all agreed that it is.

FITZ-HARRIS *against* BOIUN.

Demurrer on the evidence cannot be for a thing which the jury may know of their own conusance. S. C. 1 Sid. 103, 105. 1 Keb. 450.

Error of a judgment in the Palace Court in *assumpsit*, where to prove the consideration an arrest was to be proved by the plaintiff; and for that he did not produce the writ, the defendant demurred on the evidence; and thereupon judgment was given for the plaintiff; and now to reverse the judgment it was said for the plaintiff in error, that the King's writs are matters of record, and are not to be proved but by themselves; and it was agreed by the Court that the writ ought to have been produced in evidence, but by the demurrer it is confessed, the arrest being matter of fact, though it be to be proved by a matter of record, and the jury might of their own knowledge know that there was a writ, Dyer 239. Plowd. Com. *Scholastica's case*. And by the demurrer on the evidence, all matters of fact are confessed that the jury could know of their own conusance; and the judgment was affirmed.

ANONYMUS.

On a promise against a promise there needs no averment. S. C. 1 Keb. 333, 342. 1 Sid. 270.

Assumpsit, where the plaintiff had agreed to take the son of the defendant apprentice; the defendant promised to give a bond to pay to the plaintiff 40l. and the plaintiff says, that he had accepted the son into his service as apprentice; and the defendant had not given bond to pay the 40l. After verdict for the plaintiff on issue *non assumpsit*, it was moved in arrest of judgment, [88] that it is not said that the son was bound apprentice, but (only) that he had received him into his service as apprentice, and this he might do and turn him out of doors the next day; but it was not allowed, for the agreement to take him apprentice, is a promise whereon the defendant might have his action; and so it is a promise against a promise, and needs no averment. *Secondly*, (urged) That it is not alledged of what sum the obligation should be: this was also disallowed, for a contract or covenant to give bond for the payment of money, is to be intended of double the sum; but an award to give a bond, without mentioning the sum for the payment of 20l. is not good; for the arbitrators are to make an end of all.

ELLIOTT *against* BLAKE.

Covenant with a proviso, the plaintiff need not shew more than the covenant. S. C. Raym. 65. 1 Keb. 424, 426.

Covenant and declares, that the defendant covenanted to deliver to him 1500 measures of salt-petre before such a day, and that he had not done it; the defendant demands oyer of the deed, wherein the covenant was as before said; *provided*, that if any mischance happen by fire or water to disable him, that he should be excused; and pleads that he was disabled by accident of fire; issue thereupon, and verdict for the plaintiff: and it was moved in arrest of judgment, that there was a variance between the deed on which he declared, and that produced in Court; for the one is absolute and the other conditional. But judgment was given for the plaintiff, for he need not declare on more of the deed than the covenant, and it is on the defendant's part to shew the proviso, which goes by way of defeasance of the covenants.

[89] TERM. SANCT. HILL. ANNO 14 & 15 CAR. II. IN BANCO REGIS.

NEAL *against* DEUCTON.

Conuzance of pleas. S. C. 1 Sid. 103.

Action brought here for words spoken at Wisbich in the Isle of Ely; the defendant imparls, and afterwards Turner for the Bishop of Ely, came and demanded conusance of the plea, and produced the bishop's charter, whereby he had conusance of pleas granted to him, and a letter of attorney to make the demand: but Twysden Justice said, Conuzance was not grantable after imparlance: to which Turner replied, The party himself cannot plead to the jurisdiction after imparlance, because by the imparlance he had admitted the jurisdiction, but the bishop who is a stranger might demand it at any time; and he cited 40 E. 3, 1 a. 11 H. 4, 41 b. 43 b. Mich. 6 H. 7, pl. 6. Mich. 9 H. 7, pl. 6. Trin. 6 H. 7, pl. 17. And to this opinion Justice Wyndham inclined, but it was adjourned: (this case was between *Neal and Deucton*). And *note*, in Easter term, 18 Car. 2, B. R. conusance was demanded in another case; and then it was held by the Court, that the warrant of attorney for demanding the conuzance, ought to be filed in Court. And former allowances of the conuzance were shewn, and there were cited 1 H. 7, Rot. 107. Rast. Ent. 128. Hill. 21 E. 3, Rot. 21. Rast. Ent. 130. 35 H. 6. 54. It seems the conuzance is demandable by the Lord of the Franchise, but not pleadable to the jurisdiction by the party.

[90] THE KING *against* LARKING, AND OTHERS.

Forcible entry into a church. S. C. 1 Sid. 101. 1 Keb. 438. Hawk. P. C. 280.

It was moved to quash an indictment of a forcible entry into a parish-church, and in the parsonage-house, because there is another remedy by a writ *de vi laica removenda;* and the statute does not extend thereto, this indictment being on the statute of H. 6. But he agreed it to be within the statute of R. 2. But it was held by the Court to be within both statutes, and that it well lay: and the party took nothing by his motion.

BOOTH *against* LEACH.

Words *traitorly rogue.* S. C. 1 Sid. 102. 1 Keb. 469.

Error of a judgment in the Common Pleas in case for these words, *Thou art a traitorly rogue;* where the words were adjudged not actionable, because adverbially spoken, as *thievish rogue*, because it signified no more than an inclination to *thieving*. But by Alleyn, *bankruptly knave* has been adjudged actionable; and by the Court the words seem actionable, as 3 Cro. *Ward* against *Thorn*, *traiterous knave* are adjudged actionable.

OLDHAM *against* HAMSTED.

A bailiff pleads property in replevin. S. C. 1 Keb. 360, 441.

In replevin, one as bailiff made conusance, and pleaded property in a stranger; and upon demurrer it was objected that he could not; and cited 1 Inst. 145 b. 11 H. 4, 4. But held by the Court, that is intended of the County-Court, and not of this Court; and cited 2 H. 6, 14, and gave judgment for the conusant.

[91] THE KING *against* THURSTON.

One arrested by an illegal warrant, kills the bailiff, and by Act of Parliament made afterward, the warrant is made good by relation to the first day of the Parliament. S. C. 1 Keb. 454, 456.

Indictment of murder, and on a special verdict found at the Assizes at Bury, the case was, in Hillary term 1659, a *latitat* issued to arrest him returnable in Easter

term 1660, on which the 29th of May he was arrested by a warrant thereupon, and upon that arrest the bailiff was killed; and afterwards an Act is made for the confirmation of all judicial proceedings, which related to the first day of the Parliament, viz. 15 April, 1660, and the sole question was, if by the relation of the Act, which made the proceedings legal, and the arrest good (which else had been void and without authority) this killing be murder. And it was argued at the Bar, by Kelynge for the King, and by Jones for the defendant: and Kelynge said, that by relation all the process is made good, for it shall relate to the first day of the Parliament; Jones agreed the Act should relate to the first day of the Parliament, but not to such intent as to make it murther *ex post facto*, which was not so when the fact was done. The Court said nothing. But afterwards in Easter term 16 Car. 2, I heard Thurston plead his pardon of this murder, whereby it seems as if the opinion of the Court was against him.

TOWNSEND'S CASE.

A *mandamus* to make an apprentice free of a town. S. C. 1 Sid. 107. 1 Keb. 458, 470, 659.

A *mandamus* was prayed for him to the Mayor, &c. of Oxford, to admit him to be a freeman of that city, having served seven years apprentice; and on view of a precedent in the like case of Norwich, it was granted: and thereupon it was returned, that he put himself apprentice for seven years according to the custom, and that he covenanted to serve seven years, and not to marry within the time; and that within the first two years he married, and so broke his covenant, and that his master accepted of him to serve for the residue of the time, which he did, but not as an apprentice, but rather as a journeyman. And it was objected, that by this breach of covenant he had lost his right of freedom: but the Court held the contrary, for that an action of covenant might lie, but not loss of his freedom, and awarded a peremptory *mandamus* to admit him to his freedom, in Hillary term, 15 & 16 Car. 2.

[92] GLASCOCK *against* MORGAN.

Debt on a judgment after *elegit*, and part levied of the goods. S. C. 1 Sid. 184. 1 Keb. 692.

Debt on a judgment of 1000l. The defendant pleads, that the plaintiff had sued three several *elegits* on the said judgment into several counties, on one of which the sheriff returned, that he had levied of the defendant's goods 500l. whereon the plaintiff demurs. This case was argued three several times at the Bar, viz. in this term and Easter term following; and in Easter term 16 Car. 2, by Aleyn, Baldwyn and Winnington for the plaintiff, and by Jones and Wylde, and by Jones again for the defendant: and first it was questioned, if the suing of the *elegit* be not an election of that writ, and a waiver of all others? 2dly, If the suing of the *elegit* be not an election to have such an execution, and no other? 3dly, If the suing of three writs, and it not appearing what is become of the other two, be not a bar of this action; for lands may have been delivered on the other writs? And many books and authorities were cited on the one side and the other, and the Court was a long time in variety of opinion: but at length agreed, that judgment should be given for the plaintiff; for when the Statute of Westminster 2 gave the *elegit*, it said, *To hold the tenements aforesaid until the debt shall be levied;* so that it intended to give a remedy for the debt until it was levied, and to give a further remedy than was at common law, and not to take away any remedy which was at common law before; and (the Court) said, that the judgment lies at common law, and at common law, debt will lie on the judgment after the action when no execution lies. And it was not the intent of the statute by a nice construction of the word *elegit*, to say that it was such an election of the writ, so as that he should never after have any other writ, when it appears the statute intended to add a larger remedy to men than they had before. And the levying of goods for parcel only upon the *elegit*, is no impediment, but that he shall have another *elegit*, and take the lands for the residue. But when an *elegit*

is sued, and lands are taken, and that returned and filed, he shall not have any further execution. And as to that, that it does not appear what is become of the other writs of *elegit*, it shall not be intended **[93]** that any lands are extended thereupon, it not being shewn; and if there were any lands extended, the defendant ought to have shewn it in pleading. And in Easter term 16 Car. 2, judgment was given for the plaintiff by the whole Court. Whereupon the defendant brought a writ of error immediately, as I was informed, but what became thereof I never heard.

OTES *against* THORNHILL.

Obligation to make a suit of linen for one. *Q.* Who shall provide the cloth? S. C. 1 Keb. 466. *Q.* 2 Jon. 2 Danv. 99, pl. 5 & 6.

Debt on an obligation conditioned to make for the plaintiff all the linen he shall wear during his life, and assigned a breach, that he desired the defendant to make such linen for his necessary wearing, which she had not done. The defendant demurs, and the reason was that the plaintiff did not deliver to the defendant the cloth of which it was to be made. To which it was answered for the plaintiff, that the defendant being to make the linen, is also to find the cloth, as if one be obliged to cover the lord's hall, he is also to find the materials, 11 H. 4, 25. 16 H. 7, 9, 11. But by the Court, the contracts of parties are to be interpreted according to their intent and the subject matter. As if a tailor be obliged or promise to make a suit of cloaths for me, I ought to deliver him the cloth, for that it is usual, and not for him to provide it. But if a shoemaker be obliged to make a pair of shoes for me, he is also to find the leather, because it is usual. Also if a sempstress be obliged to make for me a suit of linen, she is to find the linen-cloth; but it is not here shewn, that the defendant was a sempstress, nor such a person as uses to make linen and find the cloth: and therefore judgment was given for the defendant.

UPHAM'S CASE.

Procedendo after record filed in B. R. S. C. 1 Sid. 108. 1 Keb. 470.

An indictment of barretry being brought into this Court and filed; it was moved to have a *procedendo*. Mr. Justice Twysden said, it could not be, for a record filed here cannot be removed without an Act of Parliament: But by the opinion of Foster and Wyndham, a *procedendo* was granted. *Quære* of this.

[94] FRENCH *against* PIERCE.

Obligation not to waste: replication, that he had wasted divers goods, is well, but otherwise in covenant. S. C. 1 Keb. 467, 471.

Debt on an obligation to satisfy for all goods that an apprentice shall waste, and in the replication assigns a breach, that he had wasted divers goods to the value of 100l. Whereupon the defendant demurs, and it was now excepted as to the replication, that it was too general, not shewing what the goods were. But by the Court, it is well enough in this action on the obligation, where damages are not to be recovered, but the penalty of the obligation upon any breach (thereof); otherwise in covenant, where the recompence is to be by damages: and judgment was given for the plaintiff.

Note, This whole term I was sick, and the cases which I have before reported of this term are (taken) from the report of my friend Mr. Lemuel Sholdam.

[95] TERMINO PASCHÆ, ANNO 15 CAR. II. IN BANCO REGIS.

TURNER *against* FELGATE.

A judgment vacated, yet the officer is excused for executing the writ, but not the party. S. C. Raym. 73. 1 Sid. 107. 2 Sid. 125. 1 Keb. 453, 478, 488, 822. Bull. N. P. 84.

This case was cited and remembered by Twysden and Wyndham Justices, to have been adjudged within six or seven years last past: a man had a judgment and execution executed, and afterwards the judgment was vacated for being unduly obtained, and restitution awarded; and afterwards the defendant brought trespass against the plaintiff in the first action, for the taking of the goods; and it was adjudged that it well lay against the party; for by the vacating of the judgment it is as if it never had been; and is not like a judgment reversed by error: and *note*, this action was against the party, and not against the sheriff, who had the King's writ to warrant him, which is sufficient for him; for in trespass or false imprisonment, it is enough for the sheriff to plead the writ only, but the party ought to plead not only the writ, but also the judgment. But Justice Twysden said, that he was not satisfied with this judgment when it was given, in the time of Glyn Chief Justice, nor was he yet for making a man a trespassor by relation, for when the execution was served there was a judgment, though that afterwards the execution was vacated. But *note*, the difference between charging of an officer and charging of the party; for in *Bayly and Bunning's case* hereafter (*vide post.* 173, 174), it is held, that the officer shall not be charged, where perhaps the party will be charged.

[96] WESTCOTE *against* HARDING.

Citation out of a diocess, for tithes within the diocess. S. C. 1 Keb. 481, 501. *Vide* 1 Keb. 638, 647, 651, 669.

A prohibition was granted to the Bishop of Sarum, for citing one out of his diocess to appear at his Court at Sarum; whereas the party was living in London: but it being a suit for tithes of lands in the diocess of Sarum, the Court on notice thereof granted a consultation, for the lands lying in the diocess of Sarum, the suit cannot be elsewhere, let the defendant live where he will; and therefore this case is not within the statute; and a consultation was granted.

WHITEHEAD *against* BROWN.

A promise within a jurisdiction, to pay for a thing that does not appear to be done within the jurisdiction. S. C. Raym. 75. 1 Keb. 522.

Error of a judgment in the Palace-Court, where the plaintiff declared, that whereas the defendant being indebted to him for the nursing of a child, afterwards such a day at such a place within the jurisdiction of the Court, he did promise to pay. After verdict and judgment the error was assigned, that it does not appear where the nursing was, nor where he was indebted: and therefore Twysden held the judgment ought to be reversed, for the jury is to inquire of the nursing, and of the being indebted; Foster and Wyndham on the contrary held, that it does not appear that those were out of the jurisdiction; and where a man is indebted to another in one place, he is indebted to him in all places where he comes; and when he promises within the jurisdiction, he was (became) indebted within the jurisdiction, and it was adjourned. But afterwards at another day, Foster was of Twysden's opinion, for that the jury is to inquire of the consideration, as well as of the promise, otherwise it is a naked or void agreement. But it was further adjourned.

[97] FANSHAW *against* MILDMAY.

Debt for tithes of 20 acres, and that he carried the corn from the said 30 acres. S. C. 1 Sid. 135. 1 Keb. 492.

Debt on the statute of Edw. 6, for tithes, and on *nil debet* verdict was for the plaintiff: it was moved in arrest of judgment, that the declaration is, that the defendant was occupier of twenty acres of land, which before-said thirty acres he sowed, and carried the corn from off the same without setting out the tithes; so that (it appears) they are not the same acres that he sowed: but by the Court: there not being any thirty acres before, the word *thirty* is void; and it shall be taken *the before-said acres*, which were well enough ascertained before, and good; and gave judgment for the plaintiff.

ROE *against* HAWKES.

A new trial not granted for the excessiveness of damages, nor for words spoken by the attorney. S. C. 1 Sid. 131.

Action on the case by an officer of the custom-house at Portsmouth, for that the defendant said of him, *He set his hand to the petition to bring the King to justice.* After verdict for the plaintiff it was moved for the defendant for a new trial, for the excessiveness of the damages, which were 700l. and cited *Wood and Gunston's case* in Style's Reports. But thereto it was answered by Twysden Justice, that the new trial was not granted in *Wood and Gunston's case* meerly for the excessiveness of the damages, but because a tampering with the jury was proved. *Secondly*, It was moved, that the attorney for the plaintiff said before the trial, that the jury were their friends, and understood their business, and that they would do well enough. But by Wyndham Justice, If express embracery of the jury be not proved, the words of the attorney shall not work any prejudice to the cause of his client; and if the damages are excessive an attaint lies, and a new trial was denied.

[98] BENSON *against* FRENCH.

Promise to the bailiff on the plaintiff's part, that if he would permit the prisoner to tarry out of prison to pay the debt. S. C. T. Jo. 139. 1 Sid. 132. 1 Keb. 483. 1 Danv. 45, 22.

Assumpsit and declares, that he had arrested a woman for 20l. and that she being in the custody of the bailiff at the defendant's house, the defendant in consideration that the bailiff would permit the woman to tarry at the defendant's house for one night, promised to the bailiff on the plaintiff's part, to deliver the woman to the bailiff the next morning, or to pay the 20l. And that the bailiff permitted the woman to tarry there that night; but that the defendant did not deliver her to the bailiff the next morning, nor had he paid the 20l. After verdict on *non assumpsit* for the plaintiff, it was moved in arrest of judgment by Wylde the King's Serjeant, that the woman was either always in the custody of the bailiff, (and then it was not any consideration) or out of his custody, and then it was an escape, and the consideration and promise were (then) both illegal. To which it was answered by Jones, that it might be for the ease of the woman to lie there that night, and so a good consideration, though never out of the custody of the bailiff; and if it be intended that she was out of the bailiff's custody, yet it shall be intended that it was by the plaintiff's assent, because the promise was made to the bailiff on the plaintiff's part; and the plaintiff having brought the action it proves his assent, and his assent after is sufficient to make the promise good. And held by the Court, if it was an escape, the consideration and promise were both illegal; but they held that it was not any escape, but rather an undertaking that she should not escape: and the promise being laid to be made to the bailiff on the plaintiff's part, it shall be intended that she was left there by the assent of the plaintiff. And they gave judgment for the plaintiff, except better cause were shewn.

[99] MAYHEW *against* FLOWER.

Trover *de salsura*, Anglice *a salting tub*, and damages given for that particularly is ill.
S. C. 1 Keb. 420, 428, 488. 1 Sid. 98. 2 Danv. 460, pl. 11.

Trover was brought among other things *de una salsura* Anglice *a salting tub*. And after verdict for the plaintiff on not guilty, it was moved in arrest of judgment, that *salsura* is Latin for *seasoning* and not for a *salting tub*, and then damages given for that, is ill. The Court said, then the *Anglice* is void, and no damages given for it. But the record being inspected, it was found, that damages were given particularly for the (several) things in particular, and among the rest *pro salsura præd.* and yet were also given for all the particulars together. And that *salsura* was altogether uncertain, which is to be intended a *seasoning*: and they held it incurable, and stayed the judgment.

GWYNNE *against* GWYNNE.

Judgment in a real action that the demandant should hold the tenements, &c.
S. C. 1 Sid 138. 1 Keb. 495, 343, 557, 626.

Error of a judgment in a *quod ei deforceat* in Wales, by protestation to prosecute in nature of a writ of right, obtained there thirty years before, because the judgment being for the demandant, was *quod teneat tenementa præd'*, where it ought to have been, *that he should recover seisin, &c.* And after divers arguments in this and the following term, the judgment was reversed.

HENN *against* HANSON.

A release of all demands does not release rent on a lease for years not due.
S. C. 1 Sid. 141. 1 Keb. 491, 510.

Covenant brought on a covenant in a lease for years to pay the rent reserved. The defendant pleads a release by the plaintiff of all demands at a day before the rent in question became due. The plaintiff replies, that the release was in performance of an award of all matters in controversy between the plaintiff and the defendant: whereupon the defendant demurs, and it was argued for the defendant, that the release is a bar; for a release of all demands will release a rent-service, and extinguish the inheritance thereof, Co. Lit. 310. 2 Cro. 486 & 170, 171, this very case is put, that such release shall release a rent on a lease for years before that **[100]** it be due, because it releases the contract. See *Hancock* against *Field's case*, Moor 544, 545. 6 H. 7, 15. 14 H. 8, 6. And of this opinion was Twysden, Justice, that the release in this case was a bar, for the rent is a thing in demand tho' not yet due, and the release discharges the means to come by it, and cited 40 E. 3, 47. 20 Ass. 5. And altho' this release was made in pursuance of an award, and so not within the intent of the arbitrators, because this rent was not then in controversy; yet (says he) the intent ought to be ruled by the law, and not the law by the intent. But for the plaintiff it was argued, that this release ought not to be a bar; 1st. For that it was out of the intent both of the arbitrators and the parties, the award being made of other matters, and this rent not then due nor in controversy, and cited 2 Cro. 300, *Tinan* against *Bridges*, a release of all demands after the award made, does not release a sum awarded to be paid at a day subsequent to the release: also they cited 2 Cro. 486, *Witton* against *Bye*, where it is held by Houghton, that a release of all demands, does not release a rent incident to the reversion; but there, for that the lessee had assigned his term rendering rent, for that this rent was a sum in gross, and not incident to the reversion, it was barred by the release of all demands, and there 170. *Hancock* against *Field's case*, adjudged by the whole Court, that where the lessor on payment of 60l. to him by the lessee due on a judgment, released to him all demands; this did not release a covenant for repairs not then broken, but a release of all covenants would have released the covenant. And of this opinion were Wyndham, Mallet, and Foster, that the release here did not bar, as well for that it was not the intent of the

parties, as for that this rent being incident to the reversion, and part thereof, is no more released hereby than the reversion itself is. But a rent-service in gross, as a seigniory of which Littleton is to be intended, would have been released by such a release, for that the seigniory is thereby extinct; also this rent becomes due by the perception of the profits, and is not like to a rent-charge; or a rent, parcel of a seigniory. And they gave judgment for the plaintiff: and of the like opinion was the Court, in Michaelmas term, 29 Car. 2, between *Ingram and Bray*, which is entered Hill. 2 Rot. 49, which see hereafter. And so in Trinity 21 Car. 2, B. R. between *Stokes and Stokes*, which also see hereafter, where by a **[101]** release of all demands on his proper account, it was adjudged by the whole Court, that an obligation taken by the plaintiff in his own name in trust for the children of J. S. was not discharged thereby. And in Easter term 1 W. & M. B. R. between Knight executor of Knight, and Cole executor of Lawford, where Knight had a judgment of 6000l. against Lawford, and Lawford had given a legacy of 5l. to Knight, and on the receipt thereof Knight gave to Cole, the executor of Lawford, a release in this form; *I acknowledge to have received of Cole* 5l. *left me as a legacy by Lawford, and do release to him all demands which I against him, as executor of Lawford, can have for any matter whatsoever.* And it was adjudged by the whole Court, that the generality of the words *all demands* should be restrained by the particular occasion mentioned in the former part thereof, viz. the receipt of the 5l. legacy, and should not be a discharge of the judgment.

BROWN *against* SPENCE.

Reading the articles in the porch of a chapel of ease, well enough, where he is kept out of the church and chapel. S. C. 1 Sid. 163. 1 Keb. 502, 590.

On a trial at Bar in a *quare impedit*, the plaintiff proved, that he read the Articles on the fifth of November, where his induction was September the fifth, and it was ruled insufficient, because not within two months after the induction, computing twenty-eight days to the month. But then he proved, that he read them in the porch of a chapel of ease within the same parish within a month after his induction, the keys of the church and of the chapel being detained from him by the defendant; and this was admitted by the Court to be a sufficient reading of the Articles within the statute of 13 Eliz.

PEASELIE'S CASE.

Administration proved by the act of the Court without seal. S. C. 1 Keb. 509.

In ejectment tried at the Bar where the plaintiff made title as administratrix, and proved her administration by the act of the Court for the grant of it to her; and this was admitted sufficient (evidence) by the whole Court, without shewing any grant thereof under the seal of the Court.

[102] EKINS *against* TRESHAM.

Case for falsly affirming a messuage to be let at 42l. per annum, where it was let only at 32l. per ann. S. C. 1 Sid. 146. 1 Keb. 518, 522.

Case, that whereas the plaintiff and defendant were in treaty for the sale of a messuage; the defendant falsly and fraudulently affirmed it was let at 42l. per annum; whereto the plaintiff gave faith, gave him 500l. for it, where in truth it was let at 32l. per annum only. After verdict for the plaintiff, it was moved in arrest of judgment, that the action did not lie; as for saying that a thing is of a greater value than it is, without warranty no action lies, Yelv. 20. No more will it for saying that it is demised for more than in truth it is; for the party might inform himself from the tenant, and a warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is apparently blind of one of them. But by the Court, tho' an action will not lie for saying, that a thing is of greater value than it is (nor by Wyndham, it is perjury to swear it, because value consists in judgment

and estimation, wherein men many times differ). Yet to affirm that a thing is demised for more than it is, is a falsity in his own knowledge, and the party who is deceived, may for such deceit have an action, for perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave. And after it had been twice moved, judgment was given for the plaintiff in Trinity, 15 Car. 2, by the whole Court.

HOOKES *against* SWAIN.

Covenant to pay 20l. annually, and does not say how long, if it shall be for life. S. C. 1 Sid. 151. 1 Keb. 511, 517, 555. 2 Danv. 58, pl. 6.

Covenant was brought on a covenant, whereby the defendant covenanted if the plaintiff married his daughter to pay him 20l. per annum, without mentioning for how long, and assigned a breach in non payment for two years: the defendant as to the first year pleads payment, and as to the other demurs, supposing that no time being limited, he was not obliged to pay more than one year. But on argument, the Court inclined, that the payment should be for life, for *annually* imports more than for one year; but whether for the life of the husband or the wife, **[103]** it was not determined; and adjourned: but it seemed by some to be for the life of the husband, because it is in lieu of a portion, and it shall be taken most strongly against the covenantor; others held that it should be for the life of the wife, because it is for the marriage provision for her.

Note, In Trinity 3 Jac. but entered Pasch. 3 Jac. 2, in the Common Pleas, between *Death and Benns*, a widow woman covenanted on marriage with her husband, that he should enjoy the wife's lands during their joint lives; and the husband covenanted with the wife's trustees, to pay them 20l. annually, not saying how long, and it was adjudged to be for their two lives, as the covenant on the other part was for the enjoyment of the wife's lands.

FOSTER *against* HOLYMAN.

A promise that if they agreed on a price, to pay it. S. C. 1 Keb. 512, 627.

Error of a judgment in the Palace-Court, where the plaintiff declares, that he and Higden were bargaining for a horse, and the defendant assumed (undertook) that if they agreed on the price, the defendant would pay the money; and that they agreed for so much, and the defendant had not paid. And verdict and judgment for the plaintiff there on the issue *non assumpsit*; and the error assigned was, that there was not any consideration, for it is not that he should sell or deliver, (but only agree, &c.) and so no loss to the plaintiff, nor benefit to the defendant: but the judgment was affirmed, for it shall be intended after a verdict, that the horse was upon the agreement delivered, and the promise the inducement thereto, and good.

[104] TERM. SANCT. TRIN. ANNO 15 CAR. II. IN BANCO REGIS.

DRAKE *against* BEARE.

Debt for rent on a lease made in an inferior jurisdiction, but not said that the lands lay within the jurisdiction. S. C. 1 Sid. 151. 1 Keb. 555, &c. 1 Vent. 2, 72. 2 Danv. 301, 11.

Error of a judgment in the Court at Exeter, where an action of debt was brought on a lease for years at Topsham, within the jurisdiction of the Court, of lands at D. but does not say, that the lands lay within the jurisdiction of the Court, whereto the defendant pleads *nil debet*; and thereupon the plaintiff had verdict and judgment: and this was assigned for error, because it does not appear that the lands lay within the jurisdiction of the Court, and if part of the cause of action lies within the jurisdiction of the Court, and part without, the Inferior Court ought not to hold plea; and though the issue be *nil debet*, and so the contract in question, yet an entry, suspension, &c. might be given in evidence, whereof they have no power to inquire, and yet for an entry,

suspension, &c. the defendant (might say) he owed nothing. And of this opinion were Foster, Twysden and Kelynge Justices: but Wyndham Justice on the contrary said, it could be no reason to out a Court of its jurisdiction by supposal of a thing which might have been pleaded, but is not; and he put a difference between a case, where on the pleading any thing appears to have been out of the jurisdiction, and where any thing might have been out of the jurisdiction, but does not appear to be so; it shall not be supposed, except it be shewn by the pleading, or otherwise appears to the Court: but the three others said, that the Inferior Court shall not hold plea, except the whole matter be within their jurisdiction, **[105]** for suppose here he had declared on a lease made at Topsham, and did not say that Topsham was within the jurisdiction, the Court would not suppose it to be within the jurisdiction without it were shewn, no more would they suppose the lands (here) to be within the jurisdiction, it not being shewn. And afterwards inasmuch as all the others were in opinion against him, Wyndham consented to the reversal, which was done accordingly. The like case is entered Hillary 14 & 15 Car. 2, B. R. Rot. 240, between *Draper and Kent*, in error of a judgment in the Palace Court, in an *assumpsit*, where the plaintiff declared on an *indebitatus* within the jurisdiction, for divers merchandizes to him (the defendant) sold and delivered, and did not say within the jurisdiction of the Court.

SLAUGHTER *against* TUCKER.

Judgment ought not to be in real actions upon default made, but a grand or *petit cape*.

Error of a judgment in a *quod ei deforceat* to the Grand Sessions in Wales, and assigned divers errors, some in fact, others in law, upon the record; whereupon the defendant in the error demurred for duplicity, and now the plaintiff waved the errors assigned on the record, and assigned a new error, viz. that judgment final was given on a default after appearance, where there ought to be a *petit cape* only in all real actions on a default after appearance, and a grand cape on a default before appearance, which the Court (agreed and therefore) held this a manifest error.

SMITHE *against* SMITHE.

Consideratum est, and not said *per Cur'*, in what Court good or not. S. C. 1 Keb. 478, 529. 1 Sid. 147. *Post*, 123.

Error of a judgment in dower in the Court at Durham, for that it was entered *consideratum est*, and not said *per Cur'*, but held by this Court, it is well enough in Courts of Counties Palatine, or Grand Sessions, which are not to be resembled to inferior base Courts; otherwise of the Court of the Grand Franchise of Ely; and a case was cited where a judgment there was reversed for this cause.

[106] HOLDAGE *against* HODGES.

Plea, that Longhope is ancient demesne, proof that Hope is so, is not sufficient, tho' known by the one name and the other, but it ought to be pleaded. S. C. 1 Sid. 147. 1 Keb. 530.

Ejectment of lands in Longhope, the defendant pleads it is ancient demesne, issue that it is not ancient demesne, and the book of Domesday brought into Court to try it; wherein it appears, that Hope is an ancient demesne; and by Foster, Twysden and Kelynge Justices, this shall not maintain the issue for the defendant, but the defendant ought to have pleaded, that it is known as well by the name of Hope, as of Longhope, and that it is ancient demesne; and then it should be tried by the jury if it be known by the one name and the other; but it cannot upon this pleading be supplied by any proof or examination *de hors* (*i.e.* foreign to the record) Wyndham held that it might be supplied by proof of witnesses, for this is a trial by the Court on the (Domesday) book, and not by jury; and he resembled it to a trial of infancy on inspection and affidavits, but the rest were contrary, and so it was ruled.

BOCKENHAM'S CASE.

Bail for striking in Westminster-Hall, body for body. S. C. 1 Sid. 211. 1 Keb. 751.

He was brought into Court immediately for beating of a man in Westminster-Hall, *sedente Curia*, and obliged to find sureties to appear to an indictment, which were four persons, each obliged in a recognizance, and also body for body to stand to the judgment upon the indictment. And Twysden said, that though on an assault and battery in another place, the party struck may justify the striking the other again, yet he cannot do so when he is struck in Westminster Hall, sitting the Court, nor in the church-yard, Bockenham having said that Harlston had struck him first: and afterwards in Hillary 16 & 17 Car. 2, he was tried at the Bar for this upon an information, and a verdict against him, that he struck, beat, wounded, and evil intreated Harlston; and he pleaded a pardon which recited the information, omitting **[107]** *verberavit* (that he beat) and pardoned the beating, omitting the wounding, and yet the pardon was allowed. For it was held by the Court, that the word *percussit* (he struck) includes the beating, and the wounding is not material; for the striking made the offence, be there any wounding or not; also the pardon had general words, viz. all malefeasances in the information contained: and he being discharged, was immediately arrested at the suit of Lenthal the marshal for 100l. that Lenthal had paid for him for an escape, and the Court permitted the arrest.

THE COUNTESS OF RUTLAND'S CASE.

[Discussed, *Holden* v. *Weekes*, 1860, 1 J. & H. 284. Referred to, *Ecclesiastical Commissioners* v. *Wodehouse* [1895], 1 Ch. 563.]

Parson, if he may dig mines. S. C. 1 Sid. 152. 1 Keb. 557.

Maynard moved for a prohibition to a parson for digging new mines of coal in his glebe; and also for felling trees: for that it is waste and prohibitable by the statute, against prostrating trees, &c. But the Court held, that it lay not for the mines, for if so, no mines in any glebe should be now opened.

COLLINS *against* MAN.

Surety of peace for giving ill language in Westminster Hall.
S. C. 1 Keb. 558. Hawk. P. C. 261.

Collins having given the lie to Man in Westminster-Hall, sitting the Courts, was bound to his good behaviour: but it being proved that Man had there given him a provocation, he was also bound to his good behaviour.

[108] THE KING *against* THE INHABITANTS OF WOODFORD, CHINGFORD, AND OTHER ADJACENT TOWNSHIPS IN ESSEX.

Fences thrown down in the day or in the night by persons known, not within the statute.

A *distringas* issued on the Statute of Westm. 2, for throwing down inclosures against the inhabitants of the next town, and two of each came and pleaded for themselves and the other inhabitants of the several towns, that the fences were thrown down in the day-time, when the persons might be known; and traverse that they were thrown down in the night, or at such a time as the offenders could not be known; and issue was accordingly joined in the disjunctive; and now on a trial at Bar it was said for the defendants, that if the prosternation was either in the day or in the night so publickly, that the malefactors were known, it is not within the statute; to which the Court agreed, for the statute was made to give remedy in cases where the malefactors not being known, the parties were without remedy by action of trespass, &c. But if it was done either in the day or in the night before the face of the owners,

so that they had remedy by trespass, &c. this is not within the statute: and on the evidence it appearing to be done publickly, altho' by the doers (*i.e.* the defendants, &c.) the jury, by the direction of the Court, found for the defendants.

[109] TERM. SANCT. MICH. ANNO 15 CAR. II. IN BANCO REGIS.

KITCHEN AND KNIGHT *against* BUCKLY.

Tenants in common join in covenant for repairs. S. C. 1 Sid. 157. Raym. 80. 1 Keb. 565, 572.

Covenant, and declares, that Randal devised the tenements to the defendant, who covenanted with the lessor to repair them; and afterwards Randal grants the moiety of the reversion to Kitchen; and then granted the other moiety of the reversion to Knight, and they brought a joint action of covenant against him for not repairing of the messuage; and after verdict for the plaintiff, on performance pleaded, it was moved in arrest of judgment. 1st. That they being tenants in common ought not to join in this action for repairs, which concerns the inheritance, but ought to have several actions in this case, which savours of the realty, according to their several interests. 2dly. That the covenant is not with the lessor and his assignees, and therefore the assignees shall not have any action (not) being named; whereupon judgment was staid. But afterwards it was argued by Jones for the plaintiff, and he agreed that in real actions, or mixed which savours of the realty, they ought to join; but in actions personal, where damages only are to be recovered, they may join, and cited Littl. sect. 311, 312, 313, and 18 H. 6, 5, 6, 7. And as to the second objection, he said, that as an assignee of a lessee shall be charged in covenant for repairs (tho' assignees are not named in the covenant) in respect of their having the possession, as in 5 Co. *Spencer's case;* so an assignee of the reversion shall have an action of covenant for default of repairs in respect of his having the reversion, tho' assignees are not named in the covenant. And to this opinion the whole **[110]** Court agreed. But as to the first point, it was argued by Baldwin for the defendant, that this action of covenant is mixed in the realty, because it concerns the inheritance, as well as in the personalty to recover damages; and in such cases tenants in common ought to sever: and he cited Moor 452. Godb. 90, 280. Dy. 326. sect. 314, 317. That they shall not join in an assise or an avowry for rent because mixed. Nor in a *cessavit*, waste, &c. Mo. 40, and in *Pyott and St. John's case* 2 Cro. where Pyott claimed by two grants of the reversion of several parts at several times, and he brought an action of covenant for repairs, and it was allowed; for that both grants were to one and the same person, and he could not be tenant in common with himself; but here the grants are to several persons and at several times, by several grants. But held by the Court, that this was merely a personal action, wherein tenants in common may join: and in *Pyott's case* he was tenant in common with himself, for he had the fee in part of the reversion, and for years only in the reversion of the residue; and by the whole Court, judgment was given for the plaintiff in this case.

LEE *against* ROGERS.

Assumpsit on a promise twenty years before, no benefit of the statute without pleading it. S. C. 1 Keb. 566, 578. Raym. 86.

Assumpsit on a promise made the first of May, 3 Car. 1, for money lent: the defendant pleads, that the writ was first brought the 4th of February, 14 of this King, and that he did not promise within six years before the said 4th of February. The plaintiff replies, that he assumed within six years before the said 4th of February: and after verdict it was moved in arrest of judgment, for that it appears by the declaration, that the cause of action did arise above six years before the action brought. 2. That the replication is a departure from the Court. But by the Court, judgment was given for the plaintiff; for first, tho' the cause of action appears to be 20 years before the action brought, yet the plaintiff shall recover, if the defendant

does not plead the statute, which was made for the ease of those who would take advantage thereof, but the Court shall not give the defendant advantage thereof if he will not plead it. 2dly. The replication is no departure from the declaration, for the time put in the declaration was not material, for he might [111] declare of an *assumpsit* at any time, but when the defendant makes the time material by his plea, the plaintiff may by his replication answer to that plea, for maintaining his action by the time that before was not material; and they gave judgment for the plaintiff. And in Hillary term the 15th of Car. 2, in the Common Pleas, between Sir George Bremion and Sir John Evelyn, on a promise made in 1646, the defendant pleaded the Statute of Limitations; to which the plaintiff replied, that the defendant was a member of the House of Commons till 1648, and that then the Government was usurped, and no Courts erect: and that he brought his action as soon as the Courts were erected by the King's restoration. And on demurrer it was adjudged, (as I heard) *first*, That none should take advantage of the statute without pleading it. *Secondly*, That the replication is no departure, because it is not but an answer by the time to the plea, which before was not material. *Thirdly*, That privilege of Parliament, nor the Courts not being open, are not any excuse against the Statute of Limitations, not being excepted out of the statute; and a man might here file an original against a member of Parliament without breach of privilege, and continue it till his privilege be determined.

JAMES *against* MORGAN.

Assumpsit to pay for a horse a barley-corn a nail, &c. S. C. 1 Keb. 569. 6 Mod. 305. 1 Jo. 138.

Assumpsit to pay for a horse a barley-corn a nail, doubling it every nail; and avers that there were thirty-two nails in the shoes of the horse, which being doubled every nail, came to five hundred quarters of barley: and on *non assumpsit* pleaded, the cause being tried before Hyde at Hereford, he directed the jury to give the value of the horse in damages, being 8l. and so they did: and it was afterwards moved in arrest of judgment for a small fault in the declaration, which was over-ruled, and judgment given for the plaintiff.

[112] MILLS *against* MONDAY AND HIS WIFE.

Cousiner, *He made false letters*, spoken of a carrier without a *colloquium* of his trade, not actionable. S. C. 1 Keb. 571, 612. 1 Sid. 155.

Action for that the wife of the defendant having *colloquium* of the plaintiff, being a carrier, said of him, *He has made false letters, he has cousined my husband of* 21*l. and gave me a false and forged acquittance:* after verdict for the plaintiff, it was moved in arrest of judgment, and the judgment was stayed because the *colloquium* was not laid of his trade of a carrier, but (only) of himself. And it being moved again at another time, and the Court continuing in their former opinion, judgment was given, that the plaintiff should take nothing by his bill.

BISCO, LESSOR OF STRODE, *against* DR. HOLTE.

Chancellor of a cathedral is enabled by stat. 32. H. 8 to make leases. S. C. 1 Sid. 158. 2 Keb. 576.

In evidence to a jury at the Bar in ejectment, on a lease made by the chancellor of a cathedral church, not being confirmed by the dean and chapter: there was a doubt made, whether this being for twenty-one years or three lives, should bind the successor within the statute 32 H. 8, c. 28, or not? And by the whole Court, it shall bind without confirmation, for he is a prebendary and more, for he hath a prebend, and besides that he is a dignitary, and is seized in fee in right of his church within the words of the statute; and they would not permit it to be found specially, as it

was desired by the Attorney General; for they said, they would not have it made a doubt.

Note, in 3 Cro. 350, *Watkinson* against *Man*, it was adjudged on a special verdict, that a lease by a prebendary shall bind the successor; and it is there said by Fenner to have been so adjudged in the case of a treasurer of a church. But see 1 Inst. 300 b. where a prebendary is taken as a parson or vicar, not to have the whole fee in him.

[113] And *note*, the statute excepts parsons and vicars, but not prebends, and Hyde said, that precentors of old foundations are enabled by the statute, but otherwise perhaps of new foundations: and whereas a case was cited in the Exchequer, that leases made by the chanters of Paul's ought to be confirmed; Hyde said, that they were not properly chanters, but of the lesser order, and only singing men: but chanters, precentors, &c. are of the greatest order.

TILFORD *against* FRENCH.

A parol submission to an award, does not imply a promise to perform it. S. C. 1 Sid. 160. 1 Keb. 599, 600. 1 Danv. 27, 3.

Debt for 50l. and declares, that the plaintiff and defendant mutually submitted to the award of J. S. who awarded, that the defendant should pay to the plaintiff 50l. and that the plaintiff on payment thereof should deliver to the defendant, certain writings, and also make to him a release: after verdict for the plaintiff judgment was stayed and given for the defendant, because the award is void; for that the defendant had no remedy for the writings and the release upon this parol submission; for it did not imply any promise to perform it, and so it is an award of one part only.

THE KING *against* CHALONER.

The year of the King, and the year of the King's reign, all one. S. C. 1 Sid. 156. 1 Keb. 572. Record of a force on the statute R. 2 quashable by motion.

It was moved to quash a record of a force, made on the view of a justice of peace on the statute of R. 2, because it was only *anno Regis Car.* 2, omitting *regni;* but by the Court, it cannot be intended the year of his life but of his reign; for it is not the 14th year of the King, except it be the 14th year of his reign, for he is not King but from the commencement of his reign; but they said, that it is quashable by motion without writ of error, if it had been insufficient.

[114] SMITHE *against* BARRET AND CLIFFORD.

Boilery of salt, what, an ejectment lies thereof. S. C. 1 Sid. 161. 2 Danv. 751, pl. 2.

Ejectment of a boilery of salt, tried at the Bar on a lease by the Corporation of Droitwich, and proof, that the pit is divided into twenty or thirty boileries, viz. that one shall have the first boilery, and another the second; and so of the residue, which consists in this, that one shall have the first tub of water that is drawn out of the pit, and another the second tub, &c. And the water that is so drawn by officers appointed, makes the boileries.

GILBERT *against* MARTIN.

Covenant in Berks to repair a house in Hampshire. S. C. 1 Sid. 157. 1 Keb. 575. Raym. 85.

Covenant, and declares of a lease made in Hampshire, of a messuage in Berkshire; and assigns a breach in not repairing of the house: the defendant pleads that he had

not broken the covenant, and issue thereupon tried in Hampshire, where the covenant is supposed to be made, and verdict for the plaintiff: whereupon it was moved in arrest of judgment, that it ought to have been tried in Berkshire, where the house is, and where the repairs are to be made: to which it was answered, that where the cause of action arises on a thing in two counties, the plaintiff has election to bring it in which county he will; as where it arises on the covenant made in one county, and on the not repairing in another. To which it was replied, that true it is, so it is in many cases, where on a general issue divers things in divers counties are to be tried; as where a man brings debt for an escape on an arrest in one county, and an escape in another, there on *nil debet* both are triable, viz. the arrest and the escape, and both are triable in that county where the plaintiff will at his election bring his action; and yet there if the arrest be traversed, the trial shall be in the county where the arrest is alledged: and if the escape be traversed, it shall be tried where the escape is alledged. And here when the breach is alledged in not repairing, and the issue is *non infregit, &c.* this shall be intended only an answer to the breach (alledged) viz. that he hath not broken the covenant for want of repairs; and so that is the only matter triable, and that only where the house lies, and cited Bro. Issue 19. 22 H. 6, 13, 23. 16 H. 7. 1. **[115]** 44 E. 3. And of this opinion were the whole Court, except Wyndham, who agreed, that a particular issue shall bring the trial to the county where the matter in issue arose, and out the plaintiff of his election; but he held that *non infregit conventionem*, is not such a particular issue, but other things may be given in evidence thereupon: but by the opinion of the three others, judgment was stayed.

TERRY *against* HOOPER.

Colloquium of the party, but the words spoken of him and of his trade. S. C. Raym. 86. 1 Keb. 60, 2, 644.

Case, for that the plaintiff being a lime-burner, the defendant having *colloquium* of him, said of him and of his art, *He is a cheating knave:* after verdict for the plaintiff on not guilty, it was moved in arrest of judgment, that here is no *colloquium* laid of his art, but only of himself; and the laying the words to be spoken of him and his art, is but a *colloquium* of the plaintiff himself, and *cheating knave* of a lime-burner is not actionable if it be not spoken with reference to his trade: whereupon judgment was stayed, and in Hillary term next following, Jones moved for judgment, and cited 1 Cro. 371. 2 Cro. 674. That the words being laid to be spoken of him and his trade, are sufficient without any *colloquium* either of him or his trade, they being found by the jury to be spoken of him and his trade; and of this opinion were Wyndham and Twysden, they being now found spoken of him and his trade. But Hyde, Chief Justice, and Kelynge were of a contrary opinion, and the judgment was stayed, the Court being divided. And by Kelynge, Wyndham and Twisden, an action lies for speaking scandalous words of a lime-burner, or of any man of any trade or profession, be it ever so base, if they are spoken with reference to his profession.

[116] BAWDRY *against* BUSHEL.

Custom for foreigners to pay 4d. per acre for tithes.

A prohibition prayed on a custom alledged, that all persons who have lands in such a village, but inhabiting out of the vill shall pay 4d. per acre only in satisfaction of tithes: and that the defendant here sued him inhabiting out of the vill for tithes in kind in the Spiritual Court. But the prohibition was denied, for the custom is unreasonable to give a greater privilege to foreigners than to inhabitants, who are at greater charge, in respect of their resiancy, to repairs and vestments for the church.

WHEELER *against* WELCH.

Case for calling whore in London, proved to be spoken in Middlesex. S. C. Raym. 81. 1 Keb. 578, 603.

Action was brought in London for calling the plaintiff whore there, which was removed hither by *habeas corpus*, and afterwards remanded and tried in the Sheriff's Court in London; and on the trial, the words were proved to be spoken at Clerkenwell, *i.e.* out of the city and liberties thereof, for which I demurred on the evidence, for that those words spoken at Clerkenwell, are not actionable. And the Judge overruled the demurrer presently; whereupon I prayed him to seal a bill of exceptions. But the parties being poor, I upon their request waved it, and a verdict was given for the plaintiff and 45s. damages.

Note, The defendant might have pleaded, that the words were spoken at Clerkenwell, and have traversed the speaking in London; and if the Judge had denied to have received the plea, the Court of King's Bench would have granted a prohibition.

[117] THE DEAN AND CHAPTER OF ST. PAUL'S *against* CAPELL.

Obligation conditioned to pay so much as J. S. shall appoint, is within the statute of 3 Jac. 1. of finding bail in error on a judgment thereupon. S. C. 1 Keb. 613, 690.

Debt on an obligation conditioned to pay to Biggs such (a sum of) money as J. S. should declare upon an account by him stated between the plaintiff and defendant, to be due from the defendant to the plaintiff. Whereto the defendant pleads, that J. S. had not declared any thing due to the plaintiff, issue thereupon and judgment for the plaintiff, and thereupon error brought, and the question was, whether the plaintiff in error should find bail on the statute of 3 Jac. 1, c. 8? For it was objected, that this was not an obligation for the payment of money *only* within the words and intent of the said statute, which extends only where a certain sum is expressed in the condition; and therefore Yelv. 227, *Girling's case*, where a man recovered on an *insimul computasset*, it was adjudged not to be within the statute: and a case is there cited, that a recovery in debt upon arbitrament is not within the statute: and a writ of error is a writ that every subject of right ought to have, and therefore the statute made in restraint thereof shall be taken strictly. And of this opinion was Kelynge, but the rest of the justices *contra*, viz. that altho' writs of error are writs of right, yet they are for the most part used for delay, for remedy whereof the said statute was made, and therefore was to be taken beneficially for the subject. They agreed the case of *Girling*, and that of debt on an award, for those are not actions on a bill or obligation for the payment of money which are only within the words of the statute; but this action is grounded on an obligation made for the payment of money only, which altho' it be not certain when the obligation is made, is yet certain before the action is brought; and they ruled, that the plaintiff should take his execution, notwithstanding the writ of error brought, except the plaintiff in error gave in bail before such a day.

[118] THE KING *against* THOMAS.

Trial for murder in the next English county. Plea that he was formerly acquitted in the Grand Sessions in Wales. S. C. 1 Sid. 179. 1 Keb. 663. Hawk. P. C. 121. Wils. 320. Atk. 175, 182.

Thomas was indicted at Hereford, the next English county, for a murder committed at Coyty in Wales; whereto he pleads, that he was at another time (*i.e.* formerly) tried and acquitted of this murder at the Grand Sessions of Wales. The Attorney General replied, that Coyty was parcel of one of the lordships marchers; and that the stat. 26 H. 8, c. 6, enables the justices of gaol delivery in the next English county to try traitors, murderers, and felons, for facts done in any lordship

marcher, as if it had been committed in the English county; and that the acquittal in the lordships shall not be at any Bar. Whereupon the defendant demurs; and the case was oftentimes argued at the Bar, and it was at length resolved by the whole Court, that the defendant should be discharged; for the reason of the making of the statute of 26 H. 8 was the irregularity of proceedings in the lordships marchers. And by the statute of 27 H. 8, c. 26, the lordships marchers are divided into the six new counties of Wales, and the English counties adjacent, and the English laws to be used in Wales, and they are thereby enabled to send knights and burgesses to the Parliament in England; and altho' by a proviso in this statute, the trials for murder, treason and felony done in the lordships marchers are saved, yet that was before the erection of the Court of Grand Sessions, which was done by the Act of 34 H. 8, c. 26. And that divides all the counties into divisions wherein the Grand Sessions are to be held, where the trials are (to be) according to the laws of England; and therefore, where after this Act a man is tried and acquitted at the Grand Sessions of treason, murder and felony, he may plead it, and not be tried again for the same offence.

Note, This matter was doubted at the Grand Sessions, and therefore to have it settled here, it was removed hither by *certiorari*, and resolved as aforesaid.

[119] THE KING *against* THE CITY OF CANTERBURY.

A *mandamus* to restore an alderman to his precedency, &c. *Vide post*, 123, 306.

A *mandamus* to restore an alderman, expelled from his priority and precedency of place of alderman; and on the return thereof, divers exceptions were taken to the return and disallowed; but at length on view of the return it was held good, and nothing further done.

Note, This kind of *mandamus*.

And see hereafter pag. 187, a *mandamus* to grant an administration. And in 2d Shower, pag. 48, to prove a will.

COXE *against* SMITHE.

Case for a false oath, causing him to lose his office. *Vide ante* 97. Hard. 221, 222, &c. 1 Sid. 131.

Case for that he being an officer of the Custom-House, the defendant made a false affidavit against him in Chancery, touching malfeasance in his office; and afterwards petitioned the commissioners of the customs against him, and thereupon caused him to be turned out of his place: after a verdict (upon not guilty) for the plaintiff, it was moved in arrest of judgment, that no action lies for the making of a false oath, Owen 258. 2 Cro. 601. Hutt. 11. Poph. 144. 1 Leon. 107, and that no action lies for the petition, because it is done in a course of justice. But (said) by the Court. The action is not founded on the oath, nor on the petition, but those are only inducements to prove the malicious procurement to have him turned out of his place; and that it was falsely and maliciously done, is now found by the verdict; and they gave judgment for the plaintiff.

[120] TOMBES *against* ETHRINGTON.

A pardon excepting murder, does not accept a *felo de se*. S. C. 1 Keb. 66, 548, 628. 1 Sid. 167. 1 Saund. 361. *Vide ante* 8, 26. 2 Show. 334. 1 Mod. 102. 2 Mod. 53.

A *scire facias* as administrator of Tombes the intestate, upon a judgment recovered against the defendant by the intestate: the defendant pleads that the intestate killed himself, and shews an inquisition found thereof before the coroner, in the times of

the late usurpation. The plaintiff replies the general pardon of 12 Car. 2, whereby the King pardons all felonies, debts, &c. The defendant demurs; and now it was adjudged on argument, that by the pardon the crime of *felo de se* was pardoned, as was formerly adjudged in the case of *The King and Ward, the Executor of Wentworth*, in Mich. 12 Car. 2, in B. R. (which see here before p. 8), but the pardon does not restore the debt vested in the King by the inquisition before the pardon, without words of restitution. But to this it was argued, that the inquisition taken in those times was void, and is not confirmed or made good by the stat. 12 Car. 2, c. 3, for the continuance of judicial proceedings not being inserted under any of the titles in that Act; whereto it was answered and resolved, that whether it were committed by the Act or not, it was yet good at the common law, for the coroner being elected by the county, his office does not determine by the King's death. But they would not award execution for the plaintiff, because they held the King had title to the debt. Whereupon, one Lock was promised a grant of the debt by the King; and in Hillary 16 Car. 2, B. R. brought a *scire facias* against Ethrington, and shewed the felony *de se*, and the inquisition, and the King's grant to him: the defendant pleads the general pardon, and it was now resolved again, that the crime of *felo de se* is pardoned, and is not within the exceptions of murder in the Act of Pardon. And *secondly*, That though the crime be pardoned, yet the debt is not restored to the administrators, being vested in the King by the inquisition, no words of restitution being in the Act. But the third question was, whether the debt is not extinguished in the hands of the debtor, by the fifth branch of the Act, which pardons and releases *all causes, things, quarrels, suits, judgments and executions not excepted in the Act.* And as to this it was said for the plaintiff, *First*, That the commencement of this clause is a pardon of *treasons, offences, &c.* and the words *judgments and executions* shall be **[121]** satisfied, and refers only to judgments and executions for the offence, and not judgments and executions for the debt. *Secondly*, The clause shall be satisfied with judgments and executions originally (due) to the King, and shall not include debts which came to the King by assignment or forfeiture. *Thirdly*, The pardon is to all subjects, and the defendant in his plea avers that he is *modo subditus*, and that may be by naturalization since; and if he was not a subject at the time of the Act, he is not within the pardon; and as to the first and second of those objections it was answered by Jones, that though the clause in the statute speaks of treasons and such offences, yet afterwards the clause contains rents, arrears of rents, forfeitures, penalties, and many other general words, as bonds, securities, &c. and therefore it is to be taken generally, and shall be extended to the case in question: and of this opinion were Hyde and Twysden on the first argument, but Wyndham and Kelynge were of a contrary opinion. And as the case of Sir George Binion, cited to be lately adjudged in the Exchequer, that debts which came to the King by assignment, were not pardoned; Sir George Binion was an accomptant, and in arrear; and by the tenth clause of the Act, such accounts are excepted out of the pardon; for J. S. being indebted to Binion, Binion assigned the debt to the King for the better recovery thereof, to be paid to the King in satisfaction of his accounts, and the Court at first held it discharged: but afterwards for that it came to the King in lieu of the account, they by equity of the Act held it to be excepted as the account itself was; but Hale Chief Baron, and the whole Court of Exchequer, always ever since the pardon have adjudged, that debts coming to the King by assignment, were pardoned as well as debts originally due to him. And as to the third (question) the word *subditus* shall be taken in the more worthy sense, viz. a subject born; as the Feast of St. Michael shall be taken for St. Michael the Archangel. But it was adjourned, and the case was again argued at the Bar in Easter term, 16 Car. 2, and then Hyde Chief Justice doubted more than before; but Kelynge having spoken with the Chief Baron Hale, and being satisfied by him of the course of the Exchequer, and the case of Binion to have been as was before declared by Jones, he altered his opinion, and held the debt to be discharged in the hands of the debtor. Wyndham continued his former opinion, but it was adjourned; and afterwards in Trin. 16, Hyde being **[122]** dead, it was adjudged by Twysden and Kelynge, that the debt was discharged; Wyndham continuing his former opinion. But all agreed that *modo subditus* was sufficient, and shall be intended to have been always so. And judgment was given for the defendant.

(1929) 2 K.B. 134.

PALMER *against* FLETCHER.

[See *Tenant* v. *Goldwin*, 1703-4, 2 Ld. Raym. 1093; *Robinson* v. *Grave*, 1872, 27 L. T. 650; *Ellis* v. *Manchester Carriage Company*, 1876, 2 C. P. D. 16; *Angus* v. *Dalton*, 1877-81, 3 Q. B. D. 114; 4 Q. B. D. 178; 6 App. Cas. 743; *Wheeldon* v. *Burrows*, 1879, 12 Ch. D. 41; *Allen* v. *Taylor*, 1880, 16 Ch. D. 357; *Russell* v. *Watts*, 1885, 10 App. Cas. 603; *Birmingham, etc., District Banking Company* v. *Ross*, 1888, 38 Ch. D. 300; *Phillips* v. *Low* [1892], 1 Ch. 47; *Smith* v. *Hancock* [1894], 2 Ch. 388; *Broomfield* v. *Williams* [1897], 1 Ch. 612.]

A man builds a new house on part of his lands, and after sells the house to one, and the lands to another, he cannot obstruct the lights. S. C. 1 Sid. 167, 227. Raym. 87. 1 Keb. 553, 625, 794.

Case was brought for stopping of his lights. The case was, a man erected a house on his own lands, and after sells the house to one, and the lands adjoining to another, who by putting piles of timber on the land, obstructed the lights of the house: and it was resolved, that although it be a new messuage, yet no person who claims the land by purchase under the builder, can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by Twysden and Wyndham Justices, Hyde being absent, and Kelynge doubting. For the lights are a necessary and essential part of the house. And Kelynge said, Suppose the land had been sold first, and the house after, the vendee of the land might stop the lights; Twysden to the contrary said, Whether the land be sold first or afterward, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees; and cited a case to be so adjudged; but all agreed, that a stranger having lands adjoining to a messuage newly erected, may stop the lights; for the building of any man on his lands, cannot hinder his neighbour from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription. And afterwards in Mich. 16 Car. 2, B. R. a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.

[123] THE KING *against* THE GOVERNORS OF THE NEW WATER-WORKS, LONDON.

A *mandamus* to restore the treasurer of the new water-works, London. S. C. 1 Sid. 169. 1 Keb. 625.

A *mandamus* was prayed for restoring him to the treasurership of the company, which was much opposed by Coleman and Powys, because it was only a thing of private concernment, and not touching the publick; and of this opinion was Wyndham, and that it did not lie, nor for a fellow of a college, nor had it been ever seen that a *mandamus* was granted to restore an abbot, a monk, a Knight-Templar, or Hospitaller, &c. But it was strongly pressed by Maynard, and the Attorney General, and Wylde (all of the King's Counsel) to have the writ, and they said it concerned the King, who had an interest in the waterworks, viz. certain parts or shares. And Twysden held, that the *mandamus* well lay, but to Hyde, Chief Justice, it seemed that it did not, because a private corporation and a private office; but at length they consented that the writ should go, and they would consider further upon the return thereof.

THE KING *against* COOK.

No pledges on an information on 5 Eliz. but in debt, *qui tam, &c. præceptum est, and consideratum est*, and not said *per Curiam*. S. C. 1 Keb. 631. *Ante* 105. 1 Wils. 226. Stra. 857.

An information at the sessions of the peace in the county of Hertford for using the trade of a mercer; and judgment thereupon, on which error was brought here and assigned, that there were not any pledges *de prosequendo*, and the plaintiff might

be nonsuited and amerced. But said by the Court in debt *qui tam* he may be nonsuited and amerced, but not in an information, and therefore there need not pledges. 2dly, The *venire* is *præceptumest*, and it is not said *per Curiam*, and the judgment is *consideratum est*, and not said *per Curiam*. 3dly, The *venire facias* is *duodecim liberos & legales homines*, and it is not said *de burgo* or *de Civitate de Hertford;* and for these last causes judgment was reversed.

[124] TERM. SANCT. HILL. ANNO 15 & 16 CAR. II. IN BANCO REGIS.

THE KING *against* SIR JOHN JACKSON.

No new trial in a criminal case where defendant is acquitted. *V. ante* 9, 10. 1 Sid. 153, 154. 1 Keb. 124, 127, 484, 546, 566, 568.

In trespass between Sir John Jackson and Primate, the verdict being against Primate, he indicted the witnesses of perjury; which being at issue and brought to trial, Sir John commanded his servants to beat and imprison the witnesses which were to prove the perjury, so that they did not come to give evidence, whereupon the others were acquitted. And Primate (after) moved for a new trial of the perjury, which was denied, it being in a criminal case, wherein the party being once acquitted, shall never be tried again. But the Court directed an information against Jackson, which was done, and he convicted. And now it was moved in arrest of judgment, that the information was by way of recital how an issue was joined, and does not positively say, then an issue was joined and appointed to be tried, &c. But it was not allowed, it being only by way of inducement to the suit on the information, which is for the battery and the detaining the witnesses. 2d. Objection, that the information is against Jackson for procuring A. and B. to beat and imprison the witnesses, and Jackson only tried and convicted, and the others never yet tried; so that it does not appear that they were guilty of the battery and imprisonment, and then Jackson cannot be guilty of the procuring of that which does not appear to have been done. But it was resolved, that he commanding the same to be done, is a principal and not an accessary, and he being found guilty, it shall be intended that the fact was done; and the Court imposed a fine of 1000l. upon Jackson, and that he should find sureties for the good behaviour for a year before he should be discharged. But being specially **[125]** committed by the Court at the King's suit, they ordered that no action or execution should be put upon him during his imprisonment without licence of the Court: and afterwards Primate moved to have part of the fine allowed him towards his charges, and thereof the Court would consider. And note in the same term, in *Sir Charles Stanley's case*, the Court would not permit him, being in prison at the King's suit, to be charged.

SHEROCK *against* BOUCHER.

A prebendary who has a peculiar, leases his prebend, *q.* if the lessee may hold courts. S. C. Raym. 88. 1 Bl. Rep. 81. Doug. 378. 1 Term Rep. 552.

A prohibition was prayed, on which the case appeared to be, that a prebendary who had a peculiar jurisdiction, made a lease of his prebend, *with all profits, commodities and advantages, &c. thereto belonging.* And the question was, whether the ecclesiastical jurisdiction should pass to the lessee, so that he might make a commissary to hold courts or not? And the Chief Justice and Wyndham held, that it should not, for that it is annexed to the spiritual person, and not to the lay-body of the prebend: and Wyndham said, The commissary is only the deputy of the prebendary (as prebendary) which his lessee could not make for him. Kelynge and Twysden held to the contrary, and that it was annexed to the body of the prebend, and passed with it. But this being the first motion, it was appointed, that the plaintiff should declare on his suggestion, and that the defendant should demur thereupon, so as to bring the point judicially in question.

THE KING *against* ALDERMAN STERLING AND SEVENTEEN OTHERS.

[See *Mogul Steamship Company* v. *MacGregor*, 1889-91, 23 Q. B. D. 631; [1892], A. C. 25; *Allen* v. *Flood* [1898], A. C. 88.]

Information for a conspiracy, not saying *vi & armis*. S. C. 1 Sid. 174. 1 Keb. 650. *V. ante* 10, 62, 124. Hawk. P. C. 343, 344.

Information against them, for that they with divers others of the brewers of London did factiously and unlawfully assemble themselves, and conspire to impoverish the excise-men, and made orders, that no small-beer called gallon beer should be made for such or so long time to be sold to the poor, nor no ale but of such a price, with intent to move the common people to pull down the Excise-House, and bring the excise-men into the hatred of the people, and to impoverish and disable them from paying their rent (being then 118,000l. per ann.) to the King; and **[126]** on not guilty pleaded, they being found guilty on a trial at Bar of assembling and consulting to impoverish the excisemen, and not guilty of the residue, it was moved in arrest of judgment, 1st. That there wanted *vi & armis* in the information; but held by the Court it was well enough without it, the information being for plotting and contriving which may be without force. 2dly. That they are found guilty only of the conspiring without any act done, for they are found not guilty of the making the orders, &c. and this is only against private men, and not punishable at the King's suit, but by suit by the parties, if they are endamaged thereby. 3dly. That the contriving to impoverish the excise-men, is uncertain what is meant, and it may be by bringing actions against them for just debts. To the first of which objections it was answered by the King's Counsel, that this conspiracy tends to the public, because it concerns the loss of the King's revenue. And as to the second objection, the information says, that it was factiously and unlawfully, and is so found by the jury, which well enough explains what kind of impoverishment is intended, and a conspiring to do an unlawful thing is punishable without any overt act done, as 9 Co. Rep. *Poulter's case*, Moor 788, and the same in *The Lord Gray's case*, and *Scrogg and Midwinter's case* in the Star-Chamber 1636. And the whole Court gave their opinions, that judgment should be given for the King. And Hyde, Twysden and Kelynge held, that the bare conspiracy in this case to diminish the King's revenue, without any act done, is finable. 27 Ass. 44. 43 Ass. 20. Wyndham said, that if it was no more than a conspiracy without an act done, it was not punishable, but that here was more, viz. a confederacy and a coaduna-tion, by assembling themselves to this purpose, and he cited 45 E. 3, 19. And so all agreed, that they should be fined, but not jointly, but separately, according to their ability, with a *salvis contenementis*; and thereupon they fined Sterling 1000 marks, and the others 300 marks each.

[127] MORGAN *against* MAN.

Where the plea, is no award, you cannot rejoin, a void award. S. C. 1 Sid. 180. 1 Keb. 678. 2 Saund. 24, 189. *Post*, 133.

Debt on an obligation conditioned to perform an award. The defendant pleads no award; the plaintiff replies and shews an award, and assigns a breach; the defendant rejoins, and shews another matter in controversy, of which the arbitrators had notice, but made no award thereof; and so the award was void, the submission being with an *ita quod*. But by the whole Court, this rejoinder is a departure, for no award is none at all, and is not to be maintained by shewing the award to be void; but he ought at first to have pleaded the award, and also that other matter, whereby it was void. And judgment was given for the plaintiff, as it was in a like case before, between *Howe and Launder*, Mich. 14 of this King, in this Court. *Vide ante* 85.

HELIER *against* CASEBERT.

The lessor brings debt against administrators of the lessee after an assignment by him. S. C. 1 Sid. 240, 266, 402. 1 Keb. 839, 923. 2 Vent. 209. 1 Saund. 137 to 141, &c. *Ibid.* 2 Show. 133. 2 Jo. 144. Nelson's Lutw. 95, 211, 109, 136, 145. Cro. El. 555.

Debt for rent by the lessor, against the administrator of the lessee, who pleads, that before the rent was due he had assigned the term, whereupon the plaintiff demurs. And after divers arguments, it was in Trinity term, 17 Car. 2, adjudged for the plaintiff, by Twysden, Wyndham and Kelynge, (Hyde the Chief Justice being then dead) for the privity of the contract continued between the lessor and the administrator of the lessee, as it was between the lessor and lessee themselves: and this is not contrary to *Overton and Syddal's case*, cited in *Walker's case* in 3 Co. and Popham's Reports; for there the action was brought by the successor of the prebend, against the executor of the lessee; and privity of contract shall not go to the successor any more than to the heir, and the heir of the lessor shall not maintain debt against the executor of the lessee after assignment, because no privity of contract, but only of estate descended to him. And here Wyndham said, that an executor cannot waive a term so, but that he shall be charged for the rent if he has assets; for he is bound to perform all contracts of the lessor, if he has assets, be the rent above the value of the land or not, which was not denied; and Kelynge said, that he cannot so waive it, but that he shall be charged in the *detinet*, on which the assets shall come in question: **[128]** and if he continues the possession, he shall be charged in the *debet & detinet* in respect of the perception of the profits, whether he has assets or not; to which Twysden agreed.

Note, Michaelmas term, 2 W. & M. in the Common Pleas, Rot. —— there was the like case between *Coghill and Fructon*, as the principal case here, and the like judgment.

AT LENT-ASSIZES AT SOUTHWARK.

EARL OF PETERBOROUGH *against* SIR THOMAS BLUDWORTH.

A disseisee levies a fine, and declares the uses thereof.

An ejectment was tried before Bridgman, Chief Justice of the Common Pleas; and on the evidence the case was, that a disseisee levied a fine, and declared the use thereof by deed to the conuzee. And Bridgman held, that it should not enure to the use of the disseisor, but if no use had been declared, it should have been to the use of the disseisor, and extinguished the right of the disseisee. And it was intended to have been found specially; but the jury gave their verdict at large against the direction of the Court.

[129] TERMINO PASCHÆ, ANNO 16 CAR. II. IN BANCO REGIS.

SANDERS *against* POWELL.

Case for a malicious attachment of another's goods. S. C. 1 Sid. 183. 1 Salk. 14, 15. 6 Mod. 25, 216, 261.

Case was brought for that the plaintiff having among other things two *duodenas*, *Anglice* dozens, of guns in the possession of J. S. the defendant did falsly and maliciously attach them in the hands of the said J. S. as the goods of A. for a debt due to him by A. After verdict it was moved in arrest of judgment, that the action did not lie. *First*, Because an attachment is a legal suit in a course of law, for which no action lies; but all the penalty is, that he shall pay costs on a nonsuit, or verdict against him, if he found he has no right, F. N. B. 49, & 3 Cro. 2. *Secondly*, It is not said *scienter*, nor that the defendant knew the goods to be the plaintiff's. But by the Court, the action lies, as where the sheriff levies the goods of A. for the debt of B. though they were among the goods of B. (an action lies against the sheriff) and the

scienter is not material, for the sheriff is at his peril to levy the goods of B. only. *Thirdly*, It was objected, that *duodenas* is either no Latin, or at most is only an adjective word; and then the damages are only given for the *Anglice*, which is ill, because all pleadings ought to be in Latin: but by the Court, if there be not any Latin word for a dozen, then *duodenas* may be taken for a Latin word made for it, and so it is well; and if it be an adjective word, then no damages are given for it, nor for the *Anglice*. And thereupon they gave judgment for the plaintiff.

[130] GOODWIN *against* NEWTON.

Debt against the heir in the *detinet*. *Vide* 1 Sid. 342. *Post*, 147, 224. *Ante* 128.

Debt again an heir, who pleads he has nothing by discent. After verdict for the plaintiff it was moved in arrest of judgment, that the action is in the *detinet* only; to which it was answered, that it is for the benefit of the defendant, and that it may be either in the *debet* and *detinet*, or in the *detinet* only; and cited 10 H. 7, 8. But held by the Court to be ill, and not cured by the verdict: and they gave judgment, that the plaintiff should take nothing by his bill.

WINNE *against* LLOYD.

A warrant of attorney tested before the summons *ad warrantizandum*. S. C. 1 Sid. 213. 1 Keb. 54, &c. 748, 809, 914. *Vide ante* 72. *Post*, 146.

Error of a judgment in a *quod ei deforciat* in Wales, for that the tenant vouching, the warrant of attorney is tested before the summons *ad warrantizandum*. Whereto Jones answered, that the vouchee may come in before the summons *ad warrantizandum* if he will, and make an attorney, as Fitz. Voucher 230. 22 E. 3, 7. Fitz. Voucher 197. 13 H. 7, 24. And it shall be intended here, that the vouchee being present in Court, made the attorney, and so the summons to warranty, the *dedimus potestatem*, and the warrant made thereupon, were void: and of this opinion was the Court, and said, that they would not reverse a common recovery, if by any means they could make it good; and they affirmed the recovery.

BOWMAN *against* MILBANKE.

[Disapproved, *Smyth* v. *Smyth*, 1878, 8 Ch. D. 567.]

A will wherein he says, *I give all to my mother*, lands do not pass thereby. S. C. 1 Sid. 191. Raym. 97. 1 Keb. 719. 2 Danv. 527, 16. *Vide* 1 Salk. 236. 6 Mod. 110. Al. 28. 3 Mod. 228. *Post*, 212. 2 Vent. 285, 286. 1 Mod. 100. 3 Lev. 434. Hob. cited 2 Shower, Case 367.

Ejectment and a special verdict, where a man seized of lands in Newcastle upon Tine (where lands are devisable by parol by the custom) by a parol will devises in these words, *I give all to my mother, all to my mother*: and whether the lands passed by those words was the question: and it was argued by Glyn the King's Serjeant for the plaintiff, who said, that by the word *all*, it was uncertain whether he intended lands or goods: and by Jones for the defendant, who said, that he who gives all excepts nothing; and cited a case, where by the devise of all his estate, all the estate as well real as personal **[131]** passed; and Bendl. 6, where a devise of all his livelihood extended to lands and goods. But by the Court, *all* is altogether uncertain, and not sufficient to disinherit an heir, and they gave judgment for the plaintiff, that the lands did not pass by the will.

ARCHER *against* BENNETT.

Demise of a mill with the appurtenances, if a kiln used therewith shall pass, *Q.* S. C. 1 Sid. 211. 1 Keb. 736.

Ejectment, and upon not guilty, a special verdict: a man seised of a close, on one part whereof was a house, and on another part thereof was a kiln; and also of two

mills adjoining to the close; and used and occupied them all together till 1655, when he divided them, and sold the house and a part of the close, and reserved the other part and the kiln, and used them with the mill (and in truth the kiln was a kiln for the drying of oats, and the mills were for the making of oat-meal, but this was not found by the verdict). And afterwards he sold the mills *cum pertinentiis* to the plaintiff: and whether the kiln, and the parts of the close on which they stood, should pass to the plaintiff, was the question. And it was held clearly by the Court, that they did not pass; for by the grant of a messuage or lands *cum pertinentiis*, any other land or thing cannot pass, tho' by the words *cum terris pertinentibus* it would: and gave judgment for the defendant. But by Wyndham Justice, If all the matter had been found, and that the kiln was necessary for the use of the mills, and without which they were not useful, the kiln had passed as part of the mills, tho' not as appurtenances. As by the grant of a messuage, the conduits and water-pipes shall pass as parcel, tho' they are remote; to which no answer was given.

[132] TERM. SANCT. TRIN. ANNO 16 CAR. II. IN BANCO REGIS.

DAVIES *against* DAVIES.

An executor pleads a judgment, and that he had not goods besides, except such which were not enough, not shewing the value, 'tis ill. S. C. 1 Sid. 210. 1 Keb. 734.

Debt against an executor who pleads a judgment, and that he had not any goods, except such as were not sufficient to satisfy the judgment; whereto the plaintiff demurs specially, because not shewn of what value the goods were which he had. And now Jones argued, that it was ill in substance for this on a general demurrer, as *Tresham's case* is in 9 Co. and if it be no more than form, as *Moor and Andrew's case* is in Hob. 133, yet being specially demurred on, it is ill. And *per Cur'*, it is only form, as in Co. Entries 146, 148, 149, 152, 269, 617 b. But being specially demurred on, it is ill.

HOPPER *against* HACKETT.

An award recites differences and arrears of rent, and about trees, and awards 4l. for the arrears of rent. S. C. 1 Keb. 738.

Debt on obligation, conditioned to perform an award: the defendant pleads no award. The plaintiff replies, and sets out an award, which recites, that whereas several differences had been between the plaintiff and defendant concerning a house and divers elms, and arrears of rent: **[133]** they to make a final end of all, did award, that the defendant should pay to the plaintiff 4l. for all the said arrears of rent. The defendant demurs, for that it is an award of one part only, and not of all differences. But by the Court, the award being to pay 4l. for the arrears, is mutual therein, for it being for the arrears, it is in satisfaction of the arrears, and they are thereby discharged; and tho' the award recites other matters, yet it shall be intended they were otherwise determined, or at least when the award says to make an end of all differences, it shall be intended, that the 4l. was in satisfaction of all, the other matters not appearing but by the recital of the award itself; and they gave judgment for the plaintiff.

GARRETT *against* WEEDEN.

After no award pleaded, to say it was not ready to be delivered is a departure. 3 Keb. 739. *Ante* 85, 127.

Debt on an obligation conditioned to perform an award: the defendant pleads no award. The plaintiff replies and sets out an award made, and ready to be delivered to the defendant, that he should pay to the plaintiff 5l. and assigns the breach for not paying the 5l. The defendant demurs, because not shewn that it was ready to be delivered to both parties, but only to the defendant, and the condition is, *so that it be ready to be delivered to both parties.* But by the Court, it shall be intended to be ready

to be delivered to the plaintiff also, and he has brought his action thereupon; and if it was not ready to be delivered to both, the defendant ought to have pleaded *no award*; after which he cannot shew the award to be void without a departure: and they gave judgment for the plaintiff.

[134] HERBERT AND OTHERS MANUCAPTORS OF MERRY *against* ALCOCKE.

Judgment in an Inferior Court removed into B. R. when execution shall go thereon. S. C. 1 Sid. 214. 1 Keb. 758, 735.

Judgment in an Inferior Court, being removed into this Court (by error) and affirmed; it was adjudged, that execution should issue from this Court, for now it is a judgment of this Court. But a judgment in an Inferior Court, removed hither by *certiorari*, shall not be executed here, to make this Court subservient to the Inferior Court: but on such judgment removed hither by *certiorari*, debt may be brought in this Court, according to Hutton's Reports 117.

BOIS *against* BOIS.

Whore spoken of a woman who held lands while sole and chaste. S. C. 1 Sid. 214. 1 Keb. 731, 758.

Case for calling a widow, who held an estate while sole and chaste, whore, falsly and maliciously, with intent to oust her of her estate, and saying he would oust her thereof; and at another time calling her whore. After verdict for the plaintiff on the issue *not guilty*, it was moved in arrest of judgment, that no special damages being laid, the words were not actionable: but by the Court, they import damage in themselves in this case, in respect of her estate; as for calling a man thief, an action lies without special damage, because the words import it in themselves. But for the last words spoken at another time, which are not actionable in themselves, and the damages being entire, the judgment was therefore stayed till the matter be examined, whether the damages were given entirely or not? For on the back of the writ where the damages are entered, there seemed to have been some alteration.

[135] SNOWE *against* CUTTLER.

A woman tenant for life, her husband devised to the heirs of the wife's body, if they attain fourteen: she after has issue, but before they are fourteen, suffers a recovery; it is no remainder, but an executory devise. S. C. 1 Sid. 153. 1 Keb. 567, 752, 800, 851. Raym. 162, 164. 2 Danv. 517, 2.

In ejectment tried at Bar, a special verdict found, that husband and wife were seized of a copyhold to them and the heirs of the husband; the husband surrenders to the use of his will, and devises the lands to the heirs of the wife's body, if they attain the age of fourteen years, and dies without issue; she takes a second husband, by whom she has issue, but before the issue attains fourteen, the wife and second husband suffer a recovery in the court of the manor: and if the heir of the wife shall have the land, (the wife being dead) was the question, which was argued at the Bar several times in this and the following terms; and divers points were moved and argued, viz. *First*, Whether this devise were good at all, being to a person not *in esse*? *Secondly*, If it could be good in respect of the double contingency, or a possibility upon a possibility, viz. if the wife should have an heir of her body or not? and though she had such heir of her body, if it should attain to the age of fourteen, at the time of her death? *Thirdly*, If the devise were good, what estate it should be, viz. a remainder or an executory devise? *Fourthly*, Whether it should be barred by the recovery? and the Judges delivered their opinions in Mich. term 19 Car. 2, and then as to the first point, Wyndham and Moreton held the devise void, as well for want of a person *in esse* when the devise was made, as also for the double contingency, viz. if the wife should have any heir of her body, and if such heir should be fourteen at the time of

her death. And they held, that a devise to an infant in his mother's womb is void, according to Dyer, 304 a. (but that a devise to an infant in his mother's womb when he shall be born, is good) because he is (not) a person capable; and the statute enables to devise to any person or persons; and not only on the words of the statute, but so it was of lands devisable at common law, by Paston 11 H. 6, 13 b. But as to this point Twysden and Kelynge then Chief Justice held, that a devise to an infant in his mother's womb is good; and that it, and a devise to an infant in his mother's womb, when it shall be born, was all one; and they said, that Hale Chief Baron was of the same opinion, and told them he had caused the roll of Dyer, 304, to be searched, and that it **[136]** did not warrant that opinion; and so said Hyde Chief Justice, when the case was argued in Michaelmas term 16 Car. 2, viz. that he had seen the roll, and he seemed to be of Hale's opinion; and those two Judges, viz. Kelynge and Twysden, held this devise good notwithstanding the double contingency: and as to the third point, all agreed, that if this devise were good, it must be by way of executory devise, which may well be allowed to take place within the compass of a life, but not after a dying without issue, for that would make a perpetuity; and it should not be by way of remainder; for though the wife had an estate for life, yet this is a new devise to take place after her death, and is not a remainder joined to her estate. *Fourthly*, All agreed, that if it was an executory devise, it was not barred by the recovery as *Pell and Brown's case* in 2 Cro. and much more in this case of a copyhold, the recovery is no bar without custom, and no custom is found of barring estates by a common recovery. But the Court being divided in the principal point, no judgment was given, but the cause was agreed to be adjourned into the Exchequer-Chamber. But I suppose the parties afterwards agreed, for I heard nothing of it after.

THE KING *against* THE CHURCH-WARDENS OF AXMINSTER.

A man hang'd by the bell-rope. *Q.* If the bells are deodands. S. C. Raym. 97. 1 Sid. 204, 205. 1 Keb. 123, 744.

In an information for the King, the case was one Brockhurst ringing a bell in the church, was strangled with the rope; and whether the bell should be a deodand was the question on this information for detaining it from the King; and the objections against the King were two: *First*, That the bell was fixed to the freehold: to which it was answered, that it was not fixed to the freehold, but (only) tied in the steeple, and bound down with pins or keys, which might be removed without altering the freehold. *2d Objection*, That the bells are parcel of the church goods, and it would be in vain to forfeit it to the King, to be by him given back to the church again, viz. to pious uses: to which it was said, that it should be forfeited as a satisfaction for blood, to be disposed by the King to other pious uses. Hyde Chief Justice, and Wyndham were of opinion, that the bell was not forfeited; the other two seemed contrary: but nothing further was done in the case, that I could hear of.

[137] ATHERTON *against* HOLE.

Bail cannot bring error of a judgment against the principal and himself, nor can they join in error. *Q.* 1 Sid. 216. 3 Term Rep. 79.

The bail in Inferior Court before any judgment given against them there, but after judgment against the principal there, brought error of the judgment against the principal and himself, in which are the usual words, *If judgment be thereupon given;* and suppose the error, *as well in giving the judgment, as in adjudging of the execution*, and the writ was quashed, because the bail cannot bring error of the principal judgment, nor can the principal and the bail join in error. But whether the record was removed thereby was the question; and that it was removed: Pollexfen cited 1 Cro. *Smith* against *James* where principal and bail join, which was therefore quashed, and yet the record was removed. But Twysden Justice, cited Hill. 21 Car. 1, B. R. Rot. 217, that by a writ of error brought by the bail, the judgment against him only can be removed, and here no judgment being against him, nothing is removed; for judgment against him is not yet given. But it was adjourned.

PRICE *against* HILL.

Assumpsit in an Inferior Court on a promise within the jurisdiction for goods sold, and not saying sold within, &c. S. C. 1 Keb. 760. 1 Saund. 74.

Error of a judgment in Wallingford Court, where the plaintiff declared, that the defendant being indebted to him at Wallingford, for goods to him sold and delivered, promised at Wallingford, (to pay) &c. and because he does not shew where the goods were sold and delivered, and so it may be without the jurisdiction, therefore the judgment was reversed.

[138] SLADER *against* SMALBROOKE.

Prosecution in the Spiritual Court for forging ecclesiastical orders, not prohibited. S. C. 1 Sid. 217. 1 Keb. 721, 762.

Prohibition, a layman forges orders, and obtains a benefice, for which he is prosecuted in the Ecclesiastical Court, in order to deprivation, and he prays a prohibition, because forgery is triable at common law; but the prohibition was denied, for the forgery is touching an ecclesiastical matter, and he is suable there for it in order to his deprivation only.

[139] TERM. SANCT. MICH. ANNO 16 CAR. II. IN BANCO REGIS.

THE KING *against* SUMMERS AND SUMMERS.

A scandalous letter indictable before justices of the peace as a libel. S. C. 1 Sid. 270. 1 Keb. 772, 788, 931.

Error of a judgment on an indictment for reciting a libellous letter scandalous to Mellish, to a woman whom he intended to marry, before the justices of peace at Guild-hall. And the errors assigned were; 1st. That it was only a private letter, and not punishable by indictment. 2dly. If it were, yet not before justices of peace, but commissioners of oyer and terminer, who have these words in their commission, *de propalationibus verborum*. And for both causes, Hyde, Chief Justice, at first held it to be erroneous. But in Trinity term following, Hyde being dead, Twysden, Kelynge, and Wyndham held it indictable, because it tended to a breach of the peace, and before justices of peace, as well as before justices of oyer and terminer.

BEAN *against* NEWBURY.

A. and B. of one part, and C. of the other part, submit, and the award is between B. and C. only: it is void.

Debt upon an obligation conditioned, that whereas the defendant by himself and his son, had submitted to the award of A. and B. to perform it, so that the award be ready, &c. before the first of May, and if they made none, to the award of such an umpire as they should chuse, to be made the 1st of June: the defendant pleads no award nor umpirage; the plaintiff confesses no award by the arbitrators, but (says) that the umpire awarded the plaintiff to seal to the defendant three obligations, and the defendant to pay to the plaintiff 100l. which he had not done. The defendant demurs, **[140]** and the award was adjudged void for two causes; 1st. For that nothing is awarded as to the son, and it ought to be to every one for some part, or else it is void in the whole. 2dly. Altho' the *ita quod* be in the clause referring to arbitrators, and the award is made by the umpire, yet the *ita quod* by construction shall relate as well to the umpire as to the arbitrators, and for this was cited by the counsel 2 Cro. 278. 3 Cro. 838, but of this the Court for some time differed in opinion, but at length all agreed as aforesaid. Then the plaintiff seeing the opinion of the Court against him, prayed leave to discontinue, which was denied; for tho' they permit discontinuances in case of obligations for payment of money, yet never in case of obligations for performance of awards, except upon extraordinary occasions.

COLEMAN AND HIS WIFE *against* HARCOURT.

Husband and wife cannot join in an action for saying, *Thou keepest a bawdy-house.* *Ante* 3. Hard. 166.

Case for saying to the wife, they keeping a victualling-house, *Thou art a bawd to thy own daughter*, whereby J. S. that used to come to the house forbore, &c. to the damage of both. After verdict for the plaintiff, judgment was staid, because the words are not actionable, except in respect of the special loss, which is the husband's only.

KEYME *against* GOULSTON.

Put your daughter to school and I will pay for her for a year. He puts her to school a quarter of the year. Action lies. S. C. 1 Sid. 225. 1 Keb. 792.

Assumpsit, in consideration *the plaintiff would put out the plaintiff's daughter's daughter to a school-mistress, he the defendant would pay for her board for a year.* And that he put out his daughter for three quarters of a year, which came to 10l. and that the defendant had not paid: after verdict for the plaintiff, it was moved in arrest of judgment, that the consideration is not performed, for when he promised to pay for a year, it ought to be intended, that he should put her out to school for a year, otherwise the plaintiff might put her out for a week only, and yet oblige the plaintiff to pay for a year. But by Twysden and Wyndham, it may be intended, *Put her there to school, and I will pay for a year, stay she more or less;* and by **[141]** Hyde, Chief Justice, it may be intended, *Set her to school, and I will pay for a year or less, according to the rate she stays.* And thereupon by all the three, judgment was given for the plaintiff.

WRIGHT *against* BEAL.

Indeb' assump' for goods, implies sold and delivered. S. C. 1 Sid. 225. 1 Keb. 781, 783, 792, 823.

Assumpsit, that where the defendant was indebted to him for such tithes arising from the Vicarage of Dale; he the defendant promised to pay, &c. After verdict on *non assumpsit*, it was moved in arrest of judgment. 1st. That tithes are in the realty of which an *assumpsit* does not lie no more than for a rent. 2dly. That the vicar is to have and not to pay tithes. 3dly. It is not said, sold and delivered to him. But answered by the Court, as to the 1st. It may be intended tithes severed. To the 2d. An abbot or other person might have had a portion of tithes out of a vicarage, which is now come to the plaintiff. 3dly. The *indebitatus* implies sold and delivered, otherwise he could not be indebted; and they gave judgment for the plaintiff.

HILL *against* ELLARD.

Prescription for common for 4 cows and a half. So much of the prescription as is enough to justify, is good, tho' the whole prescription is not found. S. C. 1 Sid. 226. 1 Keb. 793.

Replevin of a cow. The defendant avows damage feasant: the plaintiff pleads in bar to the action, and prescribes for four cows and half a cow, issue on the prescription and verdict for the plaintiff. It was moved in arrest of judgment, that the issue is senseless and void; for one cannot have common for four cows and an half. But by Wyndham and Twysden, the rest being absent, if in replevin so much of the prescription be found as will serve the turn of the party, tho' the whole be not found, it is sufficient. And here the action is for one cow only, and the prescription as to the four is a good justification of putting in one cow: and they gave judgment for the plaintiff.

[142] ELRINGTON *against* DOSHANT.

Not guilty pleaded *in assumpsit*. 1 Stra. 574. 2 Stra. 1022. Bull. N. P. 151.

In assumpsit the defendant pleads not guilty, issue thereon and verdict, that he was guilty, and that he assumed in manner and form as declared. It was moved in arrest, that not guilty is no issue in this case, and the finding farther that he assumed, is void, not being in issue. But held by Wyndham and Twysden only in Court, that it was cured by the verdict at least; and by Wyndham, not guilty is a good plea and issue *in assumpsit*, for it is trespass on the case; and they gave judgment for the plaintiff.

REBY *against* ROBINSON.

Vouchee alone brings error without the tenant. S. C. 1 Keb. 141, 880, &c. 2 Saund. 95. 1 Sid. 321. Infant suffers a recovery in person, and being of age, assigns the infancy for error.

Error of a common recovery suffered by an infant in person as vouchee, he being now of age: and two questions were argued, 1st. Whether the vouchee alone might have error without the tenant; for that the principal judgment is to be reversed, and the judgment against the vouchee is but as a consequent thereof. 2dly. Whether the infant might assign it for error, he being now of age, so that it cannot be tried by inspection, as in the case of one within age, and it not being done by attorney, it cannot be tried by jury, as in judgments where he appears by attorney (it may). And the case was often argued, but at last the parties agreed before any judgment given. But Jones told me, he heard the Judges were of opinion against the plaintiff in error upon the second point.

[143] BEVEN *against* CLAPHAM.

Statute of Limitations no bar where the plaintiff goes beyond sea. S. C. 1 Sid. 228. 1 Keb. 799.

Assumpsit, that where the defendant at the parish of Bow, in the ward of Cheap, London, was indebted to him, he promised to pay, &c. The defendant pleads he did not promise within six years: the plaintiff replies, that the debt was contracted at Tenerif beyond sea, viz. in the parish and ward aforesaid; and that within six years after his return he brought the action: the defendant demurs. *First*, For that the replication is a departure from the declaration, which lays the *indebitatus* at Bow in London; and the replication is at Tenerif beyond sea. But by the Court, it is well enough, it also saying in the parish and ward aforesaid. *Secondly*, This case is not within the action, which saves the statute till the defendant returns; but here it is founded on the return of the plaintiff, which is not mentioned in the statute. But by the Court, it is within the reason and intent of the statute: and they gave judgment for the plaintiff.

ELLIS *against* JACKSON.

A writ executed before the *quarto die* after the return is ill. S. C. 1 Sid. 229. 1 Keb. 718, 805.

Trespass for battery and imprisonment; the defendant justifies by execution of a writ, but on the plea it appeared to be executed after the return, but before the *quarto die post*: and the execution was adjudged to be illegal. Moor 733. 3 Cro. 180. 23 H. 6, 45 b. were cited; and judgment was given for the plaintiff. And Justice Wyndham cited a case, where the writ by the roll was awarded to be returned on a Wednesday, but it was made returnable on the Thursday, and executed on the Thursday; and the writ was ordered to be amended according to the roll, and the execution on the Thursday made void.

[144] BURMAN *against* ASTON.

A. being tenant of B. (who holds of C.) is under-tenant of C. S. C. 1 Keb. 775, 806.

Covenant against the defendant, as executor to Eltonhead, who covenanted in a lease made by him to the plaintiff, of certain gravel pits in Black-Acre, that he, his heirs, assignees, or under-tenants, would not dig or sell any gravel there; and assigns a breach, that Brent, an under-tenant to Elton-head, did dig and sell gravel in other pits in Black-Acre. Issue that Brent was not under-tenant to Eltonhead; the jury found, that Brent held the other pits in which, &c. by lease from one J. S. who held them of Hunt, who held them of Eltonhead; and it was objected: *First*, That Brent was not under-tenant to Eltonhead, for Brent had not the whole term granted by Eltonhead to Hunt, nor could Eltonhead maintain debt against him for want of privity: but it was adjudged that he was under-tenant mediately to Eltonhead, for he claims under him, though not immediately. *Secondly* objected, that the covenant extends only to the pits demised, and not to other pits. But by the Court, it ought to be intended of all the other pits in the close, and not only of the pits demised to the plaintiff, for in them Eltonhead had nothing to do before the term (ended). And judgment was given for the plaintiff.

SMITH *against* FARNABY. IN THE COMMON PLEAS.

Remainder of a new rent, good. S. C. 1 Sid. 285. 2 Keb. 89. Carter 52. Nelson's Lutw. 386.

A rent *de novo* was devised to one for life, remainder to another in tail; he in remainder suffered a common recovery, and adjudged in the Common Pleas, that it was a good rent and remainder, and not an executory devise of the rent after the death of the devisee for life, and that it was barred by the common recovery. This I had by report from Roger Moore, then a student, afterwards serjeant at law: and *note*, this judgment was afterwards affirmed on a writ of error in B. R. in Easter term 18 Car. 2, which see in 1 Sid. 285. But it is there put, that the first devise was in tail, the remainder in fee; and adjudged that the remainder of the new rent was good.

[145] MASON *against* TREDWAY.

Tenant for years releases to him in the reversion. S. C. 1 Keb. 807. 5 Com. Dig. 409, 630. 3 Bac. Abr. 457. Gilb. Ten. 301. 1 Burr. 78, 80. Cowp. 599. Doug. 139.

Tenant for years remises, releases, discharges, and for ever quit-claims to him in reversion: and whether it was a good release or surrender of the term, was the question: and it was argued by Raymond, that it was in the case of a lessee for years, though it would not be so in the case of a tenant for life. Co. Lit. 275 b. 276 a. 2 Cro. 160. Tenant for life releases to him in reversion, it is void by way of release, and not good by way of surrender for want of apt words: but in the case of a lease for years, consisting only in contract, it may be extinct by the word *discharge*, which shews his intent not to have any thing further to do with the land, and therefore it shall be a surrender. 3 Cro. 21. Perkins, sect. 607. And the Court inclined, that it was a good surrender. And Wyndham Justice, cited a case, where a lessee for years remised and released to his lessor; and it was adjudged a surrender, for that the lease for years stood only in point of contract. But it was adjourned.

BROOKES *against* DEAN.

Condition to deliver goods such a day, plea, a delivery according to the condition is not good. *Q.* 1 Keb. 678. 2 Mod. 269. 1 Lutw. 546. Nelson's Lutw. 168, 178.

Debt on an obligation, conditioned to deliver goods upon such a day: the defendant pleads that he delivered them according to the form of the condition aforesaid.

Whereupon the plaintiff demurs, for that he ought to have pleaded expressly according to the words in the condition, that he delivered the goods upon the said day, and not generally, as here; and the Court seemed of the same opinion: but it was adjourned.

[146] MR. BACON'S CASE.

An intent to commit felony is finable. S. C. 230. 1 Keb. 804, 809.

He was indicted for intending to murder the Master of the Rolls, and for offering 100l. to J. S. to do it; and saying, that if he would not, he would do it himself; and he being convicted, it was moved, that this intent only was not indictable: but the Court to the contrary said, anciently the will was reputed or taken for the deed, in matters of felony; and tho' it is not so now, yet it is an offence and finable; and they fined him 1000 marks, 3 months imprisonment, and to find sureties of good behaviour during life.

Note, He pleaded by attorney, which the Court said he might do by the favour of the Court, though not by strictness of law: but the Court being moved to charge him in prison with other actions, they would not permit it.

WINNE *against* LLOYD.

No costs in error, where none in the original action. Strange 139, 262, 617, 834, 977, 1072, 1084. 1 Bac. Abr. 524. S. C. 1 Sid. 213. Raym. 16, 55, 70, 96, &c. *Vide ante* 72, 130.

Error of a judgment given for the plaintiff at the Grand Sessions in Wales, and the judgment affirmed (as before 72, 130). And now it was moved, that the demandant in the former action, (being the defendant in error) might have costs on the statute 3 H. 7, because the writ of error was sued in delay of execution. But by the Court, no costs shall be given on the writ of error, because no costs or damages in the original action, according to 1 Cro. *Smithe* against *Smithe*, Mich. 11 Car. 1.

But *note*, in 3 Cro. 616, 617, *Graves* against *Short*, entered Hill. 40 Eliz. Rot. 847, costs were given in error upon a *formedon*, and in the same book, 659, *Penruddock's case*, and 5 Co. 101, in error of a judgment in a *quod permittat*, 41 Eliz. costs were given in the writ of error, though none were in the original action.

[147] COREY *against* THINNE.

When an executor shall be charged in the *debet* and *detinet* on a *devastavit* or not. S. C. 1 Sid. 102. 1 Saund. 219.

Error of a judgment in debt given in the Common Pleas, entered in Easter term 1655, Rot. 844, where the plaintiff declared in the *debet* and *detinet* against an executor, and of a *devastavit*, and had judgment of the executors own goods, and the judgment was affirmed in B. R. And in Easter term 15 Car. 2, B. R. Rot. 546, was the like case and the like judgment, in debt on a judgment, where the plaintiff recovered, and the defendant paid the money; and so in Michaelmas term, 20 Car. 2, B. R. Rot. 740, a like case was in debt on a judgment by *Wheatly* against *Lane*, and the like judgment. But in the case of *Ent* against *Withers*, Mich. 29 Car. 2, B. R. in debt on an obligation, the count was *devastavit* against an executor in the *debet* and *detinet*, and it was ruled by judgment for the defendant, for the Court would not allow the action to go further than it had been before, viz. than in debt on a judgment; and so held the Court formerly in the time of Hale, in the case of one *Horsey and Daniel*.

RUTTER *against* HEBDEN.

Assumpsit to marry a woman. S. C. 1 Sid. 180. 1 Keb. 252.

Assumpsit in consideration that she would marry him he would marry her. After verdict for the plaintiff, it was moved, that it was a matter ecclesiastical on which no

action would lie. But the Court would not permit it to be argued, but gave judgment for the plaintiff, see 7 H. 6, 1. Deceipt brought for not marrying his daughter according to the agreement; and held well, for the contract is temporal.

[148] ANONYMUS.

A power is to elect a jurate for life, if they think fit; he is not removeable at pleasure.

A *mandamus* to restore a jurate of Maidston; they return their incorporation, with power to elect jurates for their lives, if they think it expedient; and that they elected him, and afterwards it seemed expedient to them to displace him; wherefore they accordingly did so; and the return was adjudged insufficient, for tho' they had power to elect for life, if it seemed expedient to them, yet they had no power to displace or put him out of it, if it seemed expedient to them.

PROBY *against* THE MARQUIS OF DORCHESTER.

Scand' mag' for saying, *I value him no more than a dog.* S. C. 1 Sid. 233. 1 Keb. 813. 1 Com. Dig. 190. Stra. 618.

Error of a judgment in the Common Pleas in *scandalum magnatum*, for saying, *I value my Lord Marquis of Dorchester no more than I value the dog at my foot:* and the errors assigned were, 1st. That the words are not actionable within the statute, for they do not import any ill action done, or words spoken by him (*i.e.* the marquis) but only shews the esteem or value the defendant had for him. 2dly. The declaration is, that he said *these false and opprobrious words of him*, and does not say, *lies*, or *false news or tales*, as the statute speaks. 3dly. The judgment is *in misericordia*, where it ought to be a *capiatur*, the suit being as well for the King as for himself. But as to this last, the Court thought it sufficient, but they spoke nothing as to the two former, only adjourned it to be further argued. But afterwards before it came to be argued again, Proby was killed, and it was said, that the judgment passed without debate in the Common Pleas. But the executors, after Proby's death, paid the money, as the marquis himself told me.

[149] CORNHILL'S CASE.

Error lies in B. R. on a judgment in criminal cases in the same Court of Errors in fact or in law, and in civil cases in fact only. S. C. 1 Sid. 208. *Q.* 721.

Error of a judgment given here on an indictment in London, against him for seducing him into an ill house, and there cheating him of 300l. removed hither by *certiorari;* and it was objected, that the writ lay not here upon a judgment given by themselves, and cited *Read and Dawson's case* about two years before, where the writ of error on a judgment in an indictment of perjury in this Court was brought in Parliament: the Court said, that proves that it may be brought in Parliament, not that it must; and they affirmed their jurisdiction, that error may be brought in this Court in cases criminal on judgments given in the same Court: but now in cases civil, except it be of errors in fact triable by jury. But in cases criminal, as well of errors in law as in fact. And it was said by Twysden and Wyndham, and not denied, that error lies here of an attainder before the Lord High Steward: but the plaintiff in error ought to assign his errors in person.

COLLINS *against* SUTTON.

The plaintiff lays transitory matter in one county, the defendant cannot by plea carry it to another county. S. C. 1 Sid. 234. 1 Keb. 816.

Debt on an obligation at London, conditioned, that if such a ship did not miscarry in such a voyage, to pay, &c. The defendant pleads, that the ship miscarried at Falmouth in Cornwal. The plaintiff demurs, and judgment for him, for all this

matter is transitory, and the plaintiff hath election to bring his action in which county he pleases, and the defendant is obliged to plead to all transitory matters, as this is, in the same county; for whether the ship perished in the one county or the other, it is all one: but if he had local matter to plead, he may plead it in the county where such local matter arose, and thereby bring the plaintiff to try it in another county, otherwise not, as 9 E. 4, 46, and Hill. 1655, Rot. 864, between *Lenois and Williams.*

[150] JASON *against* MORGAN.

Warrant of attorney amended.

A judgment was obtained forty years before, and no warrant of attorney to acknowledge satisfaction entered, till within these two years, and the entry was, *He acknowledged himself about to be satisfied*, instead of, *he was satisfied;* and the warrant being good, it was resolved to be amended, being only the fault of the clerk, and it was done accordingly.

JENKINS *against* KEYMIS IN THE EXCHEQUER.

Consideration of a former marriage extended to the second.
S. C. Hard. 395. *Post*, 237, 238.

Ejectment tried at Bar, and a special verdict, viz. Sir Nicholas Keymis tenant for life, and remainder to his son Charles in tail general, with a remainder over, they on the marriage of Charles with Blanch his first wife, and in consideration of the marriage, and 2500l. marriage-portion, levy a fine and suffer a recovery to the use of Sir Nicholas for life, remainder to Charles and the heirs of his body on Blanch begotten, the remainder to the heirs of the body of Charles, remainder over, with power for Sir Nicholas by deed in writing, to charge all and singular the premises with the payment of 2000l. After which, Sir Nicholas and Charles without recital of the power, by lease and release for 2000l. convey part to David Jenkins and his heirs, on condition to be void on the payment of 160l. at the end of the first year, and 160l. yearly for nine years after (being the interest) with the said 2000l. or of 2000l. and interest at the end of any year after the first year: Sir Nicholas dies, Blanch dies, Sir Charles marries a second wife, by whom he had issue the defendant, and dies; and the money not being paid, the lessor, son and heir of David Jenkins, brought ejectment. And two points were argued at the Bar by Levinz for the plaintiff and Stephens for the defendant, viz. 1st. If the conveyance by the lease and release be a good execution of the power? 2dly. If not, then whether the settlement be not voluntary and void against Jenkins the purchaser for 2000l.? And as to the first, It was said and agreed by the counsel, that the lease and release was a good execution of the power as to the form, tho' that the power is to charge by deed in the singular number, and this is done by two deeds. For **[151]** a condition to make a feoffment is well satisfied by a lease and release. Secondly, It was said and agreed, that notwithstanding the power be not recited, it may be a good execution of the power, as 6 Co. *Cleer's case.* And also it may be good notwithstanding Charles joined in the conveyance, and though it be only of part of the lands: but the principal matter in this point was, if this conveyance of a fee, redeemable on the payment, not only of 2000l. but also interest for a year certain, and also for more years if not paid at the end of the first year, be good; or if it be not good for the interest, it be good for the 2000l.? For it was said, that when a man performs his whole power and more, it shall be good for that which is within his power, and void for the residue. But as to this point Hale and the Court held, that it was not an execution of the power, for by this means he might charge all the estates with a great sum of money, which would defeat the whole settlement; and the power is intire, and so is the execution, and cannot be made good for part, and void for the residue at law: but Hale said, that perhaps there might be reason in equity to aid the execution, as to the 2000l. And he said also, that the power might have been better executed by a grant of the debt, till 2000l. were levied of the profits, or by declaration of a use till 2000l. were received, or by a deed charging

the land with the payment of 2000l. But he doubted, that it could not be good by feoffment, or by lease and release of the inheritance, till 2000l. and interest were paid: and as to the second point it was said, that the settlement was meerly voluntary as to the issue by the second wife; for the marriage of the first, and the portion paid with her could not extend to the issue by the second wife; nor could it be supposed that any thing was given for it; for the estate as to the issue by the second wife, is no more than he had before; for the remainder before the marriage-settlement with Blanch, was to Charles, and the heirs of his body, which extends to the defendant without the settlement, and therefore it cannot be intended that the marriage-portion was paid for that which Charles had before; and then the settlement being voluntary, and the conveyance to Jenkins, made by Charles as well as Sir Nicholas; and the settlement being with a proviso to charge the lands with the payment of 2000l. it is voyd against Jenkins, a purchaser for a valuable consideration within the provision of **[152]** the statute 27 Eliz. c. 4, which makes conveyances with power to revoke, alter, or determine at their will and pleasure, void: but as to this the Court held, that this proviso for charging with 2000l. is not a power within the words of the statute, (it being a particular sum) to revoke, determine or alter the estate; and no fraud being found, they could not adjudge the consideration of the marriage and portion, might extend to all the estates in the settlement. And they gave judgment for the defendant.(1)

And *note*, that Jenkins afterwards brought his bill in Chancery to have the defect of the execution of the power supplied there, but could not have any relief.

JOHNSON *against* CARRE.

A covenant in the same deed, how pleadable in bar. 1 Danv. 722.

Debt for rent on a lease for years, the defendant pleads in bar a covenant by the lessor, that the lessee might deduct so much for charges: and upon demurrer it was adjudged, that the covenant being in the same deed, is well pleadable in bar, the thing being executory; and the party shall not be put to a circuity of action, viz. to bring an action on the covenant.

[153] TERM. SANCT. HILL. ANNO 16 & 17 CAR. II. IN BANCO REGIS.

ADAMS *against* TOMLINS.

Debt in B. R. on a judgment there, after error brought thereof in Cam. Scacc. S. C. Raym. 100. 1 Vent. 34. 3 Lev. 396. 1 Sid. 236. 1 Mod. 121. 1 Keb. 827.

In trespass 300l. damages were recovered, and judgment thereon; and error brought thereof in the Exchequer Chamber; pending which the plaintiff brought an action of debt in this Court for the 300l. And by all the Judges, except Kelynge, it well lies, for the record itself is yet in this Court, and the writ of error is a *supersedeas* of the execution only. See 4 H. 6, 31.

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(1) *Note*, This cause was heard in Chancery, Pasch. 20 Car. 2, before Bridgman, who held, that the marriage and portion of the first wife extended to the issue by the second, and that Sir Charles joining with Sir Nicholas in the conveyance to Jenkins, and not reciting the power, it could not be intended to be done in execution of the power, but as owners, and therefore denied relief; although there was a covenant for further assurance, which Sir Charles might have made by recovery, but he not having done it, his issue shall not be compelled to do it. *Vide post*, 238, 239.

CORVEN OR CORBET *against* PIERSON.

Judgment in an Inferior Court for lose of an office, which does not appear to be within the jurisdiction of the Court. S. C. 1 Sid. 342. 2 Keb. 267. *Vide* Pasch. 22, *Bernard* v. *Bernard, puis icy*, pag. 289.

Error of a judgment given in Exeter Court in case, for that he being an officer of the Custom-House for the port of Exeter, the defendant falsly and maliciously at Exeter, within the jurisdiction of the Court, informed the commissioners of the customs there, that he took bribes, whereby he lost his office. After verdict and judgment for the plaintiff in Exeter Court, it was assigned here for error, that it does not appear that the office is within the jurisdiction of the Court, and the action lies not but for the special damage, of which the jury cannot inquire, if the office be not within the jurisdiction of the Court; but where words are **[154]** actionable of themselves, there the jury may inquire for the aggravation of damages of a matter out of the jurisdiction, as *Taylor's case* in 1 Cro. where by reason of words (that of themselves were) actionable, spoken within the jurisdiction, the jury may inquire for aggravation of damages of the loss of trade out of the jurisdiction. And for this reason the whole Court here, except Kelynge, held, that the action was not well brought, and that the judgment was erroneous: but Kelynge held the matter of itself actionable, it being found to be false and malicious: but it was adjourned, and so it depended till Mich. 19 Car. 2. And then after divers motions and arguments, the Court said, they would not intend the port of Exeter, to be out of the jurisdiction of the Court of Exeter, but within it, and affirmed the judgment.

BAKER *against* BERISFORD.

Administrator pays debts of the intestate, and does not say, with his own money. S. C. Raym. 58. 1 Sid. 76. Clayt. Rep. 116. 1 Keb. 285.

Debt for rent, as administrator of an administrator of a lessee for thirty years, who demised to the defendant for twenty years, rendering rent, and that the first administrator had paid debts of the first intestate, to the value of the term, on which the defendant demurs; because the plaintiff had not shewn that the first administrator had paid the debts with his own money; and it may be he paid them with the money of the first intestate, for which cause the Court held the declaration ill. But it being further declared, that he elected and took the term in satisfaction, the Court held it a strong implication, if not a plain averment, that he paid them with his own money: and thereupon in Easter term following, they gave judgment for the plaintiff.

[155] SHERWOOD'S CASE.

Record made of a confession in Court, &c. S. C. 1 Keb. 341.

He having forged the Chief Justice's hand to divers bails, and being brought into Court and examined, confessed it, of which confession a record was instantly made, and judgment given, that he should be set in the pillory three several days, at three several places, and appear at the Bar with a paper on his hat, shewing his offence; and this was done without information, only upon the record of his confession.

CLAPHAM *against* MOYLE.

Proviso to pay is a covenant. S. C. 1 Keb. 842, 860, 897.

In debt, he declares on articles indented, whereupon Clapham was upon the marriage of Moyle to receive the marriage portion of Moyle's wife, being 1500l. and that Clapham should convey an office to Moyle; provided, that Moyle out of the first profits of the office should pay to Clapham 500l. and avers that he had conveyed the office, and that the defendant had received 500l. out of the profits, but had not

paid. And on demurrer it was adjudged, that the action brought on the proviso well lies, for this proviso is not by way of condition or defeasance, but by way of agreement to pay the 500l.

BOIS *against* NORLIFFE.

Matter which proves the writ abateable, not assignable for error, but matter which proves it abated, is. S. C. 1 Sid. 238. 1 Keb. 841, 850. 1 Stra. 492.

Error of a judgment in ejectment assigned, that the plaintiff after verdict, and before judgment entered; and it was argued by Weston, that it is not assignable, for nothing is assignable which proves the writ abateable, but only that which proves it abated, and cited 4 H. 6, 27. 8 E. 4, 19. 2 Cro. 303. 1 Bulst. 5, whereto Jones answered, that that is true, where the party hath time to plead it, but that he had not here after verdict: but by the Court, it is not assignable for the reason given by Weston, and they affirmed the judgment.

[156] STONE *against* WADDINGTON.

Judgment in an Inferior Court reversed, the goods not said to be sold within the jurisdiction. 1 Keb. 842.

Error of a judgment given in the Court at York, where the plaintiff declared, that the defendant being indebted to him at York, within the jurisdiction, for divers goods to him sold and delivered, did then and there promise to pay; and the judgment was reversed, for that it was not shewn where the goods were sold and delivered, and that may be out of the jurisdiction.

ERING *against* STREETE.

Hast stole lead out of my master's house.

Case, for saying to the plaintiff, *Thou hast stole as much lead out of my master's house as is as big as a house;* moved in arrest of judgment, that it might be lead fixed to the freehold: like the case in Cro. *Thou hast stolen iron bars out of my master's windows,* intended to be the iron bars fixed, and here it might be the covering of the house. But by the Court, it might have been so intended, if the words had been *stole off my master's house:* but the words being *out of my master's house,* it shall be intended lead there lying.

HARRIS *against* WILLIS.

Presentment to a church, intended to extend to institution and induction. S. C. 1 Sid. 239. 1 Keb. 844.

Error of a judgment in the Common Pleas, where the case was on the statute of 12 Car. 2, for confirmation of ministers, which establishes such as were in possession the 25th of December 1659. Provided that it should not prejudice such as were presented by the King before the 9th of December, 1659. And here the parson was presented by the King (before) but not instituted and inducted till after. And it was adjudged in the Common Pleas, that he being presented was within the proviso; and of the same opinion were Hyde, Wyndham and Kelynge; but Twysden not having read the Act, would give no opinion, because *presentment* is sometimes taken to present, institute and induct as a **[157]** grant of an annuity till he be presented, shall not determine till induction, which is the perfection thereof. But judgment was affirmed by the other three.

PRICE *against* PARKER.

Administration duly granted according to the statute, cannot be revoked without just cause. S. C. 1 Sid. 280. 1 Keb. 146, 854.

Debt for rent brought as administrator: the defendant pleads, that the administration granted to the plaintiff was *debito modo* revoked and granted to J. S. The plaintiff replies, that he was the next of kin to the intestate, and that he had sued an appeal from the said sentence, whereto the defendant demurs, and it was argued at the Bar in this term, and in Easter term following: and the principal point argued, was, whether the Ordinary having granted the administration to the next of kin according to the statute, could revoke it? And it was argued for the plaintiff, that when the Ordinary had granted the administration according to the statute, he had executed his power given him by the statute, and had nothing further to do in the case, 2 Rolle's Abr. 303, 27, 28, and 1 Cro. *Fotherbie's case*, and the same in *Levein's case*, Sty. 10, 74, 75, and *Sir George Sand's case* in this Court within two or three years last past: where the son of Sir George being dead, and the administration granted to him, it not being then known that the son had any wife. And afterwards the wife discovering herself, sued to repeal it, and was prohibited. But for the defendant it was said, that an administration was only a deputation, and in its nature always revocable; and that administration in this kingdom did originally belong to the Ordinary by the laws of the realm, and was not given to them by any statute, nor lost, as is supposed by 9 Co. in *Henslo's case*, and cited Selden's Titles of Honour, pa. 713, 714, and by their law they might have granted it to whom they pleased, and have revoked it when they pleased. And the alterations that have been made by statute are 31 Ed. 3, c. 11, which appoints the Ordinary to depute the next friends to the dead, and gives to them an action, which the person deputed by the Ordinary before could not have. Then the statute 21 H. 8 goes further, and directs, that it shall be granted to the wife, or next of kin, under a penalty; so that at this day, if they **[158]** grant it to any other, it is not void, but they incur the penalty only; and so it remains as it was before a power committed by the Ordinary, and revocable in its nature; and cited 3 Cro. 163,460. And. Rep. 303. 27 H. 8, 26, and Ow. 50, which cases are all since the statute 21 H. 8. Wyndham on the first argument held, that the Ordinary could revoke. Twysden held, that he could not without just cause, as if the administrator becomes lunatick, or where it was not duly granted at first; and the cause ought to be shewn to the Court, so that they might judge thereof: and it is not enough to say, that it was *debito modo* revoked, to which Wyndham replied, we ought to believe that their proceedings are just, till the contrary appears. Hyde, Chief Justice, held, that after administration granted according to the statute, it cannot be revoked without just cause, as lunacy; but whether the cause ought to be particularly pleaded, he said, would be the question. And it was adjourned; and afterwards in Easter term, Wyndham agreed, that the Ordinary could not revoke an administration granted according to the statute without just cause, and that the Court here is Judge of the cause; but after he is made by the Court there, this Court ought to intend it done upon just cause; and the party who will revoke an administration, ought by pleading to shew the cause, so that it may appear to the Court to be (granted) without just cause. And Kelynge and Twysden held, that the cause was to be shewn by the party who procured the revocation, so that it may appear to the Court to be revoked for just cause. But they both (all) agreed, that it might be revoked for just cause, as if it was unduly granted contrary to the statute at first, or if the administrator afterwards becomes disabled by lunacy or the like. But it was adjourned, and so it long depended; but, as I heard, judgment was afterwards given for the plaintiff, because by the appeal, the sentence of revocation was suspended.

And *note*, Justice Wyndham said, that the roll cited, whereon Coke grounded his opinion in *Henslo's case*, is 7 H. 3, where a writ was directed to the sheriff to seise the goods of an intestate into the King's hands, whereupon he collected, that administration belonged to the King. But (says he) that was only a prerogative writ to seise the goods of an intestate, who was indebted to the King, to the intent the King

should be satisfied his **[159]** debt before others, as the law is at this day: but *note* also, that Lyndewode acknowledges the granting of administrations did not belong to the Ordinary of right, but that he only had it by the concession of princes. See the case of *Offly and Best*, hereafter, pag. 186, 187, and that of *Ravenscroft* against *Ravenscroft*, pag. 305. Hill. 22 & 23 Car. 2, B. R.

CLARKE *against* MOLINEUX.

A *habeas corpus* by justices of peace, to discharge one arrested in coming to the sessions. S. C. 1 Sid. 269. 1 Keb. 845. Raym. 100.

Case against the sheriff, for an escape upon mesne process: the defendant pleads a *habeas corpus* by the Duke of Newcastle, and other justices of the peace, at the sessions of the peace, to bring the prisoner before them, who for that the arrest was made on the person coming to the sessions, discharged him, because he ought not to be arrested in going or returning, &c. on which the plaintiff demurs; and Wyndham and Twysden inclined the privilege ought to be allowed, or else the King's business would remain undone. But by Kelynge, the justices of peace cannot grant a *habeas corpus*. And it was adjourned.

THE KING *against* THE CITY OF CANTERBURY.

Exemption of jury-men not to be allowed by the sheriff's return, but by the prayer of the party. S. C. Raym. 113.

Indictment for a riot there, being to be tried at the Bar, and the *venire* returned, on the *distringas* the sheriff returns a grant of King James I. That the citizens should not be returned to serve on juries out of the city, except in cases of treason. And it was doubted by the Court, whether such a privilege could come (in debate) on the sheriff's return, and it seemed not; but that the party when he comes in may excuse himself thereby. 30 Ass. 1. 18 H. 8, 5. And Jones of counsel with the city, seemed afterwards to agree thereto. But for another cause the return was clearly insufficient, viz. that he had returned the panel on the *venire*, whereby he admits them chargeable to serve; and then he cannot afterwards return a discharge from serving upon the *distringas*.

[160] EARL OF STAMFORD *against* NEDHAM.

On an *elegit*, the moiety of every part is to be delivered. S. C. *ante* 56. 1 Sid. 239. 1 Keb. 858.

By the Court, if the sheriff on an inquisition upon an *elegit*, returns the defendant to have twenty acres in Dale, and twenty acres in Sale; and delivers the twenty acres in Sale for the moiety of the whole, all is void; for he ought to deliver a moiety of the twenty acres in each vill; and this might be avoided in evidence in ejectment brought for the lands.

[161] TERMINO PASCHÆ, ANNO 17 CAR. II. IN BANCO REGIS.

SWALLOW *against* EMBERSON.

An executor pleads another executor not named, not saying that he had administered. S. C. 1 Sid. 242. 1 Keb. 865.

Debt against an executor, who pleads that J. S. is co-executor with him not named in the writ, judgment of the writ, but does not aver that the other had administered; whereupon the plaintiff demurs, and the plea was adjudged ill. For although when an executor sues, the defendant may plead another executor not named, without shewing that the other hath administered, because he cannot know whether he has

administered or not; yet when an executor is sued, if he pleads another executor not named, he ought to go further and say, that he has administered, for that lies in his own conuzance.

QUICK *against* COPPLETON.

A promise in consideration of forbearance, by one who is not liable. S. C. 1 Sid. 242. 1 Keb. 886. *Post*, 165.

Assumpsit. Whereas the defendant's late husband was indebted to the plaintiff, and she about to come to London, and being in fear to be arrested by the plaintiff, she promised him in consideration that he would not trouble her, and would forbear till Michaelmas, to pay, &c. After verdict it was moved, that she not being shewn to be executor or administrator, her forbearance was not any consideration, which was agreed by the Court: but the subsequent words *forbear till Michaelmas*, are distinct and general, not only to forbear her but all others, and makes a good consideration, whether she be liable or not; and they cited *Heriot and Hinton's case* adjudged, that a general forbearance is a good consideration, **[162]** whether the party promising be liable or not. But Kelynge at first doubted, that by the copulative *et*, all was one sentence; and that it was not only to trouble her, but also to forbear her till Michaelmas; but afterwards he agreed with the others; and judgment was given for the plaintiff. And Hyde Chief Justice held, that a forbearance to sue one who fears to be sued, is a good consideration; and he cited a case in the Common Pleas, when he sate there, where a woman who feared that the dead body of her son would be arrested for debt, promised in consideration of forbearance, to pay; and it was adjudged against her, though she was neither executor nor administrator. But of this the other Judges here doubted.

THE KING *against* APPROVED MEN OF GUILFORD.

Q. If a *mandamus* lies for one suspended from his office. S. C. 1 Keb. 868, 880. Raym. 152. 2 Keb. 1.

A *mandamus* to restore an approved man, they return certain scandalous words spoken by him of another approved man, for which being summoned before the mayor and aldermen in their Court, he said, that he would justify it; for which they suspended him: it was objected, that the return was ill, because not returned any power to turn out; and by the Court, it was ill if they had turned him out, but here he is only suspended: and by Hyde Chief Justice, and Kelynge, a *mandamus* does not lie for suspending, for the freehold still remains in him: but Twysden with his whole force to the contrary; for a suspension is a temporary amotion, and perhaps they will never discharge the suspension; and Wyndham being absent it was adjourned.

WILKINSON *against* BOULTON.

Custom for the custody of the orphans of London, pleaded. S. C. 1 Sid. 250. Raym. 116. 1 Keb. 868, 895. 2 Danv. 312, B. 3.

In trespass and imprisonment, the defendant justified by the custom of London, that the mayor and aldermen should have the custody of all male orphans till twenty-one, and of females till twenty-one or married, and of committing them to guardians; and any person taking them from the guardian, is to be brought to the next Court and to be imprisoned; and that the plaintiff took such an one an orphan, out of the guardianship of such an one, and was (thereon) brought to the next Court and committed in prison to the defendant. Whereupon the plaintiff demurs; and it was objected by Williams, that the plea was not good to take a man without notice of his crime, and to bring him to the **[163]** Court to be immediately committed; that he ought to have notice for what cause he was brought to the Court, that so he might be prepared to answer. But by the Court, this pleading, that he had committed the offence, and was convicted thereof (is sufficient), and the matter is criminal, for which

every justice of peace may commit. 2dly. It was said by him, the custom is not good to commit without exception of peers. But by the Court, a peer is not privileged in this case, for in *homine replegiando* where he detains the body, he shall be committed, F. N. B. 68, C. 11 H. 4, 15 b. Wherefore judgment was given for the defendant.

AMCOTS *against* AMCOTS.

Issue on a dilatory plea tried by jury, is peremptory. S. C. Raym. 118. 1 Sid. 152. 1 Keb. 869, 900. *Q.* 2 Danv. 773, H. 3. *V. ante* 142.

Error of a judgment on a *formedon* in remainder, where the tenant pleads infancy, and that the remainder descended to him, and prayed his age. The demandant pleads, that the remainder did not descend to him, issue joined, and found for the demandant and judgment final, and that assigned for error. Argued by Serjeant Newdigate, that there ought to be a *respondeas ouster;* he agreed, that generally on an issue upon a dilatory plea judgment final ought to be given, but that infants were not to be within this rule, and he cited many authorities of the privileges of infants, but none that came up to this case. To whom Jones answered, the law is general, and if he would have infants excepted, he should shew a precedent thereof, L. 5 E. 4, 90. The law is general upon any issue joined. But see Fitz. Issue 14, Age 22. An issue joined on infancy tried by inspection, and a *respondeas ouster;* but in all cases when the issue is upon a dilatory, and tried *per pais*, the judgment is peremptory, otherwise it is in all cases where it is tried by demurrer, except it be in one only, and that is in the case of a demurrer upon evidence, where it is peremptory, because no *respondeas ouster* can be, because the parties are at the end of their pleading, L. 5 E. 4, 139. 2 E. 4, 10. And the reasons why judgment is peremptory on an issue tried *per pais* are, for that the delay is greater, and that issues of fact lie in the cognizance of the parties, but issues of law not. And the whole Court were of opinion, that the judgment ought to be final, and affirmed the judgment in C. B. except cause shewn, &c.

[164] GUILLAN *against* GILL.

Two executors are, the one dies, and then the other; and the executor of the first was sued in the Spiritual Court for a legacy. No prohibition where they proceed in an ecclesiastical matter although contrary to our law. S. C. Raym. 123.

A man makes two executors, one whereof makes his executor and dies, and afterwards the surviving executor dies intestate; a legatee sues the executor of the executor who first died, in the Spiritual Court for his legacy, who pleads this matter, which plea they refused, wherefore he prayed a prohibition, and it was denied; for the matter is testamentary. And perhaps the executor of the executor has all the goods in his hands, and is executor of his own wrong, and no other in the case to be sued for the recovery of the legacy. And tho' the survivor shall have all by our law, it is not perhaps so in theirs, and the matter belongs to their law; and if they proceed wrong, he ought to appeal, but they shall not be prohibited by this Court; and the prohibition was denied.

BUCKLER *against* ANGIL.

Assumpsit that he would be willing to pay. S. C. 1 Sid. 246. 1 Keb. 878. Raym. 123.

Assumpsit, and declares, that in consideration that the plaintiff would surrender a term, the defendant *would be willing to pay* 10*l*. After verdict for the plaintiff, it was moved in arrest of judgment, that here was no promise, and then *non assumpsit* was no issue to be tried; and so held the Court, and stayed the judgment.

THE KING *against* WORMS.

False Latin, &c. *Vide* 2 Show.

An outlawry in trespass was reversed, for that it was *utlegat'* for *utlagat' est;* and another was reversed the same term, between *The King and Pleyter*, and also another between *The King and Cowly* for the same cause.

[165] WIRRALL *against* BRAND.

Two executors sued in *assumpsit*, and one dies, the writ shall abate.
S. C. 1 Sid. 259. Raym. 131. 1 Keb. 906.

Assumpsit against two executors on the promise of a testator; issue *non assumpsit*, one executor dies, which is suggested on the roll, and the trial had against the other, and verdict for the plaintiff. And it was moved by Jones in arrest of judgment, that the bill was abated by the death of the one in cases of contract, but otherwise in cases of trespass, as 50 E. 3, 7. 40 E. 3, 26 b. Fitz. Brief. 263, 344, & Plowd. Com. 186 b. In case of executors sued on a contract, the death of one abates the writ.(1) But of this, in case of executors, the Court at first doubted; but at another day having seen the case in Plowd. 186, *Woodward* against *Davis*, which is directly in point, they resolved, that the writ abated and staid the judgment.

HUNT *against* SWAIN.

Consideration to forbear one not chargeable in *assumpsit*, not good; otherwise of a consideration to forbear in general. S. C. 1 Sid. 248. Raym. 127. 1 Keb. 890. 1 Danv. 57.

Assumpsit against the heir on a promise, in consideration he would forbear him till Michaelmas to pay, &c. After verdict, judgment was staid, because it does not appear, that the ancestor obliged himself and his heirs, and the consideration is not to forbear generally, but to forbear him who does not appear to be chargeable; and afterward the plaintiff perceiving the judgment of the whole Court against him, prayed a *nil capiat per billam*, with intent to begin *de novo*. And *note*, the case of the Lord St. Paul was cited to be adjudged contrary in the late times; but to that the Court gave no regard, and Twysden, who was of counsel in that cause, said, that it was then taken to be a hard case.

PRICHARD'S CASE.

By prorogation of the Parliament all their orders are determined.
S. C. 1 Sid. 245. Raym. 120. 1 Keb. 887.

On an *habeas corpus* for bringing him hither, it was returned, that he was taken by an order of the House of Peers for a contempt; and the House of Peers being prorogued, it was held by the Court, that their orders are all at an end, and every thing else before them, except writs of error and *scire facias* thereupon.

[166] ANONYMUS.

Promise to pay on collateral request, on *non assumpsit*, the request being traversable, is admitted.

Assumpsit in consideration the plaintiff would deliver to J. S. ten quarters of malt, to pay him for it on request, if J. S. did not do it; and says, that he delivered it, and that J. S. had not paid, and that such a day he requested the defendant, and that he had

(1) *I.e. Where plaintiffs. But N. B. here they are defendants. Q.* Stat. 8 & 9 W. 3, c. 10.

not paid: and at a trial in Middlesex before Twysden and Wyndham, the defendant would put the plaintiff to prove the request, but the Judges would not permit it, for the request was traversable, and not being traversed, is admitted, and (so) the issue arises solely on the *assumpsit*, the defendant having pleaded *non assumpsit*.

Note, Towards the end of this term, Hyde, the Chief Justice, died suddenly at his chambers in Serjeants-Inn; in whose place Kelynge was (afterwards) made Chief Justice, but not till Michaelmas term following at Oxford, the term being kept there because of the plague at London.

[167] TERM. SANCT. TRIN. ANNO 17 CAR. II. IN BANCO REGIS.

OPY *against* THOMASIUS.

Settlement of the reversion, with power to make leases in possession. *Q.* If a lease in present of a reversion expectant upon another lease, be a pursuing the said power. 1 Sid. 260. S. C. Raym. 132. 1 Keb. 778, 910. 3 Bac. Abr. 416, 417. Powell on Powers 412. Cowp. 260. 1 Term Rep. 705.

In ejectment, upon not guilty and a special verdict the case was, that one Rouse seised of lands in fee, made a lease for ninety-nine years, if three persons or either of them so long lived; and afterwards Rouse levied a fine of them to the use of A. for life, the remainder to B. for life; the remainder to C. in tail. Provided, that each of them might successively make leases for ninety-nine years, or three lives in possession, or for two lives in possession, and one in reversion; or for one life in possession and two in reversion: and that during the first term A. made a lease for life to the defendant, and that afterwards A. B. and C. levied a fine to the lessor of the plaintiff; and the first lease being determined, the defendant enters as upon the second lease, and the conusee of the fine entered, and let the same to the plaintiff. And two questions were made. *First*, If the second lease (A. and B. being dead) being now leased by tenant in tail, be pursuant to the power? *Secondly*. If not, then, whether the conuzee of the fine may avoid it as the issue in tail might have done? And it was argued for the plaintiff, that the lease was not pursuant to the power, for that was to make leases in possession, and the possession was demised before by the first lease, and so it is only a lease in reversion; and *Thecomb and Hawkin's case* in 2 Cro. was cited in point: and as to the second point, that the conuzee may avoid the lease as the issue in tail might have done; and a difference was taken, where tenant in tail did **[168]** an act which might be to the advantage of the issue, that is not void, but only voidable; but where the act cannot be of advantage to the issue; as if he grants a rent, or makes a lease without rendering any rent, it is void, Plowd. 436. 12 H. 8, 8, and then without doubt it shall not bind the conuzee, it being void in itself. And if it be not void, but only voidable, yet the conuzee may avoid it, as the issue might have done, Co. Litt. 46. Plowd. 437. But for the defendant it was said, if the settlement had been of lands in possession, then without doubt the power could not extend to make a lease in reversion; but the settlement being of a reversion, the power ought to be taken, to make leases in possession *in præsenti* of the reversion; for it cannot be supposed, that a tenant for life should expect to make a lease for life after three lives ended, who would probably survive him: and as to the second, the lease is not void, but voidable by the issue, by virtue of the Statute de Donis, which extends only in privity to the issue. Plowd. 424. Co. Litt. 46 b. and Kelynge inclined, that this lease was within the power, for the settlement being only of the reversion, a present lease of the reversion is within the same; and he held, that if it were not within the power, that yet it was not a void, but a voidable lease, and that the conuzee may notwithstanding avoid it as the issue in tail might. Wyndham and Twysden held, that the settlement being of a reversion, if the words of the power had been general to make leases, a lease of the reversion, or a lease in reversion had been within it: but the power here being expressly to make leases in possession, this lease in reversion is not within it; and they held it not void but voidable. And Twysden held, that the conuzee could not avoid it. But Wyndham held, that the

conuzee might avoid it as the issue could: and they both observed the particulars of the power to make leases for two lives in possession and one in reversion, or one in possession and two in reversion; so that it appeared the whole scope and intent was not to have an estate above three lives in being at one time. But it was adjourned.

[169] JOHNSON *against* PIE.

An infant, *q.* if chargeable in an action for a false affirmation, whereby one is deceived. S. C. 1 Sid. 258. 1 Keb. 905, 913. 2 Danv. 770, pl. 14.

Case, for that the defendant being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him 100l. and so he had cheated the plaintiff by this false affirmation: after verdict for the plaintiff on not guilty, and 100l. damages, 'twas moved in arrest of judgment that the action would not lie for this false affirmation; but the plaintiff ought to have informed himself by others, and cited *Grove and Nevill's case*, to be adjudged in this Court in Easter term 16 Car. 2, Rot. 400, where in case against an infant for selling a false jewel, affirming it to be a true one, 'twas adjudged the action did not lie: to which 'twas answered, that this is a trespass on the case, and an infant is chargeable for trespasses, though not for contracts. Kelynge and Wyndham held, that the action did not lie, because the affirmation being by an infant was void; and it is not like to trespass, felony, &c. for there is a fact done. Twysden doubted, for that infants are chargeable for trespasses, Dyer 105, and so if he cheat with false dice, &c. But 'twas adjourned.

But see 1 Keb. 905, 913. Judgment arrested.

LOE *against* BORDMORE.

Case does not lie for indicting one of a rescue. S. C. 1 Sid. 261. 1 Keb. 881, 915. Raym. 135.

Case for falsly and maliciously indicting one of a rescue, where he acknowledged he was not present at the rescue: after verdict for the plaintiff 'twas moved in arrest of judgment that the action did not lie for such an indictment which does not sound in scandal, but only in trespass; and if it should, it would be too great a discouragement to persons to prosecute for the King; but where the indictment sounds in scandal, as felony, &c. there it would lie: and Wyndham and Twysden Justices, being only in Court held, that the action did not lie, and stay'd the judgment. But Twysden said, that if the action had been laid more specially, viz. that the defendant knowing it to be false, did it purposely to vex him and to draw him into trouble, and to cause him to expend his money, perhaps the action had been maintainable.

[170] JEMMOT *against* COOLY.

A rent granted in fee, with a proviso that the grantee may enter and retain till satisfied out of the profits, he may make a lease to try title in an ejectment. S. C. Raym. 135, 158. 1 Sid. 223, 262, 344. 1 Saund. 112. 1 Keb. 784, 915. 2 Keb. 20, 184, 270, 295. 2 Bac. Abr. 172. 4 Bac. Abr. 362.

Ejectment, and on not guilty a special verdict was, that Drake seized of lands in fee granted a rent to Bovy in fee, with condition, that if the rent be arrear by twenty days after any day of payment, he or his heirs might enter and take the profits till he be thereof satisfied; the rent being arrear, he enters and demises to the plaintiff, and the sole question was, whether by the entry he had gained such an estate as thereof he might make a lease? And the case was argued at the Bar three times, viz. this term by Jones for the plaintiff, and Thursby for the defendant; and afterwards in Easter term 18 Car. 2, Nudigate for the plaintiff, and North for the defendant (*for in Michaelmas and Hillary terms, nothing of moment was done because of the plague*) and in Trinity 19 Car. 2, by Finch the King's Solicitor for the plaintiff, and

Maynard for the defendant: and at length the whole Court, viz. Moreton, Wyndham, Twysden and Kelynge then Chief Justice, delivered their opinions *seriatim* for the plaintiff. The objection for the defendant was, that the lessor by the entry gained only an estate at will, and so could not make a lease for years, and it could not be a freehold for want of livery, nor a term for years, for it is not for any term certain. And in an incertain interest of continuance whereof leases may be made, as the case of an *elegit*, or by will for payment of debts; but not by conveyances between the parties; and that it was neither a freehold nor a chattel, but a meer tenancy at will, and so determined by the entry of the defendant, were cited 37 H. 6, 26, and 4 Co. 30, as a case in point. See Bro. Leases, 67. 8 Co. 96. 1 Inst. 42 b. Plo. Com. 524. Fitz. Barr. 80, Done 200. But for the plaintiff it was argued, that it is not material what estate it is, for it is an interest in the land depending on the grant of the rent that makes it good and 'twas likened to Litt. sect. 327. A feoffment rendering rent, with condition on non-payment to re-enter and retain till satisfied is a good grant by intent of the parties; and yet there is no **[171]** livery by the feoffee to reconvey the land, nor no express grant, but only a condition to re-enter till he be satisfied, and 2 Cro. 510, *Havergill and Hayes's case*, a rent granted with clause of distress, and a fine levied to the use, that if it were arrear, the grantee should enter and retain till he be satisfied, but this was by way of use: and Trin. 14 Car. 2, in the Common Pleas, *Edgar and Molins*, a rent was granted with condition of entry upon non-payment, and to retain till satisfied as here; and in ejectment on a special verdict, adjudged, that a lease made by the party after entry, was good. But the counsel for the defendant said, that the case of *Edgar and Molins* was between father and son, and it might be good by way of use. But the plaintiff's counsel said, that Bridgman, Chief Justice, and the whole Court, except Browne, considered it only as a grant, and that it was as good in a grant as in the limitation of an use. And in Michaelmas the 19 Car. 2, the Court delivered their opinions. Moreton held, that by the entry the grantee gained an inheritance, which descended to his heir, and that a man might grant an inheritance (of an interest) in the land without livery; as *vesturam terræ*, 17 E. 2. 6 Hutt. 44. Fitz. Precipe 55, and Wyndham said, so he may grant the trees which are an inheritance (or inherent) in the land. But by Kelynge, Twysden, and Wyndham, the power of entry is an inheritance, and descends with the rent to the heir; but when entry is made, it is then no more than a chattel-interest in the land, which shall go with the arrears to the executors. And Twysden said, that if it was not for the words, *and to retain till he be satisfied out of the profits*, it would have been an inheritance in the land to remain in the heir as a penalty, but by reason of those words it is only a chattel, and shall go to the executors, who are the persons that are to be satisfied of these arrears: and they all agreed, that *Havergill and Hayes's case*, and *Edgar and Molins's case* cited by the plaintiff, did rule this case in point. And all the three justices held, that after entry they could not cut trees or commit waste, but only take the ordinary profits.

[172] NEWTON *against* SHAFTO.

A custom that if the father dies, leaving no sons, but two daughters, the eldest should have the estate for her life, &c. and that the wife should have it for life, a man dies, leaving a wife and two daughters, the elder dies in her mother's life, the second daughter shall have the estate for her life. S. C. 1 Sid. 267. 1 Keb. 925. 2 Keb. 111, &c. 2 Danv. 550, pl. 3.

In ejectment on not guilty, a special verdict found the lands to be customary, and held of the honour of Tinmouth; and that the custom of the manor was, that if the father died, leaving no son but two or more daughters, that the elder daughter should have it only for her life, and that after her death it should descend to the next heir male, who could derive thro' males; and for default of such it should escheat to the lord; and another custom, that if the tenant died leaving a wife, that she should have it for her life, and that the tenant here left a wife and two daughters, but no son; and that the wife entered, and the elder daughter died in the wife's life; and that afterwards the mother died, and that there was not any heir male deriving thro'

males: and that the lord entered as in his escheat, on whom the second daughter entered, and leased to the plaintiff. And the case was argued at Bar this term; and two questions were made, 1st. Whether the custom were good? 2dly. If the second daughter not being the eldest daughter at the time of her father's death, could have the lands within the custom, altho' she was the only daughter at the time of her mother's death? And 'twas objected, that the custom was vain and unreasonable, to disinherit the heirs for want of heirs males, claiming by males; and they cited the custom of tanistry. But on the other side 'twas said, that all customs deviate from the common law, and such a custom might be good in those northern parts, to have males owners of land, in respect of the neighbourhood to Scotland: and they cited the custom of Taunton-Dean, that if the husband died seised in fee, his wife should have the inheritance, and might sell it. And if she married a second husband, he should have the inheritance. But it was said at the Bar, that that had been reputed to the custom, but was never adjudged and allowed. And afterwards in Hillary term, 18 & 19 Car. 2, Kelynge, Chief Justice, briefly delivered the opinion of the Court, that the custom, was good, and that the second daughter should have the land for her life within the custom, for altho' she was not the elder daughter at the death of the father, yet she was so at the time of the mother's death, and her estate made a continuance of the **[173]** husband's estate 'till her death, as in the case of free-bench: and they gave judgment for the plaintiff, being the lessee of the second daughter.

BAYLY *against* BUNNING.

Officer executes a writ on the goods of one who before that was a bankrupt.
S. C. 1 Sid. 173, 171. 1 Keb. 638, 930, 932. 2 Keb. 32.

In trover, on not guilty, a special verdict found, that J. S. did an act of bankruptcy the sixth of June; J. D. sued a *fieri facias*, tested the 4th of June, but really sued out the 11th of June; and by virtue thereof, the defendant, being a bailiff, took the goods, and afterwards a commission of bankruptcy was sued, and the goods were assigned by the commissioners to the plaintiff: and if the taking by the defendant was lawful, they find for the defendant, and if not, for the plaintiff. And two points were argued, 1st. That the goods were bound and subject to the commission by the act done, for the statute subjects all goods to their disposal, whereof no execution is sued and executed; and here the act of bankruptcy was done, not only before the execution executed, but even before the suing of the writ; and altho' by common law, the goods are said to be bound by the *teste* of the writ, yet that 'tis here in case of a statute, which gives the disposition of all goods, whereof no execution is sued and executed; and tho' in fiction of law, the writ is supposed to be sued at the time it bears *teste;* yet that shall not prevail against an Act of Parliament; but the word *sued* in the Act shall be understood actually sued. 2dly. The special conclusion here shall not hurt the plaintiff, but he shall maintain his action (notwithstanding;) for be it so, that the first taking by the bailiff was lawful, in respect that the writ shall be supposed sued according to the *teste*, which was before the act of bankruptcy done; yet the execution was afterwards, and therefore tho' the taking were legal, yet the detainer is illegal; and 'tis here found, that they were demanded of the bailiff and denied to be delivered, which makes the conversion; and trover will lie, altho' the party came lawfully to the goods at first, if he detains them afterwards; as Mo. 103, 2 Cro. 244, for the detaining of a pawn, and 1 Cro. *Chapman* against *Allen* for goods agisted; **[174]** so 3 Cro. 495, F. N. B. 169. Whereto 'twas answered for the defendant, that the *teste* of the writ is matter of record, and it cannot be said to be sued at any time after the *teste*. And suppose it might be said to be sued after, yet the bailiff shall be justified thereby, for he could not know what acts the bankrupt had done; and if he had known that, he could not know, whether any commission could be sued or not; and it is not any return for the sheriff to say, that the party is a bankrupt, and therefore he is to be justified by the writ. Wyndham said, that notwithstanding the suing of the writ, the goods are subject to the disposal of the commissioners. But he, Twysden, and Kelynge, all agreed, that the issue is found for the defendant, for the taking by him was lawful by virtue of the writ; and

Twysden said, that the goods were bound by an act of bankruptcy committed, so that a sale in market-overt afterwards shall not bind the commissioners or their assignees. But he said, that whereas our books say, that the goods are bound from the *teste* of the writ, that is to be intended, when the writ is sued when it bears *teste*, and not if it be sued at any time afterwards; and by that means it shall avoid all sales made between the *teste* and the execution, as is often done at the end of a vacation, to sue out a writ tested the term before. And afterwards in Easter term, 18 Car. 2, judgment was given for the defendant, he being an officer, was obliged to execute the writ, who could not know of the acts of bankruptcy, or that any commission would ever be sued.

TRAVERSE *against* TWISTETON.

Arbitrators before their time expired, choose an umpire, and afterward they themselves make an award.

Debt on an obligation conditioned to perform an award, and upon demurrer, the case was, that they submitted to the award of A. and B. so that they made their award before the first of May; and if they did not agree, to the umpirage of such a one as they should elect, so that he made his umpirage before the said first of May: the arbitrators chose an umpire before the first of May, and afterwards the arbitrators themselves make the award in question before the first of May, and whether this was good, was the question: for 'twas objected, that by their choosing of an umpire they had determined their power, and put all matters in the power of the umpire. Twisden, Justice, inclined, that the award was **[175]** good, and cited *Bernard and King's case*, Style 306, Int. Pasch. 1751, Rot. 467, in this Court to be so adjudged: to which Jones of counsel for the defendant said, that this case is not like to that, because there the arbitrators and the umpire were both elected by the parties; but here the umpire is elected by the arbitrators, by which act they themselves have dismissed themselves from their authority. And Kelynge and Twysden being only in Court, 'twas adjourned.

THE KING *against* DUDENY.

Indictment at the sessions, not saying the King's sessions, quashed. S. C. 1 Vent. 39. 1 Sid. 247, 422.

An indictment was laid to be taken at the general sessions of the peace in London, and 'twas quashed, because not said at the session of the peace of the lord the King.

[176] TERM. SANCT. MICH. ANNO 17 CAR. II. IN BANCO REGIS.

Adjournment of the term, because of the plague. S. C. 1 Sid. 275. *Vide post*, 178.

Memorandum, That this term was adjourned from Westminster to Oxford, because of the plague viz. from the first return day, to *octabis Martini*, and so only the two last returns were held; and a proclamation issued, appointing all persons to keep their days then and there; and one Judge of each Court came the first day to Westminster, and there held the essoins and read the writ of adjournment, and adjourned the Courts to *octabis Martini* at Oxford; and at the essoin-day there, they only held the essoins, and did not sit in open Court till the *quarto die post:* and by the proclamation all judicial hearings in the Chancery, Exchequer and Dutchy, and all decrees were stayed; and in the King's Bench, Common Pleas, and Exchequer, no trials by jury, or judgments upon special verdicts or demurrer, were to be given.

ABBOT *against* WEEKLY, AT OXFORD.

[Followed, *Hall* v. *Nottingham*, 1875, 1 Ex. D. 3. Referred to, *Mercer* v. *Denne* [1904], 2 Ch. 552; [1905], 2 Ch. 538.]

Prescription for inhabitants to dance in another's ground at all times of the year.

Trespass for breaking his close; the defendant prescribes, that all the inhabitants of the vill, time out of memory, &c. had used to dance there at all times of the year at their free will, for their recreation, and so justifies to dance there: issue was on the prescription, and a verdict for the defendant, and to save his costs the plaintiff moved in arrest of judgment, that this prescription to dance in the freehold of another, and spoil his grass, was void, especially as it is laid, viz. at all times of the year, and not at seasonable times; and that 'twas also ill **[177]** laid in the inhabitants, who although they may prescribe in easements, as 6 Co. *Gateward's case*, and some other books are, yet they ought to be easements of necessity, as ways to a church, &c. and not for pleasure only, as this case is. *Secondly*, If it be good, it ought to have been laid by way of custom in the town, and not by prescription in the persons; and a case was cited, where 'twas so adjudged on a demurrer: but by the Court, this is a good custom, and it is necessary for inhabitants to have their recreation. And as to the second, that though perhaps it had been ill on a demurrer, yet issue being taken thereon and found for the defendant, 'tis good; and judgment was given for the defendant.

WALKER *against* HULL.

Executors bound by covenant of apprenticeship.

Covenant against an executor, on the covenant of the testator to teach an apprentice his trade: and after verdict for the plaintiff 'twas moved in arrest of judgment, that this covenant was personal to the testator, and did not oblige the executors, but only obliged the master during his life to teach the apprentice: but by the Court, it obliged the executors also; and they ought to see the apprentice taught his trade, and if they are not of the same trade, they ought to assign him to another who is of the trade, so that he may be taught according to the covenant: and they gave judgment for the plaintiff.

[178] TERM. SANCT. HILL. ANNO 17 & 18 CAR. II. IN BANCO REGIS.

Adjournment of the term, &c. writs, where tested. S. C. 1 Sid. 276. *Vide ante* 176.

Memorandum, That Hillary term was adjourned from Oxford to Westminster, and from thence to Windsor, because of the plague; and from Windsor it was adjourned to Westminster for the two last returns, the sickness being decreased at London: and *note*, all bills out of the King's Bench, commonly called bills of Middlesex, were directed to the Sheriff of Oxford instead of Middlesex; and all process bore *teste* at Oxford; although that at the end of Michaelmas term the writ of adjournment was read at Oxford, thereby adjourning the term to Westminster, from whence it was adjourned to Windsor; yet for that Oxford was the place where the Court last sate, the bills and writs were tested there, and the bills directed to the Sheriff of Oxford.

Note, Nothing was done this term worthy to be reported.

[179] TERMINO PASCHÆ, ANNO 18 CAR. II. IN BANCO REGIS.

SHEPPARD *against* PENROSE.

Prescription to pay less than a tenth part for tithes when good. S. C. 1 Sid. 278. 2 Keb. 2. 1 Rol. R. 419.

Prohibition for staying a suit in the Ecclesiastical Court for tithes of fish taken in the sea, and for tithes of corn, where the question was, whether the twentieth fish

was payable in satisfaction of all fish there taken, and if the twelfth sheaf was payable in satisfaction of all sheaf-corn? And by the Court, tithes of fish are not due without custom, and therefore a custom to pay less than a tenth part may be good; but of corn the tenth part may be due of (common) right, and therefore a custom to pay *nothing*, is not good without other matter. But they granted the prohibition as to the whole *nisi causa*, with intent to hear what the other party had to say.

JOHN GROBHAM HOW *against* NORTON.

Assumpsit on a *quantum meruit*, if he permitted him to enjoy land. S. C. 1 Sid. 272, 150. 2 Keb. 8. 1 Danv. 29, 50, 22.

Assumpsit in consideration the plaintiff would permit the defendant to enjoy such lands, to pay him as much as he deserved, and that he permitted him to enjoy it three years, and that it was worth 10l. per annum. After verdict for the plaintiff, 'twas moved in arrest of judgment; 1. That it does not appear that the plaintiff had any title to the land. 2dly. If he had (title) that debt lies and not this action. But the Court held the contrary in both points, and gave judgment for the plaintiff.

[180] ROSSE *against* ROSSE.

Rent devised out of a term, if suable in the Spiritual Court. S. C. 1 Sid. 279. 2 Keb. 5. 3 Bac. Abr. 489. Cowp. 424. Ld. Raym. 86.

A prohibition was prayed to stay a suit in the Spiritual Court for rent devis'd out of a term; and rent devised out of lands, is not suable there, Dyer 151 b. 264. 2 Cro. 279. Hob. 265. Wyndham said, that the devise of the term itself is suable there; and for the same reason is the rent thereout. Kelynge and Twysden doubted, yet did not grant a prohibition, but ruled to stay proceedings till the other party be heard.

BROMWICH'S CASE.

A peer found guilty of manslaughter without reading. S. C. 1 Sid. 277. 2 Keb. 19.

The Lord Morly and Bromwich being indicted for the murther of Hastings, the Lord Morly was tried by his peers before the Lord High Steward, and found guilty of man-slaughter, and was dismissed without being put to his book, or burnt in the hand, according to the statute of 1 E. 6, c. 12. And now Bromwich being brought to his trial at the Bar of the King's Bench, the indictment was against the Lord Morly for the killing of Hastings, and against Bromwich for being present, aiding and assisting; and 'twas proved by one witness, that the Lord Morly killed Hastings, but that at the same time they were fighting, Bromwich made a thrust at Hastings, and thereupon the Lord Morly closed with him and killed him; and the depositions of two other witnesses taken before the coroner, which were now dead, were read to the same effect, as they were read before the lords on the trial of the Lord Morly, by the opinion of all the Judges of England. And it was proved, that when the quarrel was in the tavern, the Lord Morly said, *If we fight at this time, I shall have the disadvantage from the heighth of the heels of my shoes*, and that presently afterwards they went out into the fields, and Hastings was there killed; which was taken by the Court as a clear evidence of their intention to fight when they went out of the tavern; and the quarrel being only touching words, and they fighting within a little time after, it was held murther by the whole Court: for words cannot be **[181]** any excuse for the killing of a man, and there need not be the time of a night between the quarrel and the fighting to make it murther, but such time only as it may appear not to have been done on the first passion; and here it appears not to be done on the first passion, for the Lord Morly had considered the disadvantage of his shoes: and the Court directed the jury, that it was murther in Bromwich, being present and aiding, although the Lord Morly had been found by the Lords to be guilty only of manslaughter. But the jury acquitted him of the murther, and found him guilty only of manslaughter.

HATTON *against* MASCAL.

Two executors, whereof the one is an infant, the other of age, may sue alone.
S. C. 1 Keb. 150. 1 Raym. 98.

Error in the Exchequer-Chamber on a judgment in the King's Bench. The case was, a man having a judgment makes one of full age, and two infants his executors; he of full age proves the will, and he alone brings the *scire facias*, setting out the truth of the case, and has judgment; whereon error is brought and assigned, that all ought to have joined in the *scire facias*. But by all the justices, on advice with the civilians, it was no error, for the others cannot prove the will during their nonage; and the judgment was affirmed, for the execution of the judgment shall not be delayed till the infants come of full age.

And *note*, in Trinity term, the 31 Car. 2, B. R. *Colborn* against *Right*, the executor of full age alone, who had proved the will, brought an action of debt for arrears of rent, and this case being cited, judgment was for the plaintiff.

[182] GILPIN *against* COOKSON.

Dower of the 3d part of a mill, judgment to hold in severalty by metes and bounds, ill.

Error of a judgment in dower of the third part of a mill, of a kiln-house, and of two acres of land, where the judgment was to recover seisin of the third part of the aforesaid tenements in severalty by metes and bounds; and the error assigned was, that the judgment of the mill and kiln ought not to be by metes and bounds, Co. Lit. 32 a. and if it should be divided by metes and bounds, neither of the parties could use his part, but the whole must be used entirely, and the judgment ought to have been of the third part only, Co. Ent. 171, 175, 176, 181. Rast. Entr. 238 b. And afterwards the judgment was reversed.

[183] TERM. SANCT. TRIN. ANNO 18 CAR. II. IN BANCO REGIS.

WALSINGHAM *against* COMB.

Plea of *non infregit conventionem* ill upon demurer, tho' good after a verdict.
S. C. 1 Sid. 289. 2 Keb. 51.

Covenant on a conveyance of lands, where the vendor covenants, that he was seized in fee, and assigns a breach, that he was not seized in fee, and so had not performed his covenant. The defendant pleads, that he had not broken his covenant; and on the issue so joined, a verdict was for the plaintiff: and it was moved in arrest of judgment, that this was not any issue, it consisting only of two negatives, viz. that he was not seized in fee, and (so) had not performed his covenant on the plaintiff's part, and that he had not broken his covenant on the defendant's part: also, that the pleading is too general, and ought not to be allowed, for that he ought to answer particularly in covenant to the breach assigned: the Court at first doubted, but afterwards gave judgment for the plaintiff, for it is an issue argumentative and informal; for if he had not broken his covenant he was seized in fee, and if he was not seized in fee, he had broken his covenant, so that it is not wholly immaterial, and informal issues are cured by verdict, though immaterial issues are not.

See the case of *Pitt* against *Russel* in C. B. (3 Lev. 29) for the plea in covenant, where a breach was assigned in not repairing of houses and several other things: the defendant pleads he had not broken his covenant; the plaintiff demurs; and the plea was adjudged ill, because no good issue can be taken on two negatives; also this way of pleading is too general.

[184] POPHAM *against* WOOLCOTE.

Declaration good, tho' by the plea it appears no cause of action; yet being ill pleaded, judgment for the plaintiff. S. C. 1 Sid. 291. 2 Keb. 53.

Trespass for entering his close, and throwing down his hurdles fixed to his freehold: the defendant pleads that the place where, &c. is a common space (or open place) in such a town, and the place of a market there, and for that the hurdles were there fixed he threw them down; whereto the plaintiff demurs, and divers exceptions were taken to the plea; for which it was ruled to be ill: but then it was objected, that the action does not lie, because it appears that the place where is a common space, &c. and the erecting of hurdles there is a nuisance, which every man may throw down: but by the Court, this does not appear by the declaration, but by the plea which is ill; and the defendant has not pleaded it, and relied thereupon, but another matter which is not sufficiently pleaded; and they gave judgment for the plaintiff.

BROWNING *against* LITTON.

An executor defendant, pleads *non assumpsit*, and does not say who, yet good. S. C. 1 Sid. 292. 2 Keb. 57. Lex Testam. 409, 410.

Assumpsit against executors on a promise by the testator, who plead *non assumpsit;* whereon was a verdict and judgment for the plaintiff; and error was assigned, that it does not appear by the plea who did not assume, &c. for it is not pleaded that the testator did not assume, &c. The Court on the contrary said, it shall be intended the testator; for here is no charge of any assuming by the executor, but of the testator only: and Latch 125, *Baker's case*, was cited, where in debt against executors on the testator's bond, the plea of *non est factum suum*, it was adjudged, that *suum* shall be intended of the testator; and they affirmed the judgment.

[185] BOLLS *against* ATKINSON.

An abbot time out of mind held lands discharged of tithes, the alienee shall pay tithes, for it shall be taken as a personal prescription, and not a real composition. S. C. 1 Sid. 320. 1 Keb. 162. 2 Keb. 28, 60, 85, 162, 175.

Debt on the statute of E. 6 for tithes, and on *nil debet* a special verdict found, that the Abbot of Abingdon was seized in fee of lands, being a parcel of meadow in Oxford, in right of his house, and that he and all abbots, &c. his predecessors, time out of mind, held it discharged of tithes, and granted it to the College of All Souls in Oxford; and if the college should hold it discharged of tithes, as the abbot did, was the question. And it was argued for the plaintiff, that this prescription was personal, and that by the alienation it was determined; and that so it would be if he had aliened to another ecclesiastical person, tho' capable of the pernancy of tithes, as 25 H. 6, 56, 57, the case of the Hospitalers, and much more when aliened to a lay person not capable of tithes; and they also cited 1 Cro. *Sidonne* against *Holms*, Hob. 5, 296, 297, 248, 309. Co. 2 Rep. 46, 47. 2 Cro. 58, *Cornwallis* against *Spurling*, Bridgm. 32, 33. And here they shall not be intended to be discharged by any real composition, not being pleaded to be so. But on the contrary it was argued, that the land and the tithes might be granted to the abbot before the Council of Lateran, for before that council a man might grant his tithes to what ecclesiastical person he would. Selden's History of Tithes, 306, 307, 351. 7 E. 3, 5. 44 E. 3, and this abby was founded by King Ina before the Conquest, and he might have the lands and the tithes by purchase, and hold them by way of real composition, which differs from personal discharges by way of bull, order, &c. which are personal, 1 Cro. *Morant* against *Commins;* and a college is capable of an appropriation, and so is spiritual as to the taking of tithes, 7 E. 3. Quare Impedit 19. 5 Co. 10, of an union, 6 H. 7, 13. 10 H. 7, 19. 11 H. 4, Dyer 255 a. of which no lay corporation is capable. And it was argued twice, viz. this term, and in Hillary 18 & 19. In which term after the second argument, the

Court took time till another day in the same term, when the opinion of the Court was delivered by the Chief Justice Kelynge alone, as a case wherein they clearly all agreed, that it cannot be intended a **[186]** discharge by a real composition, it not being pleaded nor found by the jury to be so; but was a meer prescription, and personal to the abbot, and did not run with the land. And judgment was given for the plaintiff.

OFFLEY *against* BEST.

Administration, if granted according to the statute, cannot be revoked without cause. S. C. 1 Sid. 293, 370. 2 Keb. 63, 72, 83, 208, 240, 392, 420. *Ante* 127. 2 Show.

A prohibition was prayed wherein the case was, a man died intestate, leaving a sister married to Offley, and a brother, viz. the defendant Best. Best enters a *caveat*, after which Offley, pending the *caveat*, it not being expired in point of time, procures administration to be granted to his wife without notice to Best, for which cause Best appeals, and Offley prays a prohibition, and the Court granted it, that the plaintiff should declare thereupon, so that upon a demurrer the matter might be solemnly argued, which was done, and is entered Mich. 18 Car. 2, Rot. 169, where all this matter appears upon the record; and afterwards in Easter term 19 Car. 2 it was first argued at the Bar, and afterwards in Trinity the 20th, by all the Judges, viz. Moreton, Wyndham, Twysden, and Kelynge Chief Justice. And three questions were moved at the Bar: *First*. Whether the Ordinary after administration committed according to the statute, might revoke it without any cause at his pleasure, or if not, whether he might for cause? *Secondly*, Whether the granting it pending the *caveat*, be a good cause to revoke it? *Thirdly*, If that be a cause or not, whether this Court ought to judge thereupon, or leave it to the delegates before whom the cause depends? And as to the first it was agreed by all the four Judges, that where the Ordinary has granted administration according to the statute, he cannot revoke it without cause, because the grantee has an interest in the goods by the statute, which the Ordinary cannot take from him without cause; but for a good cause they all seemed he might; as if the administrator becomes lunatick, &c. whereby he is disabled to administer. As to the second point Moreton, and Wyndham held, that the granting thereof pending the *caveat*, was a cause to revoke it; and they said, that the Ordinary had original power to dispose of intestates goods by the ecclesiastical law of the land, and it is not derived from the Crown by Act of Parliament; and denied that which is said to the contrary in 9 Co. *Hensloe's case*, but the Act of Parliament only directs to whom it shall be granted; but when it is granted, it is in its nature **[187]** revocable as before, but not without cause, by reason of the interest, which the grantee has therein. And as to the third point, they said, that the Judges Delegates are the proper Judges thereof, and of what validity the *caveat* shall be according to their law; and it seemed to them, that it is as a *supersedeas* in our law; and as a judgment given after that in our law is erroneous, so it is in their law after a *caveat*; but be it so or not, it is to be judged by the Delegates, who are proper judges of this manner of proceeding in their Courts touching a matter ecclesiastical, which belongs to their Courts, and not to this Court, which is not apprised of their forms and manner of proceedings; and therefore they held the prohibition to be ill grounded, and that a consultation should be granted. But Kelynge, Chief Justice, and Twysden, as to the second and third questions, were of a contrary opinion; and they denied that the Ordinary had original jurisdiction touching intestates goods, but that it was derived from the Crown, for they have no such jurisdiction in other countries where the canon laws are of more force than here. And whatever power they had touching the probate of testaments, yet it is certain they never had any power of granting administrations, but that which is given to them, is given them by the statute; for an administrator was never heard of before the statute of E. 3. And as the statutes appoint them to grant, so they ought to grant them as the statutes appoint; and if they will not, a *mandamus* lies out of this Court to compel them to grant them according to the statute; and it would be in vain to command them to grant them, if when they had so done they might repeal them again at their pleasure. And they said, that the *caveat* is of no force to hinder the grant of the administration, for it is not a

judicial act of the Court, but only an entry of a memorandum by a clerk in Court, for the giving of a caution, and is not any record of the Court. And this Court are as well judges thereof as the Delegates, and so died the Court in *Hutchins and Glover's case*, 2 Cro. 463, and so they held that no consultation ought to be granted; and the Court being divided therein, and the prohibition being granted before, the delegates remainded prohibited as they were before.

[188] RUSSEL *against* HADDOCK.

Consideration that one who had a letter of attorney to receive a debt would forbear, good. S. C. 1 Sid. 294. 2 Keb. 75, 80. 1 Danv. 45, pl. 23 & 47, pl. 11. N. Lut. 280.

Assumpsit against an executor, that whereas J. S. had a judgment against the testator, and had made a letter of attorney to the plaintiff to recover and receive it to his own use; the defendant, in consideration that the plaintiff would forbear execution thereupon, promised to pay him. The defendant demurred on the declaration, supposing that it was no good consideration; for altho' the plaintiff, who was but attorney, did forbear, yet the plaintiff himself in the judgment might sue execution. To which it was answered, that the plaintiff having authority to receive it to his own use, it shall not be intended that the plaintiff in the judgment would sue execution, for it shall be intended that it was assigned to the plaintiff in satisfaction of a debt; and a case between *Pitts and Bridgwater* in Hillary 1650 was cited to be so adjudged; and so held the Court here, and gave judgment for the plaintiff.

HUSSY *against* PACY.

A servant knowingly made his master break his covenant. S. C. 1 Sid. 298.

Case, that whereas he had covenanted with J. S. not to import such goods; the defendant being his servant, knowing thereof imported the said goods, whereby he broke his covenant, and was sued thereupon by J. S. who recovered damages against him. After verdict for the plaintiff on not guilty, it was moved, that the declaration is not sufficient to maintain the action, seeing it is not said, that the servant did it with that intent to damnify the plaintiff. But by the Court, seeing that the servant knew the covenant, and did it deceitfully and maliciously, as the declaration is, and the plaintiff is thereby damnified, he shall recover, let the servant intend what he will; and gave judgment for the plaintiff.

[189] THE KING *against* GOFFE.

Amendment of an information of perjury. 1 Salk. 47, 50. 2 Burr. 758. 2 Hawk. P. C. 348.

It was moved to amend an information of perjury, and it was ruled, that they should give notice of the things to be amended to the defendant, and he to shew cause why it should not be amended; for the Court said it might be amended.

HAWES *against* CORNWALL.

Tithes of wood above twenty years and of pollards. S. C. 1 Sid. 300. 2 Keb. 90. 2 Danv. 592, pl. 12, 13.

By the whole Court, wood usually cut for firewood, though permitted to grow till twenty-five years or more, shall pay tithes; and by Wyndham, pollards of fifty years growth shall pay tithes when felled.

[190] TERM. SANCT. MICH. ANNO 18 CAR. II. IN BANCO REGIS.

COTES *against* WADE.

A *que estate* in a term pleaded in a stranger, and not in those by whom the party claims. S. C. 1 Sid. 297. 2 Keb. 87, 96. 3 Lev. 19.

Debt for rent, and counts, that A. being possessed of a term, granted him a rent out of it, which term by mesne conveyances is come to the defendant. After verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff had not shewn how the term came to the defendant, and a man cannot plead a *que estate* of a term, because it cannot be gained by disseisin as a fee may, nor by occupancy, as a freehold may, but by mesne assignment (or conveyance) which ought to be shewn how, as 3 Cro. 22. But by the Court, one may plead a *que estate* of a term in a stranger (generally) because he cannot know his title, but not in himself, or in those under whom he claims: and judgment was given for the plaintiff.

THE DUKE OF NEWCASTLE *against* WRIGHT.

Discent as heir, not shewing how good on a general demurrer. S. C. 1 Keb. 110, 114.

In trespass, the defendant makes a title to J. S. and that he died seized, and that it descended to himself as heir, on which the plaintiff demurs generally; but by the whole Court (except Wyndham) it is only form, and it not being specially demurred on, it is amendable.

[191] BUTCHER *against* VANE.

Condition of an obligation to appear at the Court, and make appear that he had common; that he was prepared to make appear, but that the steward hindered him, is not sufficient. S. C. 1 Sid. 313. 2 Keb. 118. 2 Danv. 89, pl. 10. 5 Co. 23. Cro. El. 716, 864. Salk. 180.

Debt on obligation conditioned, that whereas the plaintiff had distrained the sheep of the defendant in such a place where the defendant claimed common, in consideration the plaintiff had delivered the sheep to the defendant, if the defendant did appear at the lord's court, at the next court to be held for the manor, and there make appear that he had common there, the obligation to be void. The defendant pleads that he did appear at the next court, and was there prepared, and did offer to make it appear, but that the steward refused to permit him to make it appear; upon which the plaintiff demurred, and had judgment; for the defendant had taken upon himself, not only to appear at the next court, but also to make it appear, and he is at his peril to procure the steward to admit him to make it appear, as 5 Co. *Lamb's case;* and the same day in a like case between *Harding and Vane*, the same judgment.

JONES *against* POPE.

The Statute of Limitations not pleadable for escapes or tithes. Debt for escape, not shewing the judgment, ill. Discontinuance after argument. S. C. 1 Sid. 305, 415. 2 Keb. 93.

In debt for an escape, the defendant pleads the Statute of Limitations, whereon the plaintiff demurs; for that statute is not pleadable in this case, it not being debt on any lending or contract, as the statute speaks, but is founded on a tort, as an action of debt for tithes, wherein it was said, the statute had been often times adjudged not to be pleadable: but then an incurable fault was espied in the declaration, which counts only on the writ and the escape, but omits the judgment; whereupon the plaintiff prayed leave to discontinue, which was granted, tho' after argument; for the sheriff shall not go unpunished or escape for a fault in the declaration.

[192] BENNET *against* PILKINS.

A traverse by *et non*, and a formal traverse afterward. S. C. 1 Saund. 20, 21, &c. 2 Keb. 94, 105.

Debt on an obligation, conditioned to appear on a bill of Middlesex, returnable *die Sabbati prox post quinden' Pasch.* The defendant pleads, that he was arrested on a bill returnable *die Veneris*, and pleads the statute of 32 H. 6, and that the bond was given for ease and favour: the plaintiff replies, that he was taken on a bill returnable *die Sabbati*, and not *die Veneris*. The defendant rejoins, that he was taken by virtue of a bill returnable *die Veneris*, *absque hoc* that he was taken by virtue of a bill returnable *die Sabbati:* the plaintiff demurs. And it was argued by Wylde and Pemberton, that the rejoinder was ill, and a traverse upon a traverse; for when the plaintiff replied that he was taken by a bill returnable *die Sabbati & non die Veneris*, the *et non die Veneris* was a traverse, whereon the defendant might have joined and taken issue. Jones and Saunders on the other side argued, that the *et non, &c.* was not any traverse, at least not a formal traverse, or such as the books mention that a traverse cannot be taken upon a traverse; and to have joined issue on the *et non die Veneris*, would have made an immaterial issue; for it matters not whether he were taken by virtue of a bill returnable *die Veneris* or not; for if he were not arrested on a bill returnable *die Sabbati*, the bond is void by the statute: but if he were taken on a bill returnable *die Sabbati* it is good, and for that only is traversable and triable; and so held the Court, and ruled judgment for the defendant *nisi, &c.* Whereupon the plaintiff prayed leave to discontinue, whereof the Court would consider: and afterwards for that the defendant would not agree to accept an issue on the traverse, nor put in bail on the original action, the Court gave leave to the plaintiff to discontinue, notwithstanding the demurrer had been argued.

[193] DRING *against* RESPASS.

An ill traverse, that the Court was held *coram majore* according to custom. S. C. 1 Sid. 229, 302. (2 Sid. 40.) 2 Keb. 107, 251, 122, 125, 152, 160.

Debt, and declares on a judgment obtained the first of May, in the 14th of the now King, before the Mayor and Bailiffs of Norwich, at a Court then held according to the custom of the city aforesaid. The defendant pleads, that the Court there according to the custom, &c. is held before the mayor, *absque hoc* that he recovered at the Court held the said first of May, before the mayor and bailiffs, according to the custom aforesaid: whereupon the plaintiff demurs, and it was argued for him, that the traverse was ill in traversing a matter of record, which is not to be tried *per pais.* And also in joining the matter of the custom with that which is matter triable *per pais;* but he might have pleaded *nul tiel record*, which would have made an end of all; or that there was not any such custom, and have tried it *per pais:* but on the other side were cited Hob. 244. Hutt. 20, 21, and issue and verdict, and judgment. But Kelynge, Twysden and Moreton, held it ill, it being on demurrer, otherwise if after verdict, as the cases cited are. But Wyndham held that it could not be good here, because by this traverse he had made the day parcel of the issue, and the other Judges agreed with him, that that was a fault. But as to an exception taken to the declaration, viz. that it was not good, because he declares as administrator on letters granted by the archdeacon, and does not say *Ordinary of that place*, nor *that it belonged to him of right to grant it:* the Court held it good in case of the archdeacon, as well as in the case of the bishop, for the archdeacon is *oculus episcopi;* and by Twysden, the declaration is good, without saying *Ordinary of that place*, because he produces the letters of administration; otherwise in a bar.

[194] CUTLER AND PASTE *against* SOUTHERN AND HALKER, IN THE EXCHEQUER-CHAMBER.

S. C. 1 Saund. 116. Nelson Lutw. 129.

Debt on an obligation dated the 8th of March, 16 Car. 2, conditioned, that whereas the plaintiffs at the request of the defendants, were obliged with them for the payment of 100l. to Thomas Cook, on the first of May next following; to save the plaintiffs harmless: the defendants plead, that they saved the plaintiffs harmless: the plaintiffs reply, that before the sealing of this bond, viz. the first of October, 16 Car. 2, they became bound to Cooke with the defendants for payment of 100l. at a day now past; and for that the 100l. was not paid at the day, Cooke sued them at law on the said bond, and endeavoured to arrest them, viz. 12 Feb. 18 Car. 2, at London, in the parish of Bow, so that they could not go about their business: the defendants rejoin, that they had no notice thereof, and that if they had had notice, they would have saved him harmless; whereupon the plaintiffs demur. And now it was first objected for the plaintiffs, that the plea of saving harmless, not saying how, was not good; otherwise if they had pleaded *non dampnificatus*, which was agreed to be no good plea if it had been specially demurred upon: but by the Court, it seems good on a general demurrer, but that is now vain by the replication over. But then three exceptions were taken to the replication. *First*, That it is not positively said that the money was not paid, but only *eo quod*, or for that it was not paid; but this exception was overruled by the Court, for *eo quod* it was not paid, is as affirmative as *et quia* the rent was arrear in avowries, Co. Entr. 122 b. In debt for rent, *et quia* the rent was arrear, the action accrued; so the word *licet* in *The Bishop of Sarum's case*, and in all *assumpsits* on collateral promises to pay on request, *licet* such a day and place he requested, is an affirmation and traversable: a second exception to the replication was, that it is, *that before the making of the said writing obligatory, viz. the said first of October*, 16 *Car.* 2, the plaintiffs were obliged for the defendants, and that they were sued for the non-payment of the 100l. due on this bond; where the first of October 16 Car. is after the eighth of March 16 Car. for he began his reign the thirtieth of January, and so the breach is assigned **[195]** for suing on an obligation made after the counterbond, and that the counterbond cannot extend to any thing that was not *in esse* at the time of the making of the counterbond: but to this it was answered, and on deliberation after divers arguments resolved by the Court, that the words *ante confectionem scripti obligatorii*, were sufficient, and the *scilicet* repugnant and void, and that as well in case of a demurrer as after verdict; and for this were cited 5 Ass. 6. 20 H. 6, 14, 5, which were before any of the statutes which cure jeofails by verdict, the first whereof was the statute of H. 8, and 3 Cro. 368, on demurrer after the Statute of Jeofails. A third exception to the replication was, that it is not shewn in what Court, or how it was shewn, and this is matter of record, and therefore the proceedings ought to be shewn, whereto *nul tiel record* might be pleaded. Whereto it was answered and resolved, that well and true it is that so it ought to be; but the intent thereof is to have it triable, and in this case there needs no trial, for by the rejoinder it is admitted as for a plea, that he had no notice thereof, which admits that he was so sued; but that he had not notice thereof, which is as strong as if he had said, that well and true it is that he was sued, and that if he had had notice thereof, he would have saved him harmless. And a difference was taken, where the plaintiff makes title by his replication, and it thereby appears that he has no title, no rejoinder can by any admittance or implication make it good; but where he makes title, tho' he does not plead it in such a manner as he ought, especially in point of the trial, the rejoinder admitting this matter, and tendering an issue of another matter, makes it good, and to prove the first part of the difference were cited 8 Co. 120 b. 133 b. 7 E. 4, 31. 2 Cro. 133. 3 Co. *Bridgman's case*, 5 *Nicholl's case*, 6 H. 7, 10 b. And to prove the first part of the difference were cited 22 E. 4, 2, 3. 3 Cro. 320, 708, 903, 917. And the plaintiffs had afterwards their judgment by the whole Court, and the defendants paid the money without more ado. Levinz for the plaintiffs, and Saunders for the defendants.

[196] CHEALDLE *against* MILLER.

Want of levant and couchant, ill on a general demurrer, but cured by verdict. S. C. 1 Sid. 313. 2 Keb. 12, 108, 120.

In replevin, an avowry was for damage feasant: the plaintiff in bar prescribes for common to two acres of land, and that for using thereof he put in his beasts. The defendant demurs generally, and the bar was adjudged ill, because not said, that the cattle were levant and couchant; and it was said to be so adjudged between *The Lord Say and Young*, 14 Car. 1, altho' it was doubted in *Stone and Musselton's case*, if it were not good without a special demurrer: and the Court held here, that it was ill without a special demurrer; but they agreed it was cured by verdict.

COURTNY *against* PHILPS.

The Court cannot take notice of return-days in moveable terms as to the days of the month. S. C. 1 Sid. 196. 2 Keb. 108, 109, 122. *V.* 2 Mod. 60.

Debt on obligation, dated 14 June, 17 Car. 2, conditioned to appear *die Veneris in tres Trin. ad respondend' Edwardo Prideaux:* the defendant pleads the stat. 23 H. 6, and that the party was arrested the 13th of June, and detained in prison till the 19th of June, and that *dies Mercurii in tres Trin'* was that year on the 14th of June; and that after the 14th of June, viz. the 19th of June, he made the obligation; *absque hoc* that he made it the 14th of June, or at any time before the 19th of June, on which the plaintiff demurs, and the traverse was adjudged ill; for it ought to have been, *absque hoc* that it was made before the day of the writ; for of the day of the month on which the return of the moveable terms is, the Court is not obliged to take notice.

HALL *against* PLANNER.

Churchwardens may take the hat off the head of one who sits there covered during divine service.

Trespass for a battery: the defendant justifies as churchwarden, for that the plaintiff being in the church in the time of divine service, and sitting there with his hat on his head, and refusing to take it off his head, upon request; the defendant took it off his head, which is the same taking, &c. whereon the plaintiff demurs; and it was adjudged that the justification **[197]** was good; for although the churchwardens may present this in the Ecclesiastical Court, yet they are not bound in the meantime to permit such irreverence and indecency in the church.

MIDDLETON *against* SHELLY.

A statute without a defeasance, good, if money proved to be paid.

Thomas Shelly 43 Eliz. entered into a stat. of 100l. to Rose Langworth; and afterwards 43 Eliz. he entered into another stat. to Middleton; which was for an assurance of the manor of D. to him for money by him paid: but no defeasance was of this stat. Thos. Shelly being indebted to Sir John Shelly, mortgaged the manor of D. to Sir John Shelly. And Rose Landworth 43 Eliz. extended her statute, and thereby continued possession for a long time, till it was satisfied, but kept on foot by assignments. Middleton preferred his bill to be let in after Rose Longworth's statute, and before Sir John Shelly's; which bill was then dismissed. Three or four years afterwards, Sir John Shelly purchases the equity of redemption of Thomas Shelly: and Middleton now brings another bill to be let in upon Sir John Shelly: and though it appears, that Sir John at the time of the purchase of the equity of redemption had notice of Middleton's statute; yet the whole Court denied to relieve him on this bill. And resolved, 1st. That although there was not any defeasance on the statute to Middleton, who had made a statute, not to find any relief in Chancery,

and was decreed in *Foster and Peacock's case*, in the time of the Lord Keeper Coventry; yet it here appearing that the money was paid, that supplies a defeasance, and so it was an agreement to have the manor conveyed to him for the money; and so *Bonham Norton's case*, was decreed in the time of the same Lord Keeper Coventry; and also that after a decree before execution, the parties making an agreement in writing, which one of them afterwards would not stand to; the Court would not permit him to take advantage of the decree, which he had waved by the agreement but set aside the decree, and compelled him to perform the agreement. And it was agreed by all the Barons, that although Middleton had once extended his statute on an infant, which was void; yet the extent being void, he was relievable in this Court: and **[198]** it was in like manner agreed, that though for a great part of the time there was infancy in this case, so that he could not extend the statute, yet he might have sued in equity, during the infancy, to have relief, although he could not have extended the statute at common law. But seeing he had done it, but had sate still near fifty years without seeking relief in equity, by reason of the antiquity of the statute, and long forbearance, they would not relieve, but dismiss this bill. And they said, that in some cases the conusee of the statute should be relieved against a purchaser, by taking in prior incumbrances, and in some cases not: and the difference did depend on the circumstances, as in this case.

JOHNSON *against* ASTELL.

Assumpsit to pay that which is before due, without any other consideration, is good. S. C. 1 Keb. 155, 156. 1 Danv. 67, 68.

Assumpsit, on issue *non assumpsit*, and a special verdict, the case was, Astell being an officer of the Custom-House at Newcastle, and Johnston and Fell merchants, and that the custom to be paid for rye, when the price does not extend beyond 32s. per quarter, is 4s. And that Fell and Johnston had imported several quantities of rye, and a question being between the plaintiff and defendant, what the custom did amount to, and what sum Fell had paid, the defendant in consideration that the plaintiff would pay to the defendant 100l. which was less than in truth the customs did amount to, did assume, that if Fell had not paid more, the plaintiff should pay no more, and that Fell had paid no more than 100l. yet the defendant had caused the plaintiff to be disturbed by the commissioners to pay more, and that he was by them compelled to pay more. And now it was argued by Weston, that here is not any consideration for the promise, for he had not paid more than he ought, and which was due; and a promise in consideration to pay that which is due, and which he is compellable to pay, is not any consideration for raising an *assumpsit*. 2*dly*, The consideration for paying less than what was due, and that he should cheat the King as Fell had done, and that by agreement with the King's officer, was a void contract and agreement. But by the Court, as to the first payment without suit, **[199]** or trouble of that which is due, is a good consideration. *Secondly*, Acceptance by the officer of less than is due, and agreement by the officer, that the merchant shall not pay more, is a good contract between the officer and the merchant; for the officer shall answer to the King for the residue out of his own purse.

Quære of this point.

[200] TERM. SANCT. HILL. ANNO 18 & 19 CAR. II. IN BANCO REGIS.

Executor confesses judgment in debt on simple contracts, and then pleads them in bar of *assumpsits*. S. C. 1. Sid. 332. Vaugh. 100. 2 Keb. 110, 120, &c. to 217.

Indebitatus assumpsit against an executor, for divers wares and merchandizes sold and delivered to the testator; the defendant pleads several judgments in actions of debt, specified due by the testator on simple contract, recovered against himself by *non sum informatus prout patet per seperalia recorda inde*, which are yet in force; and that he has not assets beyond such a sum, which is not sufficient to satisfy the judgments, and that he remains charged with them: on which the plaintiff demurs, and

the case was argued at the Bar in Michaelmas term, and also in this term, and the Court took time till Easter next, and then judgment was given by the whole Court for the plaintiff. And two exceptions were taken to the pleading. *First.* The conclusion *prout patet per seperalia recorda inde* the said several judgments, where he ought to have concluded so to each severally; but as it is pleaded it makes a complicated issue: but by the Court, it is well enough, and it shall be taken as relating to each severally, and the plaintiff might have replied *nul tiel record* to each severally. *Secondly,* It is not said that the judgments were had *pro veris & justis debitis,* as is usual, and as especially in this case it ought to be, because the judgments here are by *non sum informat'* in actions of debt, which lies not against executors, and so has the appearance of collusion. But by the Court, it is well enough, for it shall come by plea from the other side, for if it were not *pro veris debitis,* the plaintiff **[201]** might plead it and put the defendant to prove the truth of them, or he might plead fraud and covin, and put the defendant to prove the consideration. *Thirdly,* It was strongly argued for the defendant, that actions of debt do not, lie against executors on a simple contract by the testator; and therefore they who admitted judgments against them in such actions, should not have the advantage of pleading those judgments which they might reverse when they pleased, and which no other could avoid or reverse, in bar of just debts; for by such means when they barred the plaintiff of his debt, they might afterwards reverse those judgments, and so either relinquish or take back again the money to their own use. And to this opinion did Kelynge the Chief Justice incline upon the first argument in Michaelmas term: but afterwards in Easter term following, he and Twysden and Wyndham, and Moreton, all agreed, that judgment should be given for the defendant; for though they might have abated the actions, yet if they had so done the plaintiffs might have charged them in other actions on *assumpsit,* and so put themselves to a double charge, which they are not to be obliged to do when the debts are true and just, and in their conscience ought to be paid; and if they were not such, the plaintiff might by pleading have put them to prove the truth of the debts, either by pleading the fraud or traversing the truth of the debts, wherein if they failed the plaintiff should recover his debt; and so there is no room for the suspicion, that the plaintiff should reverse the judgments and retain the money: and the old books which held, that actions of debt did not lie against executors on simple contract, held also, that there was no other remedy: but the law is now otherwise, viz. that although debt on simple contract cannot be recovered against an executor by action of debt, yet it may by *assumpsit.* Jones and Levinz for the plaintiff, and Baldwin and Raymond for the defendant.

[202] GEARY *against* BEARECROFT.

[See S. C. Carter, 57.]

Tenant for another's life, makes a lease for years in trust for himself for life, and after in trust for his wife, and dies, who shall be the occupant, the lessee or the wife? S. C. 1 Sid. 346. 2 Keb. 148, 250, 285. Cart. 57. 3 Peer. Will. 262. 2 Bac. Ab. 272. Cruise on Fines 287.

Error of a judgment in ejectment in the Common Pleas, where the case upon a special verdict was, tenant for another's life makes a lease for years in trust for himself for his life, and after in trust for his wife for her life: the lessee for years actually enters, but permits the husband to enjoy it, he dies, his wife enters: and whether she or the lessee for years should be occupant, was the question. And it was adjudged in the Common Pleas against the opinion of Bridgman, that the wife should be the occupant. And thereupon error was brought and assigned in the very point, that the lessee should be the occupant; for the husband being but a *cestuy que trust,* was tenant at will to the lessee, and by his death the estate at will determined, and the estate actually revested in the lessee, who had once entered and been in the actual possession, so that he might maintain trespass before any actual re-entry, the law having cast the possession upon him by the death of the tenant at will; and 3 Cro. 182. Dyer 326 b. 2 Cro. 200, 554. Litt. sect. 71, & Co. Litt. 62 b. were cited. And to this opinion

Kelynge and Moreton inclined upon the first argument. But on the other side were cited 2 Bulst. 11, *Chamberlain and Ewen*, Litt. sect. 82. Keilw. 159, 165. That the wife should be the occupant: and to that opinion Twysden and Wyndham inclined on the first argument. And afterwards in Michaelmas 19 Car. 2, Moreton changed his opinion, and by him, Wyndham and Twysden, (Kelynge being absent) it was ruled for affirming the judgment *nisi*. They agreed, that the lessee might maintain trespass before the entry, for by the death of the husband the tenancy at will was determined, and the estate revested in the lessee so as to maintain trespass before a re-entry by the possession, which the law casts upon him. But it is one kind of possession for bringing trespass, and another to make an occupancy, for none may be an occupant but he who occupies and has the possession in fact: and this case was put and agreed, if tenant for another's life makes a lease for years to begin from his death, and a stranger enters, although the stranger be occupant for the freehold, yet the lessee for years shall enter upon him, and **[203]** shall hold it for his term, and the lease shall bind the occupant. See 3 Cro. 182 according.

THE KING *against* WETWANG.

Indictment for taking certain fishes called carp fishes, not shewing the number, good. 2 Keb. 178. Burr. 336, 1233. Stra. 198, 1127. 6 Com. Dig. 355. Hawk. P. C. 332.

Indictment for taking out of his pond certain fishes called carp fishes, being of the goods and chattels of J. S. And an exception was taken thereto, that it is not said what number of fishes he took, which is ill in indictments, as well as in actions, 5 Co. *Playter's case;* 'tis ill in actions, and indictments ought to be more certain than actions, or at least as certain, that so the defendant may know to what he is to answer. But Kelynge and Wyndham over-ruled the exception (and said,) In actions, damages are to be recovered, not in indictments, but the party is to be fined at the discretion of the Court, be it one fish or more, according to the circumstances of the fact, and not according to the number of the fishes. Twysden to the contrary, that indictments ought to be as certain as actions. But (Moreton being silent) the other two ruled the party to plead to the indictment.

FELTHAM *against* THE EXECUTORS OF HARLSTON IN CHANCERY.

Lands devised to be sold for payment of debts, goods in the hands of executors shall not be contributory, otherwise of administrators. 1 Chan. Rep. 16, 129, 249. 2 Chan. Rep. 167, 155. 1 Chan. Rep. 199, 277.

In this case 'twas said by Serjeant Fountain to have been resolved in this Court, and now admitted by the Master of the Rolls, he being only in Court, to be reasonable, that if a man devises lands for payment of his debts, and makes an executor, and leaves a personal estate, that no part of the personal estate shall go to the payment of the debts, because by the making of an executor, the testator's intent appears, that the executor should have the goods, for that the testator had made another provision for the payment of his debts. But if a man disposes of lands for the payment of his debts, and after dies intestate, the personal estate shall be chargeable in the administrator's hand to the payment of the debts, for thereby either the most part of the land remains unsold for the benefit of the heir, or the most part of the money for which the land was sold, shall remain to the heir, and no intent appears that the administrator shall have any thing.

[204] GARDNER *against* FULFORDE.

A *quantum meruit* among other things for four gilt *pellices* for *pelles*. 2 Keb. 154, 172.

Assumpsit, that whereas the plaintiff being an upholsterer, had made for the defendant, amongst other things, a pair of hangings, and had provided for him *inter*

alia quatuor pictas pellices Anglice gilt skins the defendant promised to pay so much as he should deserve, and had not done it. After verdict for the plaintiff, 'twas moved in arrest of judgment, that a pair of hangings is uncertain, not shewing what kind of hangings, silk, tapestry, or what, and *Webb and Washburn's case* was cited in Michaelmas 1655, in Style's Reports. But the Court over-ruled this exception, because the action here is only for the making of them, and not trover to recover the value in damages. 2dly, That *quatuor pictas pellices*, is four painted whores, (and *pelles* is the word for skins;) and the providing of them for the defendant is unlawful. And for this cause, the damages being entire, the judgment was staid on Levinz's motion for the defendant.

CHAPMAN *against* SOUTHWICKE.

Promise if he would permit him to enjoy a house as Lodge did, to become his tenant as he was, a good promise to pay the rent. S. C. 1 Sid. 323. 2 Keb. 182.

Assumpsit, that where the plaintiff's husband was seised in fee of such a messuage, and had made a lease thereof to Lodge, and afterwards devised the reversion to the plaintiff; and that Lodge dying, the house was empty and locked up. And the defendant pretending a title thereto under Lodge, promised to the plaintiff, that if he would consent, that he should enjoy it as Lodge had it, that he would become his tenant as Lodge was, and pay the arrears; and that he consented, and the defendant enjoyed, and had not paid so much due for rent, part before the promise, and part afterwards. After verdict for the plaintiff, 'twas moved in arrest of judgment, 1st. That here is not any consideration; for it does not appear that the plaintiff had the possession whereof to permit the defendant to have the enjoyment; nor that the defendant had any title, but that he so pretended. 2dly, That the promise to become his tenant as Lodge was, was not any promise to pay the growing rent; and for that he ought to have declared in debt on the lease, as assignee of **[205]** Lodge. But by the Court, as to the first, the permitting him to enjoy it by the devisee of the reversion was a good consideration, whether he had a title under Lodge or not; and if he had no title, it is the stronger consideration. 2dly. The promise to become his tenant as Lodge was, extends to pay the growing rent, as Lodge ought to have done, and the action will lie on this express promise, notwithstanding there be a lease.

LYMBE *versus* HOCKLY.

He got the pox of a yellow-haired wench, actionable.

Case for saying of the plaintiff, *He has got the pox of a yellow-haired wench in Moorfields.* After verdict for the plaintiff, 'twas moved in arrest of judgment, that saying, *one has got the pox*, is not actionable, because not scandalous, it being intended the small-pox, 4 Co. 17. But 3 Cro. 214, laid of the pox is actionable; and so is *rotted of the pox*, 3 Cro. 648, because intended the *French pox.* But by the Court, it being here said, that he had got them of a *yellow-haired wench*, 'tis actionable; for *wench* in common speech is taken for a whore, and therefore it shall be intended the *French-pox.* And Twysden and Moreton held, that so it would be, if the words had been, *that he had got them of a yellow-haired woman.*

[206] TERMINO PASCHÆ, ANNO 19 CAR. II. IN BANCO REGIS.

JENKINS *against* DE LA GRANGE.

Court of Marches in Wales, where they may hold plea of damages under 50l. or not. S. C. 1 Sid. 323. 2 Keb. 183.

A prohibition was prayed to the Court of Marches in Wales, to stay a suit there by bill for words, and tho' the damages are laid to be under 50l. and they have power by their instructions to hold plea, where the damages are under 50l. yet that is to be

intended in such actions, wherein they have used to hold plea; and not in actions whereof they have not used to hold plea; and it was said, that no precedent could be produced where they ever held plea in the time of Queen Eliz. King Jac. 1, or Cha. 1, in any case where the whole was to be recovered in damages uncertain; for that would be to make a new jurisdiction, for the Court there to be the Judges of the damages by bill, answer, and proofs of witnesses without a jury; and so held the Court: but if any precedents could be produced in time of E. 6, or H. 1, Eliz. or Jac. 1. That they had held such pleas, that was to be allowed as by usage on the statute of H. 8, and their instructions; and gave time to search for precedents till Trinity term; and then the Court not being satisfied on their moving of it again, the Court held their former opinion, and said further, that they could not hold (plea of) actions in covenant or *assumpsit*, where the whole damages is uncertain; but in covenant or *assumpsit* to pay a certain sum, they may hold plea under 50l. And day was given over till Michaelmas term to search precedents, and then being not satisfied, they ordered the plaintiff to declare, so that it might be determined on a demurrer.

[207] STIRKE *against* BATES.

A matter shall be tried in the county where the issue arises on the new statute. and not where the action is laid. S. C. 1 Sid. 325. 2 Keb. 187, 212, 216, 1 Danv. 456.

Debt on obligation, and lays the action in London; the defendant demands oyer of the condition, which was to perform covenants in an indenture, which was, that where the Earl of Northampton had granted to Bates, Shrob-walk, in the forest of Whittlewood in this county, and the soil and ground of the said walk, and all fees, &c. Bates by the said indenture granted it to Stirke, and appointed him keeper and covenants, that he should enjoy it; and the defendant having so set out the indenture, pleads performance of all covenants generally: the plaintiff replies, that the Earl of Northampton having title by virtue of a grant to him made before the title of the defendant, entered upon him and ousted him: the defendant rejoins by protestation, that the earl did not enter, for plea says, that the earl had no title: the plaintiff surrejoins, that the earl had title, and so issue is joyned and tried by a *venire facias* from Shrob-walk, and verdict for the plaintiff. And now 'twas moved in arrest of judgment, that a walk in a forest is not such a thing of which a venue may be taken; 'tis not certain what it is, and it cannot be intended a vill, it being only collaterally alledged in the record as a thing granted, and not as a place wherein a thing is to be done; and in truth is no more than a liberty or office within a forest; and the venue ought to have been either of the forest or of the body of the county. And held by Kelynge, Twysden, and Moreton: *First*, That a walk in a forest is only a liberty or office whereof no venue can arise. But hereof Wyndham doubted if it had been alledged as a place where a fact was done; but being only alledged as a thing granted, and not a place where a fact is supposed to be done, 'tis not; whereto the other Judges agreed. But *secondly*, It was held by the Court, except Twysden, that it being tried by a jury of the county where the matter in issue arose, it is within the new Stat. 16 & 17 Car. 2, of Jeofails, which although it says, *that it shall be good if it be tried by the county where the action is laid*, yet it is to be understood within **[208]** the county where the matter in issue arose; for it would be to destroy the whole law touching juries, to try it in a county foreign to the issue, which cannot know any thing thereof; and the rather, for that the statute says further, *that in such and other like cases, &c.* And (therefore) here, although the action is laid in London, yet it is well tried in the county of Northampton, where the thing in issue is. But Twysden to the contrary, it is not within the words, and the statute being a new law, is not to be taken by intent contrary to the words: but by the opinion of the other three, judgment was given for the plaintiff; on which the defendant immediately brought a writ of error, but afterwards the parties agreed, and the defendant gave the plaintiff satisfaction for the breach of the covenant. Levinz for the plaintiff, and Serjeant Wylde for the defendant.

PIGGE *against* GARDNER.

The Court of Ely is as a Superior Court. 1 Sid. 331.

Errors were assigned of a judgment in Ely Court, *First*, For that in the style of the Court it is not shewn whether it be held by charter or prescription. *Secondly*, The judgment is *consideratum est*, and not said *per Cur.*: *Thirdly*, The writ of inquiry of damages is, *per sacramentum duodecim, &c.* and not said *proborum & legalium hominum*: but all the exceptions were over-ruled, for it being a Royal franchise, it is not as in case of Inferior Courts: and afterwards this same term in another case between *Peacock and Bell*, in error of a judgment *in assumpsit* in Ely Court, it was assigned, that it was not said, that the goods for which the action was brought, were sold and delivered within the jurisdiction of the Court; and yet the judgment was affirmed, because it is not as in case of Inferior Courts.

[209] NORFOLKE *against* ELLIOTT IN THE EXCHEQUER CHAMBER.

The serjeant at arms of the House of Commons not within the statute 23 H. 6. S. C. Raym. 62. Hard. 464. 1 Sid. 384. *Post*, 254. *Ante*, 86. 2 Lev. 103. 1 Saund. 61, 318. 1 Vent. 237. 1 Sid. 838.

Debt on an obligation of 500l. dated 18th July 13 Car. 2, conditioned, that if Wogan, now prisoner in Tenby, renders himself prisoner to the plaintiff, serjeant at arms to the House of Commons in Parliament, according to the resolves of the House of Commons, to be void. The defendant pleads the statute 23 H. 6, and that Wogan was one of the regicides guilty of the murther of the late King Charles I. And that the House of Commons being informed thereof, and that he rendered himself to the said House of Commons, according to an order by them before made, they resolved: that he should be taken into custody by their said serjeant; and that the plaintiff being serjeant, took him into custody the 27th of July; and that afterwards, the said 28th of July, the obligation was made for ease and favour for delivering him out of custody. On which the plaintiff demurs, and on argument it was resolved by Hale and the whole Court, that the serjeant at arms to the House of Commons is not an officer within the statute of 23 H. 6, which extends only to officers who have execution and return of the ordinary process of law, and therefore the serjeant to the council of the marches was not within it, as 1 Cro. Car. 309, *Johns and Stratford's case*. But 2dly. It was resolved, that although it is not within the statute, yet he being in custody for treason, and that appearing upon the record, the obligation taken for his enlargement, was void by common law. See F. N. B. 66. That no *homine replegiando* lies in such a case. 2 Inst. 42, 43, it is not bailable except in B. R. 4 Inst. 179. Bailing of one not bailable, is a negligent escape. Dy. 324. A bond for ease and favour to one in execution, is void at common law. Hob. 14. 2 H. 4, 9. A bond to deliver goods taken in *withernam*, is void; and Plowd. and 2 Leon. 107, the statute pleaded, and the bond adjudged void by the common law: and judgment was given for the plaintiff. Levinz for the plaintiff, and Turnour for the defendant.

[210] CANNON *against* ABBOT.

Want of an original not cured, where in an action against three, the verdict is against the plaintiff as to one, and judgment by default against the other two. Three join in an action, and judgment against the plaintiff as to one, and for him against the others, they may bring error.

Error of a judgment in trespass, where the action being brought against three, one pleads not guilty, and thereupon issue and verdict for the defendant; and judgment by default, and a writ of inquiry and damages against the other two, and on the judgment for the first defendant, and the judgment for the plaintiff against the

other two, they only bring a writ of error, and assign the want of an original; and which although there be a verdict in the case, is not cured by the statute, the verdict being for the first defendant, &c. and so set out the case; and so it is as if the action had been brought only against the other two. But if the verdict had been for the plaintiff against the first defendant, this had been aided by the statute; for the want of an original as to all the parties is cured when any verdict is for the plaintiff: and although the writ of error be brought by two without the third, it was argued to be good because he cannot be joined, for he being acquitted, and the judgment for him, he cannot say that the judgment is to his damage; and so held the whole Court, except Twysden, who held, that the writ of error ought to have been brought by all three.

BUTLER *against* HEDGES.

Trespass for taking goods 1 *Aprilis*, with a *continuando* till 1 *Junii*. S. C. 1 Sid. 319.

Error of a judgment in trespass in the Common Pleas, where the plaintiff laid the trespass the first of April, of the taking of ten loads of wheat, ten loads of barley, ten loads of oats; with a *continuando* of the said trespass, from the said first of April to the first day of June. And the error was assigned in this, that the trespass being laid that he took them the first of April, and so all at one day, the *continuando* was ill; for what was done the first of April, cannot be done at another day afterwards. But he ought to have declared of so many loads taken and carried at one day, and so many at another, &c. and divers authorities were cited to this purpose; and among others the case of *Whitchcote and Elliot* in this Court, Mich. 16 Car. 2. In trespass for laying logs of wood in his land the first of April, *continuando* till the first of May, and for this judgment was arrested. But (notwithstanding) **[211]** upon view of the book, 21 H. 6, 20, the judgment was affirmed; and it was said, that even in the case of Whitchcote, judgment was afterward given for the plaintiff: but it was agreed, that for the doing of a single act, which is to be done all at one time, as killing a horse, &c. there the *continuando* is ill. But of divers things which may be done at divers times, as here, although that the trespass be at first laid to be done on the first day, the *continuando* shall make a distribution thereof, that part was done at one day, and part at another within the time (declared of); and the judgment was affirmed.

ALANSON *against* BUTLER.

A *comittitur* is to be pleaded *prout patet per record'*, otherwise of writs. S. C. 1 Sid. 330. Nels. Lutw. 402, 405. 2 Jon. 21. 2 Keb. 189, 206. The sheriff permits a voluntary escape, the plaintiff may have a new execution.

A *scire facias* for execution of a judgment: the defendant pleads, that he was taken on an execution on this judgment, and brought to the Bar, and acknowledged to be in execution, and afterwards was voluntarily permitted by the sheriff to escape. On which the plaintiff demurred and had judgment: 1. For that he did not conclude the *committitur prout patet per recordum*, for it is matter of record, and ought to be so pleaded: but writs need not to be so pleaded, though they are matters of record, because they may be amiss, and perhaps were never returned. 2dly. That a voluntary escape by the goaler without the plaintiff's assent, shall not prejudice the plaintiff, but that he may bring a new execution; as 1 Cro. *Mounson* against *Clayton*, and *Robinson* against *Clayton*; and so it was adjudged in this Court, Mich. 19 Car. 2, between *Simpson and Hunt*: but Trin. 21 between *Crane and King*, it was doubted, and the Court divided in that case, which see entered, Pasch. 20 Car. 2, in the Common Pleas, Rot. 865.

[212] COOKE *against* GERRARD.

[Referred to, *Chester* v. *Chester*, 1730, 3 P. Wms. 64. Applied, *In re Green*, 1893, 31 L. R. Ir. 340.]

Devise of part of the lands to A. for life, and another part to B. for years, and then devises all his lands not devised, the reversion passes. S. C. 1 Saund. 180. 2 Keb. 206, 207, 224. Cro. El. 152, 524. 2 And. 59. Ow. 155. 1 Leon. 180. Al. 28. 2 Vent. 285. 1 Mod. 187. 3 Mod. 228. 2 Vent. 363. 1 Salk. 236. 6 Mod. 110. *Ante* 130. *V.* 3 Lev. 259, 260. 2 Saund. 197. 2 Danv. 527.

Ejectment, and a special verdict; Robert Keepe seized of Spains-Hall, settles part thereof on his daughter for life; and afterwards by will devises the house to his wife for a year after his death; and then devises all his lands, not settled or devised, to Thomas Keepe, *habend'* to him and his heirs, after a year after his death, and after the death of his daughter; and dies: the year after his death is expired, and the daughter is yet alive, and *she* brought the ejectment for the house, and whether it lies during the daughter's life, was the sole question argued at the Bar; for it was admitted, that although the devise be of the *lands* not devised or settled, and no of the *estate* not devised or settled, yet the reversion will pass by the devise of the land, although the land itself was settled and devised before; and it shall be taken for the residue of the estate in the land. And it was resolved, that the estate of the house should pass immediately after the year after the (daughter's) death ended, and should not tarry till both parts of the copulative are determined, viz. till after the year, and after the death of the daughter, but shall be taken distributively, viz. that the house should pass immediately after the year ended, and the residue after the death of the daughter; and *Gilbert and Wittie's case*, in 2 Cro. 655. 3 Cro. 199, and *Wyndham's case* in 5 Co. were cited.

PEMBLE *against* STERNE.

Bishops lands not demised for the most part of the last 21 years, if they may be demised afterward. S. C. 1 Sid. 316, 416. Raym. 165. 2 Keb. 213, &c. 1 Danv. 752, pl. 5, 754, pl. 8.

Ejectment, and special verdict: the Archbishop of York seised in 1604, made a lease rendering the ancient rent; in 1630 this lease was surrendered, and the land remained unlet till 1662, when the archbishop made a lease thereof to the lessor of the plaintiff, rendering the same rent which had used to be reserved thentofore, when it was demised in 1604, and dies; the now Archb. Sterne enters, and makes a lease to the defendant **[213]** his daughter, against whom the plaintiff brought ejectment. And the only question argued at the Bar this term was, whether the lease made in 1662, the lands not having been demised before, since 1630, was good within the statute 32 H. 8, it not having been demised nor any rent reserved for the greater part of twenty years before the making thereof? And afterwards in Hillary 19 & 20 Car. 2, it was argued at the Bench by all the Judges, and Kelynge and Twysden held the lease good; for the intent of the statute was to preserve the revenue only, which shall not be diminished against the successor after the statute, and here the most ancient that could be known is reserved, and probably the very rent which was reserved at the time of the statute, or more: and if it be not demisable, when it has been undemised for eleven years, it would be in the power of the predecessor to do a prejudice to the successor by retaining the land in his hands for eleven years; and so enforcing the successors for ever after to keep the lands in their own manuring, which would be a great inconvenience: also for these last twenty years, during the war and the King's expulsion, great part of the bishops lands have been unletten, and by this means they would never be demisable again, if the law should be so: but Wyndham and Moreton held the contrary, that it not having been demised for eleven years (the greater part of the twenty-one years before) it is now demisable again; and cited Co. Litt. and 3 Cro. 707. *Mallett* against *Mallett;* and Harper's Reports, *Sir John Manning's case.* And if it be a mischief, it ought to be remedied by Act of Parliament,

and not by the Court here. But afterwards Hillary 20 & 21 Car. 2, Wyndham being dead, Kelynge and Twysden gave the rule for judgment for the plaintiff (the record not being transmitted to the Exchequer-Chamber, as was intended and directed) *nisi*. And afterwards it was shewn in order to stay judgment; 1. That the ejectment is among other things *de pannagio*, whereof an ejectment does not lie, for *pannagium* is but a privilege of taking pannage. And 2dly. It is of the fourth part of a meadow, not shewing the number of the acres the meadow contains. And thereupon the judgment was staid.

[214] THE KING *against* SIMS AND HIS WIFE.

Return of a rescue, where it is to be out of the sheriff's custody, and where out of the bailiff's. S. C. Raym. 161. 1 Sid. 332. 2 Keb. 217.

Exception taken to the return of a rescue, because it is, that they rescued the prisoner out of the hands of his bailiffs, where it ought to be, *out of my custody*, where the arrest is made by the sheriff's bailiff; otherwise where it is from the custody of a bailiff of a liberty, who has the return of writs, for there it ought to be *extra custodiam ballivi libertat'* who has the return of all writs, &c. And for this were cited Sty. 417. 3 Cro. 781. Dy. 241. Latch, 184, and of this opinion was Kelynge, Chief Justice: but Twysden and Wyndham on the contrary, said, there is *veritas facti, & veritas legis;* and here the return is of the verity of the fact, which is as well as the verity of the law, viz. *his own custody;* and each of those ways is good. 2dy. It is not returned, that they rescued themselves, or, who rescued them? 3ly, It is not expresly said, that they were in the bailiff's custody, but only by implication, viz. that they were rescued out of the bailiff's custody; and for these two the Judges agreed, that it should be quashed, and so it was.

[215] TERM. SANCT. TRIN. ANNO 19 CAR. II. IN BANCO REGIS.

KEIGHTLY *against* BUCKLY.

An assignee assigns over. *Q.* If discharged from paying the rent without the lessor's acceptance? S. C. 1 Sid. 338. Raym. 162. 2 Keb. 260, 277. 2 Lev. 295.

Debt was against an assignee for rent for three years, due at Lady Day, 1664. The defendant pleads, that before Lady Day, 1664, viz. the first of June, 1661, he assigned over the term: the plaintiff demurs, whereupon the question intended was, whether an assignee by assigning over be discharged from the payment of the rent, without acceptance of the rent, as the lessee himself is not? But two exceptions were taken to the plea, as to the manner of it. *First*, That no certain time is alledged of the assignment, but only before Lady Day, 1664, and that may be for a year or two after the rent was arrear; and that which comes after the *scilicet* 1 *Junii* 1661, is not traversable; but he ought to have pleaded, that he assigned before any rent (due) viz. such a day. *Secondly*, It is not pleaded that he had given notice of the assignment to the lessor; and till notice and tender of the arrears, he cannot by assignment discharge himself of the rent, no more than in the case of lord and tenant. Twysden held the first exception good, but the contrary of the second; for the assignee is not chargeable but in respect of the privity of the estate, which by the assignment is gone, whether there be notice or not: and so differs from the case of a lessee, who notwithstanding the assignment, remains chargeable on the privity of contract, till by acceptance of another tenant he be discharged. Kelynge and **[216]** Wyndham held both exceptions to be good: and judgment was given for the plaintiff by all the three.

LOW *against* KING.

Traverse the whole time, before he was sheriff or after.

Trespass and imprisonment laid the first of May 17 Car. 2. The defendant justifies as Sheriff of Coventry, to arrest him for a breach of the peace made upon

him in the execution of his office; for which he arrested him and carried him before the mayor, and traversed all the time before he was sheriff, or afterwards; and the traverse was adjudged good, though it was objected to be too large.

WRIGHT *against* WRAINSCOTT.

Justifies the killing of a mastiff, because he bit the defendant's dog. S. C. 1 Sid. 336. 1 Saund. 84. 2 Keb. 237. Nelson's Lutw. 481.

Trespass for killing the defendant's mastiff dog: the defendant pleads, that the plaintiff's dog fell upon and bit the defendant's dog, which he kept for the defence of his house, wherefore in defence of his own dog, he killed the plaintiff's dog; on which the plaintiff demurred, and the plea was adjudged ill; for that he does not say that he could not otherwise save his own dog without killing the plaintiff's dog, and a mastiff is valuable. *Secondly*, It does not appear that the plaintiff's dog was used to bite, nor that the defendant's dog was a mastiff.

WHITFIELD *against* HOLMES AND HIS WIFE.

A *feme covert* discharged, the husband finding bail for her. 1 Vent. 49. 1 Mod. 8. 1 Sid. 21. 2 Cro. 445. 1 Roll. 983. Litt. Rep. 18. 6 Mod. 301. 1 Mod. 8. 3 Wilson, 124. Ld. Raym. 73. Str. 1167, 1237, 1272. 3 Bac. Abr. 751. 2 Blac. Rep. 720. 1 Term Rep. 486.

The feme whilst sole entered into an obligation to the plaintiff, and afterwards married the defendant, and debt being brought against her, and she being in prison and the plaintiff afterwards knowing of the marriage, brought another writ against the husband and wife, and took the husband also; and both being in custody of the **[217]** marshal, he declared against both. But the Court on motion discharged the wife for the husband only is to be imprisoned, but before he be discharged, he shall find bail both for himself and his wife.

THOMAS *against* SORREL.

King James the First granted to the Vintners of London, liberty to sell wines without licence; this does not determine by his death. S. C. Vaugh. 330. Hard. 443, 464. 2 Keb. 245, 280, 322, &c. to 790. 3 Keb. 76, 119, 143, 155, 184, 223, 264.

Debt for 450l. on the statute of 12 Car. 2, for selling wines without licence, and demanded the 450l. For that the defendant at fifty several times, sold wine in his house, being a tavern, not being licensed according to the statute of 12 Car. 2, for which he forfeited 5l. for each time; and on *nil debet* pleaded by the defendant, a special verdict found the statute of 7 E. 6 touching the selling of wines, that none should sell without licence according to the said Act: then they found the patent 9 Jac. 1, whereby the King incorporates the Vintners of London, and grants for himself, his heirs and successors, that it should be lawful to the Master, Wardens and Freemen of the Commonalty of Vintners, (that being the name of the corporation) and their successors, and all who should be free of the said company, *to sell wine. First*, Within London, and three miles thereof. *Secondly*, In all cities and port-towns in England. *Thirdly*, In all other cities and thoroughfare towns on the road, between London and Dover, and London and Berwick, where any of the company should inhabit, and to keep taverns and sell wines by retail, notwithstanding the statute of E. 6, or any other statute made or to be made. Then they found the statute of 12 Car. 2, c. 25, whereby it is enacted, *That no person shall sell wines by retail, except he be enabled according to that statute;* and directs how the King shall nominate commissioners for granting licences, and thereupon reserves a revenue to the King; *Provided that this Act shall not be prejudicial to the Master, Wardens, Freemen and Commonalty of the Vintners of London, but that they may use and enjoy such liberties, as they have heretofore lawfully used.* And (they found) that the defendant was a Freeman

of the Vintners Company, and kept a tavern at Stepney, within three miles of London, and sold wine by retail at the said **[218]** times. And if he were indebted for the said times, they found for the plaintiff 50l. and if not, &c. then for the defendant for the whole. This case after divers arguments in the King's Bench, was for the weight and difficulty of the case adjourned into the Exchequer-Chamber, and it was there twice argued at the Bar; *first*, by North the King's Solicitor for the plaintiff, and Levinz for the defendant, and at another day by Finch the King's Attorney; and (a new Judge being made) by Levinz again for the defendant; and for the plaintiff three points were principally made. *First*, That the patent of King James I. with the *non obstante*, was never good in its creation. *Secondly*, If it ever was good, yet it was determined by that King's death. *Thirdly*, That the proviso in the statute of 12 Car. 2 does not enable the defendant to sell without a licence: and upon the first point they objected, that the patent was never good, *First*, In respect of the persons to whom, viz. a corporation which was not subject to a use, and therefore not capable of such a trust as for making whom they pleased free of their company: or to make them exempt from the law, and in effect to give to them a delegative power, for exempting whom they would from the law, and by this means delegate an exemption to any other person whom they should make free of their company; which the King himself could not do. See 7 Co. the case of *Penal Laws*, and Co. Entr. 370. *Secondly*, For that the grant was for ever, and so not good in point of time. *Thirdly*, That it was void in respect of the places, extending over a great part of the realm; also a dispensation is a provident relaxation of the law, by reason of some weighty necessity. See 11 Co. 88 a. 7 Co. 37. As to the second point, they said, *First*, That this is only a licence to do a thing contrary to a penal law; and all licences, commissions, &c. determine with the death of the donor, and cited Latch 170, 171, and Dyer 190. *Secondly*, It was said to this point, that those dispensations are prerogatives of the King, which he cannot grant so as to bind his successor; for they ought not to be granted, but for some weighty or urgent necessity, and the predecessor King cannot know what shall be necessary or prudent for the successor to do. And to the third point they said, *First*, That the *non obstante* in the patent of King James, cannot dispense with the statute of Car. 2 made since, notwithstanding those words, *any statute made or to be made*; which was agreed. And *secondly*, **[219]** That the proviso in the statute of 12 Car. 2 shall not enable them to sell wine without licence, for it saves to them only such liberties as they before lawfully used. And the patent of King James does not make their selling of wines lawful, but only excuses them from the penalty and forfeiture, which they would incur by the statute of 7 Ed. 6. For the Act of Ed. 6 makes the thing illegal by the restraint, and punishable; and the patent of King James dispenses only with the penalty and forfeiture, and does not make the thing legal against the body of the statute of Ed. 6, and altho' the keeping of taverns was a trade before the statute of E. 6, yet it was considered as a trade that introduced irregularities and disorders, and the statutes of Ed. 6 and Car. 2 were made for the common good to prevent those disorders, as divers laws before had endeavoured to do. See old Magna Charta 24, 25, 115, 151. It was one of the articles in eyre to enquire of false measures in taverns, and the judgment of the pillory, statute 4 E. 3, c. 12. 27 Ass. 24, and divers statutes were made for redress of disorders in taverns, as 5 R. 2, 7. 6 R. 2, 7. 3 H. 8, 8. 22 H. 8, 7. 28 H. 8. 14 & 18 E. 2 of the view of frank pledge. But on the other side, it was said as to the first point, that the patent was good in its creation; and to the first objection, that the grantees being a corporation, were incapable of such a corporation, were incapable of such a trust, it was answered, that they are the more capable of such a trust by being a corporation: corporations are intrusted with the government of places where they are, as mayors and commonalties; and the statute of Ed. 6 puts the power of licensing taverns in the corporations of several towns. Also corporations aggregate never die or change, as natural men do, and therefore the prudence of entrusting them is always the same (*i.e.* unchangeable). And this is no more a delegation of a power than when the King makes a corporation, and grants, that the elder aldermen shall be justices of peace (which he does every day) is a grant of a delegative power to make a justice of peace; but it is included in the grant itself; as a grant to a man and his heirs, the heir is not in by delegation of the ancestor, but included in the grant. The King cannot

grant to a corporation a power to make justices of peace. But when the King grants to a corporation that their aldermen shall be justices of peace, they are so by virtue of the grant itself, when they become aldermen, and not by the delegation of **[220]** those who elected them aldermen, 20 H. 7, 6. 1 H. 4, 5. Stat. 27 H. 8, 24. 21 E. 4, 56. Yelv. 13. And as to the time of its enduring, it is more than for life, viz. for ever; so are all grants to corporations to purchase in *mortmain* perpetual, and do not determine by the King's death, nor are they restrained to any time. And in Bridgman's Reports, *Allen* against *Newton*, a licence was granted on this same statute to one for life, remainder to another for life. And so in Hillary 1659, B. R. *Young* against *Wright*, a licence was to the father and his assigns, remainder to the son and his assigns for life, and held good; for by the dispensation, there passes not only an authority, but also an interest by way of restitution to that which was their right before the statute made. And the grantees of wine-licences have always aliened and assigned them from one to another, with their houses wherein the taverns are kept. And as to the second point, it was argued (agreed), that commissions, authorities and patents, which are no more than licences, do determine with the King's death. But in this case, the grant and the *non obstante* do not operate only as a licence, but as the restitution of an interest, F. N. B. 223 G. A licence to alien in *mortmain*, does not determine by the death of the King, the grantor, Plowd. 457 b. and 2 R. 3, 4. The King grants to an abbot, that he shall not be a collector of the tenths; (a tax) it shall bind the successor, because it operates as a discharge executed, and not as a licence executory. See Dyer 54. A licence on this statute to one and his assigns; and Bridgman 113, and the case of *Young and Wright*, 3 Cro. 77, before cited, and in Trinity term 2 Jac. 1, in the Common Pleas, *Norris* against *Mason* and Hill. 2 Jac. 1, in the King's Bench, *Might* against *Norton*, in an information on the statute of Ed. 6, such a patent was made by Queen Elizabeth, and confirmed by King James; and upon a demurrer, judgment was for the defendant, which shews that the patent did not determine by Queen Elizabeth's death; for if so, the confirmation by King James of a patent, which was become void, had been also void: which cases were the same year, viz. the second of King James, as the case of penal statutes, which is the same case with Sir Walter Raleigh's, and Co. Entr. 370 proves, that the Court took a diversity between this patent and the patent to Sir Walter Raleigh to dispense with penal laws. And as to the third point, when the saving in the statute saves to the Vintners **[221]** of London all the liberties which they had lawfully used, it saved to them the liberty of selling wines without licence, for when they by the patent of King James (were exempted from the penalties of) the statute of Ed. 6 they sold wines lawfully, and there is nothing else to be saved to them. And of this opinion, as to this (last) point, were all the Judges, except Baron Thurland, who held, that the patent of King James saved them only from the penalties and forfeitures given by the statute of Ed. 6, but did not make the selling of wines lawful. And the case having been argued at the Bench several days in Easter and Michaelmas terms, 26 Car. 2, viz. two Judges on each day, judgment was ruled to be given for the defendant. And on the first point, Baron Thurland, and Wyndham, and Ellis, Judges in the Common Pleas, and Turner, Chief Baron, held, that the patent of King James was not good, and grounded themselves much upon the reasons before alledged. But all the other Judges, Hale and Vaughan, Chief Justices, Twysden, Wylde and Rainsford, Judges of the King's Bench, Atkyns of the Common Pleas, and Turner and Littleton, Barons of the Exchequer, hold, that the patent was good in its creation. And as to the second point, Wyndham and Ellis held, that if the patent was ever good, it did not determine by K. James's death; and with them agreed Hale, Ch. Justice of B. R. and Vaughan, Ch. Justice of C. B. and Twysden, Rainsford, Wylde, Atkyns, Baron Turner and Littleton; but the Chief Baron Turner and Thurland held, that tho' it had been good in its creation, it was notwithstanding determined by the King's death. And as to the third point, they all as before, except Thurland, agreed, that the proviso in the statute of 12 Car. 2 exempted the Vintners of London out of the statute, because it was a privilege lawfully used by them before the statute: and thereupon the record was sent back into the King's Bench, and there, on the motion of Levinz, judgment was entered accordingly.

[222] DOWNS *against* BECK.

Consideration to forbear suing one as administratrix, good. *Ut* an affirmative, and not similitudinary. S. C. 1 Sid. 337. 2 Keb. 249, 253.

Assumpsit, in consideration that the plaintiff would forbear to sue the defendant as *administratrix* of J. S. who died indebted to him, till he the defendant had married such a woman to pay him, and says, that he had forborn, and that the defendant had married the woman. After verdict, it was moved, that it is not alledged that the defendant was administratrix, and so the forbearance of suing her is no consideration, for *ut* (as) is no affirmative, but only similitudinary, and Jones cited Pasch. 1653, B. R. Rot. 196 in Style's Reports 405 to be so adjudged, whereupon the judgment was staid: but afterwards on a second motion, it was adjudged for the plaintiff, for *ut* (as) is an affirmative, as a discent to one *as* son and heir, is an affirmative that he is son and heir.

PIT *against* KNIGHT.

In debt on an obligation in the Court of Bristol, a judgment in B. R. on the same obligation pleaded. S. C. 1 Sid. 329. 1 Saund. 97. 2 Keb. 205, 249, 278. 1 Danv. 789, pl. 5. A replication demands judgment and his debt, but not damages, yet the Court gave damages.

Debt on an obligation in Bristol, where the defendant pleaded in bar a judgment on the same obligation, in B. R. and this he is ready to verify by that record remaining in B. R. The plaintiff replies, no such record, and thereof demands judgment, and his debt aforesaid to be adjudged to him: the defendant rejoins, *that there is such a record, and this he is ready to verify by that record;* but pleads further, *that he cannot have the record out of the K. B. and thereupon demands judgment, whether the Court at Bristol would further proceed:* and the Court there gave judgment against the defendant for failing of the record; and now two errors were assigned viz. 1st. That the plaintiff in his replication did not demand any damages, but only his debt, and yet the Court there had given him damages also. But by the Court, the demand of the judgment is sufficient, for when the Court gave him judgment, they ought to have given him damages also, as incident thereto. 2dly. That the Court there ought not to have given him judgment on the failer of the record, at least, not without a demurrer on the plea, but the Court affirmed the judgment.

[223] *Note* this, for hereby it seems that the record might have been removed out of B. R. by *certiorari*, and then sent by *mittimus* to this Inferior Court. (*Quere.*)

VERNI QUI TAM *against* ——— IN THE EXCHEQUER CHAMBER.

A tales without warrant in informations, but not indictments. Bull. N. P. 305.

Debt on the statute of King James I. touching leather, and upon an issue tried at the Guild-Hall, the jury not being full a tales was prayed: but it was objected for the defendant, that it cannot be without a special warrant by the Attorney General. But by Hale, It may well be in this case without warrant, by reason of the interest which the prosecutor has; otherwise in indictments, &c. which are the suits of the King himself.

[224] TERM. SANCT. MICH. ANNO 19 CAR. II. IN BANCO REGIS.

COMBERS *against* WATTON.

Debt against the heir in the *detinet*, cured by verdict. S. C. 1 Sid. 342. 2 Keb. 259, 290, 302.

Debt against the heir on an obligation of his ancestor, in the *detinet* only: and after verdict it was moved, that it ought to be in the *debet* and *detinet;* and so held the Court at first, but it was afterwards resolved to be cured by the Oxford Act of

Jeofails, being after verdict; and though not by the particular words in the statute, yet it is by those general words, *and other like cases.* *2nd Exception.* That the defendant appeared by guardian, and it does not appear that he was within the age of twenty-one years, nor is the guardian said to be admitted by the Court; and thereupon it was stayed: but it was said by the Court, that if the guardian-piece could be found, and it is entered so there, the Court would amend the declaration thereby.

DETHICKE *against* CARAVAN.

A devise of lands to be sold by executors. *Q.* If the money be assets in their hands at common law. Lex Testament' 478, 479. 2 Brownl. 100. Goldsb. 2. Dyer 219, 177, 371. Co. Litt. 112 b. 113 b. Keil. 43, 107. Cro. El. 524. 1 Chan. Rep. 32, 35, 176, 248, 275. *Vide post*, 304. Pow. on Dev. 292, 297. Cow. 464.

It was moved to have writings brought in for the defendant to have a special verdict at the Assizes drawn up, where the case would be; that a man devised his lands to his executors, to be sold for payment of his debts: the lands are sold, and the question was, if the money in their hands would be assets at common law to charge them in debt? The writings were ruled to be brought in, and Justice Twisden said, he had known it to be adjudged, that they are assets at common law, without going into Chancery.

[225] BOLTON *against* BOLTON.

A bishop's remission from his Court may be shewn on motion without pleading it. S. C. 2 Keb. 265.

A prohibition was prayed for citing out of the diocess of Worcester, to the Arches, in a case between a husband and wife, for a divorce by reason of cruelty; and day given to shew cause, on which they shew a remission from his Court by the Bishop of Worcester; whereupon it was objected, that this ought not to be upon motion, but it ought to be pleaded; for the statute of 23 H. 8, in the exception of cases, says, Where the bishop of the diocess does request it, and the canon and civil law admits of the examination of such request; and it is properly to be argued and shewn to the Court by the civilians, whether their law admits it in this case: but the Court allowed the shewing of the bishop's remission upon motion, and denied the prohibition; and the same case between the same parties being afterwards moved in the Exchequer, the prohibition was their denied by Hale and the whole Court, on shewing the remission, upon motion, without putting the party to plead it. Levinz for the plaintiff in the prohibition.

GEE AND HIS WIFE *against* SIR FRANCIS FANE.

A recognizance of bail joint and several, a *scire facias* joint, and so the judgment, yet the execution several. S. C. 1 Sid. 339.

Gee and his wife brought an action against Burrel; and Sir Francis Fane, and Barker became bail for him, wherein they and each of them were bound in a recognizance, that if he was condemned, to bring him in, or that *he* should answer the condemnation, or otherwise the debt to be levied of their lands and chattels, as the course is in the King's Bench; judgment was had against Burrel, and a *capias ad satisfaciend'* sued against him, and returned *non est inventus*, but was not filed, and two *scire facias's* against Fane and Barker; and upon default judgment was, that the plaintiff should have execution against them according to the form of the recognizance aforesaid; and thereupon the plaintiff takes a *capias ad satisfaciend'* against Fane only, and levies the debt upon him alone, by imprisoning him 'till he had paid it: and now it was moved for a *supersedeas* and restitution, because the writ erroneously issued. *First*, For that the *capias* against the principal not being filed, no *scire facias* ought to have issued against the bail. But it was said by the Court, that the writ being sued and returned, it is **[226]** sufficient, and it may be filed at any time afterwards, and

ordered it to be now done. *Secondly*, The judgment in the *scire facias* being joint, the execution by the *capias* ought to have been so also, viz. against both the bail, and not against Fane only. 1 H. 5, 4, 5, 13 a. 11 H. 4, 6. 3 Cro. 185. And although that the recognizance was joint and several, so that they might have had a *scire facias* against one only, yet having elected to take it against both, the *ca. sa.* ought to be against both also; see 20 H. 7, 3 b. a *sci. fa.* on a recognizance in this Court against two, one whereof is returned warned, no proceedings may be against him till the other is warned, and has made default: but by the Court. This is not a judgment *to recover*, but to *have execution*, and that is to be according to the recognizance, either joint or several; but where the judgment is joint, so ought to be the execution: but the recognizance upon which this *scire facias* issued, as upon a judgment, being joint and several, although the *scire facias* was joint yet the executione may be several, as the record is upon which it issues; and therefore the execution in this case was ruled to stand good. And *note*, though the recognizance be to levy it *de terris & catallis*, yet execution by the body is good by the law and usage of this Court. Levinz for the defendant.

HEYMAN *against* GERARD.

Obligation to account and pay all moneys that came to his hands; plea, no money came to his hands: replication, that moneys did come, &c. 'tis ill, not saying that he had not accounted, or paid. S. C. 1 Sid. 340. 1 Saund. 99, 102. 2 Keb. 258, 275.

Debt on obligation, conditioned for giving an account of all such moneys as should come to his hands, and to pay the same to the plaintiff: the defendant pleads, that no moneys came to his hands; the plaintiff replies, that such a sum came to his hands; whereupon the defendant demurs. 1. For that it is not said that he refused to account for it, and it is not the receipt, but the refusing to account which was the breach of the condition. 3 Cro. 320, 899. Yelv. 20. Whereto it was answered by Jones, that by the plea it is admitted, that he did not give any account, nor (indeed) could he give any, if no goods came to his hands; therefore it would be in vain to say, that he refused to give an account of what he says he never received: but by the Court, the replication **[227]** is sufficient in not assigning a breach, that he refused to accompt. And it is not like the case of a release, &c. pleaded in debt upon an obligation to perform an award, where it is sufficient to answer to the release, being a foreign matter, and out of the condition, without assigning a breach; but here the plea is of a matter within the condition, and therefore it is not sufficient to answer thereto, without assigning a breach: for perhaps he had paid it, and therefore ought to have said, that the money came to his hands, and that he had not accounted or paid it; and the whole Court ruled judgment to be given against the plaintiff. But he then prayed leave to discontinue, which was granted, except the parties would submit the truth of the matter to their counsel, to be determined by them.

HAMOND *against* JONES.

A freeman of London devises who shall be survivor of the customary part of his children.

Covenant was brought on a covenant to pay to the plaintiff's wife so much as should be due to her on the death of her brother John, by the will of her father and the death of her said brother; and on the evidence at the trial at Guildhall, after the end of Easter term, it appeared, that the father was a freeman of London, and devised, that his third part should make the customary part of his children 500l. a piece, if their customary parts did not amount to so much, and that if any one of them died before twenty-one, his part to be divided among all the others: all the children died before twenty-one, except the plaintiff's wife, John the brother being the last that died, and the plaintiff had received out of the father's part, so much as would make his said wife's part 500l. And the question was, if she should be entitled by the

father's will to have the customary part of John? For it was objected by Jones and Levinz, that the customary part was not due by the will, but by the custom, and to entitle her thereto, she ought to take letters of administration to the brother, but is not entitled thereto by the father's will, for he had no power to appoint a survivorship thereof: but by Kelynge, Chief Justice, though the father had not power to dispose of the customary part from his children, yet he had power to appoint a survivorship thereof among the children **[228]** themselves by his will. And so Wylde, Recorder of London and King's Serjeant, said, it had been lately resolved in Chancery, in a case wherein he was of counsel; and so Kelynge now directed the jury, who accordingly gave a verdict for the plaintiff for the whole.

Quære of this matter.

[229] TERM. SANCT. HILL. ANNO 19 & 20 CAR. II. IN BANCO REGIS.

FREEMANTLE *against* THE COMPANY OF SILK-THROWSTERS.

A by-law, that no silk-throwster shall make more than so many spindles a week, good. S. C. 2 Keb. 309, 310.

This case was referred by the Privy Council to be tried, whether a by-law made by the Company of Silk-Throwsters, that none of the company should have above such a number of spindles in one week, be a good by-law or not? And after verdict for the plaintiff, on a trial of the fact, it was moved in arrest of judgment, that it being a by-law in restraint of trade, and founded on their charter of incorporation, with power to make by-laws, and not on any custom, was a monopoly, and void. To which it was answered and resolved by the whole Court, that this is not a monopoly, but a restraint of a monopoly, that none might engross the whole trade; being rather to provide for an equality of trade, according to what is convenient, and good: and they gave judgment for the plaintiff.

[230] PARKER'S CASE.

Court of Honour and Arms before the Earl Marshall only.

A return on an *habeas corpus* was, that he was committed by commissioners deputed for exercising the office of Earl Marshal (he being a lunatick) before whom Sir Edward Walker, Garter, had complained, that Parker had painted escutcheons, trophies, and other ensigns for the funeral of the Lord Gerrard, and ordered and marshalled it without licence of the commissioners, Judges of the Court of Honour, and that for this cause, they had committed him till further order; whereto exceptions were taken, 1st. That no Court could be held before the Earl Marshal, or commissioners to execute his office, but the Court is to be held before the constable and marshal: but it was not allowed, or of matters touching arms and honour, the Court is held before the Earl Marshal only, but touching matters of ordinary justice, which concern life or member, before the constable and marshal. 2dy. That the commitment till further order, was not good, that it ought to be till he be delivered by course of law; and to this purpose were cited 1 Cro. *Selce's case*, and *Brice's case ibid.* and *Burkham's case ibid.* and 1 Cro. *Wolnough's case*, and *Freeman's case ibid.* the same, and 3 Cro. *Adie's case*. But on consideration of all those cases, the Court held the return good in that point; they agreed, that a commitment till further order by the persons committing was not good, but till further order generally, as here, is all one as by further order of law. (*Q.*) 3ly. It was excepted, that the Court of Honour cannot commit for painting of arms, for it is a trade, which any man educated therein may lawfully use. But to that it was answered and resolved, that painter-stainers, as Parker here is, and not a herald-painter, though they may paint arms for ordinary uses, yet they cannot do it for great solemnities or funerals, without a licence; much less marshal or order the ceremonies of funerals, as here, without a licence; but therein they ought to be directed by the heralds; as for all noblemen

by garter king of arms; for all gentlemen on this side Trent by Clarenceux, and beyond Trent by Norroy. Whereupon Parker **[231]** seeing the opinion of the Court against him, submitted himself to Sir Edward Walker, Garter, and compounded with him for the misfeasance, and thereupon being brought up again at another day, he was discharged.

HAYWARD *against* CUNNINGTON.

Prescription for so many turfs as two men could dig in a day, as appurtenant to his house. S. C. 2 Keb. 290, 311. 1 Sid. 354.

Trespass for digging turfs, the defendant pleads that he is seized of an ancient house, and prescribes to have so many turfs every year as two men could dig in a day, as belonging to his messuage: the plaintiff demurs, for that it is not shewn that the turfs were to be burnt in his house, and all estovers are to be used in the house, and as it is laid here, they may be sold although he claims them as appurtenant to his house; and a case was cited, that a prescription for digging clay in another's soil to make pots, is void, which Kelynge Chief Justice remembered: but it was answered and resolved, that when the thing is uncertain as estovers, it ought to be applied to the house to ascertain it, but here it is certain enough in itself, viz. so much as two men could dig in a day; and for authorities were cited Rastal's Entries, 539, and 3 Cro. *Spooner* against *Day*. And judgment was given for the plaintiff.

WHEATLY *against* LANE.

[See S. C. 1 Wms. Saund. 216.]

Debt on a judgment against executors in the *detinet*, not shewing whether the judgment was of his own goods or the testator's. S. C. 1 Sid. 397. 1 Saund. 216. 2 Sid. 102. 2 Keb. 443, 431, 455. *Post*, 255. *Vide* 6 Mod. 125. 1 Mod. 188. 2 Lev. 40, 189.

Debt in the *detinet*, and declares on a judgment had by himself against the defendant, as administrator of Lane for 27*l.* damages *in assumpsit*, and 8*l.* costs, and does not shew how, *i.e.* if the damages or the costs were *de bonis propriis*, but generally *quod cum recuperasset* 27*l.* for damages, and 8*l.* for costs; whereupon the defendant demurred generally, and pretended that the declaration was insufficient; for if it was *de bonis suis propriis*, as it might be for the damages on *ne unque* administrator **[232]** or executor, then it ought to be in the *debet*, or if the costs are *de bonis propriis*, as they ought to be if he has not assets; for them it ought to be in the *debet:* but at the day the defendant did not appear to maintain his demurrer, whereupon judgment was given for the plaintiff. See 2 Cro. 545, 546, that it is good in the *detinet*, because it shall be assets when recovered, be it one way or the other. Levinz for the plaintiff.

BOIS *against* ROSWELL AND DICKINS IN CHANCERY.

A deed of trust to pay the profits to three in equal manner, and *to convey the inheritance* to them *in like sort*, makes a tenancy in common of the whole, so as in a will.

Dickins seized in fee, infeoffed Roswell in trust for himself for life, and afterwards to pay the profits to John, Robert and Nicholas Dickins, in ratable and equal manner; and also when they should come to the age of twenty-one years, in like sort to convey the premises to them and their heirs: John dies, leaving Susan, his sister and heir, in the life of the feoffor; Susan marries Bois, and has issue the plaintiff Bois, and dies: Nicholas dies without issue, leaving Robert his brother and heir; Bois exhibits his bill to have an account of the third part of the profits, and also to have the third part of the inheritance conveyed to him: Robert Dickins the defendant claims the whole: and the only question was, if this trust was a jointenancy, and so should survive wholly to Robert, or a tenancy in common, so that the third part should go to the heirs of John? And it was decreed by Bridgman Lord Keeper, assisted by the

Judges Rainsford and Moreton, that it was a tenancy in common; and that as well for the inheritance as for the profits, and as well in case of a deed of trust, as in a will; in both which the intent is to be considered, and the inheritance here was to be conveyed in like sort as the profits, and that was in a ratable and equal manner, which in a will would make a tenancy in common.

[233] HUGHES *against* HUGHES.

Ecclesiastical Court cannot bind an administrator to a distribution. S. C. Cart. 125. Raym. 499. Cro. Car. 101. Jo. 228. 1 Sid. 179. 3 Mod. 58. 1 Show. 25. *Q.* Stat. 22. 23 Car. 2, c. 10.

Prohibition on a suit in the Ecclesiastical Court, for obliging an administrator to a distribution; and upon long and solemn arguments, and hearing of civilians at large, it was resolved, that the Ecclesiastical Court could not oblige an administrator to a distribution, and that their bonds taken to that intent are void.

SIR WALTER FANE'S CASE.

Captain of the King's Guards not exempted from bearing the office of reeve. S. C. 1 Sid. 355. 2 Keb. 309.

He being a captain of the King's Guards, and being elected reeve in the lord's court of the manor of Rowton, to collect the lord's rents, &c. prayed a writ of privilege for his discharge; which Justice Twysden held, he ought to have in respect of the dignity of his office and his attendance upon the King; and that he could not make a deputy, no more than could a constable; and cited Hillary 9 Jac. 1, Rot. 249, B. R. *Phips and Winchcombe*, to be resolved, that a constable could not make a deputy, and 1 Cro. *Prowse's case*, an attorney shall be discharged from taking the office of constable, and much more a captain of the King's Guards: but the other justices to the contrary, a constable may appoint another to execute his place; and Justice Wyndham said, that he himself did so when he was elected constable of Taunton; where the custom is to elect constables by the houses, which custom he and Moreton held good, contrary to the opinion in *Prowse's case:* and the writ was denied; for this office is only a new office, and not time out of mind as an attorney is, and obliged to attend the Courts of Justice.

[234] FOOTE *against* BERKLY.

A term misrecited, and a new deed at the end thereof, to commence presently, though the whole latter term incurs during the first, and so of no effect, and the rent payable presently. S. C. 1 Sid. 460. 1 Vent. 83, 88. 2 Keb. 654, 611, 514, 480, 673.

Error of a judgment in the Common Pleas, where in an ejectment and special verdict the case was, the Prior of Bedenham seized in fee, demised the lands in question the 11th of October, 29 H. 1, to Monday for ninety-six years, and that it came to H. 1 by dissolution, and from him to Queen Elizabeth by discent, and that she the 22d of April, 32 Eliz. demised it to Monday for thirty years, from the end of the first term; and that the reversion descended to King Charles I. who settled it in jointure on his Queen Mary, and that she the 12th of May, 14 Car. 1, reciting, that Queen Elizabeth by letters patents, dated 22 April, 42 Eliz. had demised it to Monday for thirty years, she granted it to the defendant for twenty-one years from the end or determination of the estate granted to Monday by the said letters patents; and that afterwards she also granted it to the plaintiff, who brought the ejectment in the Common Pleas, and there had judgment to recover, by reason of a mistake in the recital of the lease to Monday, 22 April, 32 Eliz. for that being so mistaken, the lease of 12 May, 14 Car. 1, commenced presently upon the sealing and delivery, according to Co. Litt. 46 b. and *Miller and Johns* against *Manwaring*, 1 Cro. and Dyer 116. And of the same opinion were the whole Court here, after divers arguments by Jones,

Maynard and young Mr. Kelynge for the plaintiff in error, the land being of great value. And afterwards in Trinity 22 Car. 2, for till then it depended, the judgment was affirmed by the whole Court, being restrained by the words in the *habend'* of the end of the term granted to Monday, *by the letters patents aforesaid*, although the persons, the land, &c. are certain enough; and although the term granted to the defendant by this means is altogether void, for that it expired before the term to Monday, and so the whole would be otherwise fruitless and ineffectual, and yet he was obliged to pay his whole rent of **[235]** 60l. per annum for his whole term of twenty-one years, though he could never have the possession by virtue thereof: Monday's term continuing till beyond the said twenty-one years; and yet by the restrictive words *concessi per literas patentes præd'*, it is to commence from the sealing and delivery. But by Kelynge and Twisden, if he had misrecited Monday's lease, as he did, and then had granted the land, *habend'* for twenty-one years, after Monday's interest determined, it had been good for twenty-one years after Monday's lease ended, notwithstanding the foregoing misrecital.

OFFIY *against* WARDE.

Obligation to A. to the use of B. B. cannot sue or release it.

Debt on a single bill made to A. to the use of him and B. The defendant pleads a release made to him by B. On which the plaintiff demurs; and without difficulty, it was adjudged for the plaintiff, for B. is no party to the deed, and therefore can neither sue nor release it; but it is an equitable trust for him, and suable in the Chancery, if A. will not let him have part of the money; and the book of E. 4 cited, that he might release in such a case, denied to be law.

JONE NOELL *against* WELLS.

In what cases evidence may be given against the seal of the Ordinary.
S. C. 1 Sid. 359. 2 Keb. 357. Raym. 405.

Debt by the plaintiff, as executrix to her husband: the defendant pleads *never executrix:* and on a trial the plaintiff produced the probate of the will in evidence: the defendant said, that the will was not a true, but a forged will. And the Chief Justice, before whom it was tried, was of opinion, that he could not give such evidence directly contrary to the seal of the Ordinary in a matter within his jurisdiction, whereupon a case was made for the opinion of the Court, and a verdict taken for the plaintiff: but judgment to be staid, if the Court should be of opinion, that such evidence **[236]** might be given; and upon motion the whole Court held, that it could not be given. But evidence may be given, that the seal was forged or repealed, or that there were *bona notabilia;* for those confess and avoid the seal. But he cannot give in evidence that another was executor; or that the testator was *non compos mentis*, for those falsify the proceedings of the Ordinary in cases of which he is Judge. But those are to be remedied by appeal.

[237] TERMINO PASCHÆ, ANNO 20 CAR. II. IN BANCO REGIS.

EDMUNDS *against* BROWN AND TILLARD.

A corporation seal a bond, and particular persons sign it, the corporation is dissolved, the particular persons not chargeable. 1 Stra. 434. Show. 174. 3 Wils. 269.

Debt on an obligation of 500l. The defendant pleads *non est factum*, and on the evidence it appears, that the defendants were two of the principal of the Company of Woodmongers lately dissolved; and that the money was borrowed in the name of the company, and the obligation sealed in the company's name, and with their seal; and the defendants, as was usual, set their names to the obligation, but the obligation was, *noverint universi per præsentes nos Magistrum & Guardinos, &c. del Company de Woodmongers teneri, &c.* And the obligation was endorsed with *sigillat' & deliberat' in*

præsentia, &c. and attested. And now the company being dissolved, the plaintiff brought the action against the defendants, intending to charge them in their own right. But it was ruled by the Chief Justice at Nisi Prius at Guild-hall, that he could not so do, it being *ut supra;* whereupon the plaintiff was nonsuit.

JENKINS *against* KEYMES IN CHANCERY.

A consideration paid on one marriage, extends to the issue on another marriage. 1 Lev. 150, 237, 64. Ch. Cas. 103. 2 Wms. 599, *ante* 256. *Vide ante* 150, 151. Hard. 395.

Sir Nicholas Keymes being tenant for life, the remainder to his son Sir Charles in tail; they about the year 1641, in consideration of a marriage to be had between Sir Charles and Blanch Mansel, and 2500l. portion paid, levied a fine to the use of Sir Nicholas for life, the remainder to Sir Charles **[238]** and Blanch for their lives, the remainder to the heirs of the body of Sir Nicholas (Sir Charles) of the said Blanch begotten, the remainder to the heirs of the body of Sir Charles, with power for Sir Nicholas to charge the premisses with 2000l. Sir Nicholas and Sir Charles about the year 1642 joined in a lease and release to David Jenkins, the Welsh Judge, and his heirs, for 2000l. on condition of payment of 2000l. with interest some years after, to be void, and covenants, on default of payment, to make further assurance. And about the year 1643, by indenture, between Sir Nicholas of one part, and Sir John Awbry of the other part, Sir Nicholas reciting the power, it is said, in the indenture, that he charged the premisses with 2000l. for the payment of his debts; but it is not said, that he granted anything to Sir John Awbry, nor that he charged the lands to Sir John Awbry, or to any other person, but (only) that he charged them. Blanch afterwards dies without issue, Sir Charles marries another wife, by whom he had issue Sir Charles the defendant, and dies: David Jenkins dies, and leaves David Jenkins the plaintiff his heir and executor, who brought an ejectment in the Exchequer-Chamber; and on a special verdict it was adjudged, as before appears, that the lease and release was no good execution of the power at common law; and now he brought his bill in equity on these grounds, viz. 1st. That the consideration of the marriage of Blanch, and the 2500l. paid with her did not extend to the defendant, being an issue by the second venter, and so the estate in remainder, whereby he claimed, was voluntary. 2dly. That the father, tenant in tail, joining in the conveyance (who might by fine have barred the defendant) if his issue could not be obliged by his covenant for further assurance, to make that assurance good which his father had made. 3dly. If not, then though the power be not well executed as to the intent, yet whether it shall not be made good in equity as to the 2000l. And upon the bill and answer with this further, that Sir John Awbry having 500l. due to him, and suing here for relief, his bill was dismissed, Sir Nicholas only having sealed the deed, and no proof that Sir Charles assented thereto, which was now made appear; (*Q.*) and it also appeared that the defendant had paid other debts of Sir Nicholas due by bond to the value of 2000l. And now on the said points it was declared by the Lord Keeper Bridgman as to the *first*, The consideration of 2500l. **[239]** paid on the first marriage, should extend to the issue by the second venter; and as to the *second*, That the issue in tail was not bound by the covenant of his father to make that assurance good, which his father might have made good by a fine, although it was said, that it had been so done formerly, and that the Lord Chancellor Hyde was of that opinion: and as to the *third*, The Lord Keeper held, that Sir Nicholas and Sir Charles joining in the conveyance to Jenkins, and covenanting on default of payment to make further assurance, cannot be taken to be an execution of the power at all, but as a common mortgage; and although that the deed to Awbry was not a legal execution of the power, for default of a person to whom it should be charged, yet it being intended for an execution of the power, it shall be aided in equity before that to Jenkins, and that the defendants having, (tho' not executors) paid to the value of 2000l. in debts, may apply it in execution of the power to the discharge of the lands, being tertenants.

[240] TERM. SANCT. TRIN. ANNO 20 CAR. II. IN BANCO REGIS.

LAKE *against* KING.

[See S. C. 1 Wms. Saund. 120, 131.]

Printing and delivering copies of a petition to the Parliament, is no libel, though it tends to scandal. S. C. 1 Sid. 414. 1 Saund. 131. 2 Keb. 361, 462, 496, 649, 664, 801, 832. 1 Mod. 58. Hard. 470. 1 Danv. 196.

Case for printing a libel of him, and publishing and dispersing thereof to several persons, charging him with extortion in his office of vicar general to the Bishop of Lincoln; and the defendant pleads, that the plaintiff extorsively took of A. B. and C. and of other persons, several sums of money; whereupon he printed and preferred the petition to the Committee of Parliament for examination of grievances, and distributed printed copies thereof to several members of the committee, as he lawfully might, which is the same printing, &c. On which the plaintiff demurred, and took divers exceptions, viz. *First*, That he does not name all the persons of whom he took the money, but only of A. B. and C. and divers others: to which it was answered and resolved by Kelynge and Twysden only in Court, that the taking of the money is not made use of but only for inducing the justification of printing and publishing the petition, and so it need not mention all the persons of whom he took the money. *Secondly*, That the delivery of such a number of copies is an unnecessary publication of a scandal, and not justifiable: to which it was answered and resolved, that the delivery to several members of the committee who have the examination of such matters is justifiable, and is the common usage in such cases for information of the members of the committee. *Thirdly*, It was objected, that the *quæ est eadem* (*which is the same, &c.*) was not good without a traverse that he **[241]** delivered it to any others; to which it was answered and resolved, that the charge being general, *to divers persons*, and he justifying the delivery to the members of the committee, who are several persons, it is sufficient; but if the action had been for delivering of them to divers persons by name, and he justified the delivery to any (of them) by name, he ought to have traversed the rest. *Fourthly*, It was objected, that he could not justify the printing, for by that means the matter is published to printers and composers, which ought not to be, for the reading of a scandalous letter to another is a publication thereof; and so is the writing of a copy thereof. 9 Co. 59 b. *Lamb's case;* whereto it was answered and at length resolved, that the printing thereof with intent to deliver the copies to members of the committee is justifiable, but if he had delivered them to others, it would be otherwise; and the printing of them is not so great a publication as it would be to have so many of the copies transcribed by several clerks. A fifth objection was, that the publication is laid to be the first of November, and the justification is the second of November which is not good without traversing the first of November: and the whole matter being transitory, and the day not material, he ought to have justified on the same day, or to have traversed the first of November: to which it was answered, and at last resolved, that the plea (the day not being material) is good: and afterwards in Trinity 22 Car. 2, the matter was again argued at the Bar, and then Kelynge and Moreton inclined, that the printing was not justifiable, and that the committee ought not to be informed by printing or copies, but (only) *viva voce:* but afterwards in Michaelmas term following judgment was given for the defendant.

KING *against* STANDISH.

The Chancery by vacating a judgment given at Common Law, *q.* if within the Statute of Præmunire of 27 E. 3. S. C. 1 Sid. 263, 463, &c. 1 Mod. 59. Raym. 227. Hard. 120. 2 Keb. 662, 402.

Action on the statute 27 E. 3 of Præmunire, and declares, that in Easter term 18 Car. 2 he recovered 200l. debt in this Court against the defendant, and that afterwards the defendant exhibited his bill in Chancery, and obtained a decree for vacating of the judgment: the defendant demurs; and now it was argued by Bigland

for the defendant, that a suit in Chancery after a judgment is not within the statute. 1*st*, The **[242]** Chancery by English bill was not then *in esse*. Lambard's Jurisdiction of Courts. Anciently the King heard causes of equity on petition to himself, and sometimes by reference to the Chancellor; and the first statute which gave countenance to this Court, was the statute of 36 E. 3, 9, and such cases of equity were rarely in use till the time of E. 4, when they increased by occasion of uses. *Secondly*, That the Chancery is the King's Court, and therefore the King is not (by the statute) disinherited from suits there; but from foreign suits to foreign Courts he was. *Thirdly*, The statute appoints, that the offender shall appear before the King and his Council, or in the Chancery, and it is impertinent to put the party to appear in Chancery for suing in the Chancery; and the reason of making this and the other statutes against provisors, was to prevent the Pope from drawing the people to Rome; and where the statute says, *To Rome or other Courts*, that ought to be intended of Courts of like nature as Rome, as the Legantine Court of the Pope here. 29 E. 3, 20, *The Archbishop of York's case*. 5 E. 4, 6, *alibi* intended the Bishop's Court. See Twysden's Antiquities of the Church, that the reason of this statute was to disable the then Pope, being a French man, and the King having then war with France; and from this time the Peter-Pence were denied: and as to the opposite authorities, 2 Cro. 344, 345. Moor 838. 5 E. 4. 22 E. 4, 37. Co. Litt. Præmunire, *Throgmorton, and Finche's cases*, constant practice has been to the contrary ever since, throughout the whole reigns of Jac. 1, Car. 1, and Car. 2, and in 14 Jac. 1, this matter was referred by the King to all the Judges and his Council, and by them agreed, that the Chancery was not within the statute; and this is inrolled in the Chancery. Saunders on the other side cited for authorities to the contrary, the Parliament Roll, 13 R. 2, No. 30. 4 Inst. 82. Stat. 4 H. 4, c. 23, that judgments in the King's Court shall not be avoided, except by error or attaint. Stat. 31 H. 6, c. 2, in Rastal's Statutes at large, but not in Poulton, 22 E. 3, 37, *Finch and Throgmorton's case*, 4 Inst. 2 Cro. *supra*. 4 Inst. 20, the Articles against Cardinal Wolsey, 2 Inst. Articuli Cleri, c. 2. That the Ecclesiastical Courts are the King's Courts, and yet are within the statute; and although the Chancery was not (then) in the same use as now, yet now it is of equal mischief, and is another (kind of) Court than that where the judgment is given, 1 Roll. 381, and Dr. and Stud. lib. 1, c. 8. The Court **[243]** said little but inclined to adjourn it into the said Exchequer-Chamber; however it depended here till Trinity term, 22 Car. 2, when it was moved again, and Hale being then Chief Justice held, that this case was not within the statute, and so he said it would appear by the petition whereon the statute was founded. And so nothing further was done thereupon.

TURNER AND CARY *against* NEELE.

The original cause being within the admiral's jurisdiction, the consequent thereof shall be tried there also. S. C. 1 Sid. 367. 2 Keb. 360. Raym. 473. 1 Salk. 35. 6 Mod. 11, 79. 2 Show. 338. 1 Vent.

Prohibition, a man who had *letters of mark* in the late war with the Dutch, took an Ostender instead of a Dutch ship, and brought it into harbour, and libelled against her to have it condemned as a prize, and there is a sentence, that it was no prize; and now the Ostender libels in the Admiralty against the captor for damages, sustained by a hurt that the ship received in the port; and a prohibition was prayed, for that this suit was for a damage done in the port, for which an action lies at common law. But the prohibition was denied (after it had been twice moved and debated) because the original being a caption at sea, and the bringing into port, in order to have it condemned as prize, but a consequent thereof, not only the original, but also the consequents shall be tried there. See 3 Cro. 685. Roll. Abr. 530.

THE KING *against* JO. SEELLERS.

Upholsterer, barber and tailor are trades within statute 5 Eliz.
S. C. 1 Sid. 367. 2 Keb. 366.

Error of a judgment upon an indictment before the justices at the Quarter-Sessions for using the trade of an upholsterer, and assigned, that it was not a trade within the statute, and cited 2 Bulst. 186, the opinion of three Judges, and Calthrop's Courts and Customs of London, 48, 59. But the Court, viz. Kelynge, Twysden and Wyndham, held it a trade within the statute, and affirmed the judgment; and they said, that so had a barber and a tailor been resolved traders within the statute.

[244] DANVERS *against* THISTLETHWAITE.

[Referred, to *Moulis* v. *Owen* [1907], 1 K. B. 763.]

A watch and 100l. upon ticket won at play at the same time, and a bond given for the 100l. It is void, *q.* S. C. 1 Sid. 394.

Assumpsit in a feigned action directed out of Chancery, whether an obligation of 200l. for payment of 100l. won at play, was void or not; and on a special verdict found before Kelynge Chief Justice, the case was this; Danvers and Thistlethwayte played at dice, and Thistlethwayte won of Danvers a watch of 10l. value, which was presently delivered; and also 100l. for which the obligation in question was given: and whether the obligation was void by the statute of 16 Car. 2, c. 7, which says, *that if any person shall play and lose any sum of money, or other thing exceeding* 100*l. at one meeting, upon ticket or credit, or otherwise, and shall not then pay it; the party losing the money or other thing beyond the sum of* 100*l. shall not be compelled to make good the same; and that all obligations, &c. made for securing it shall be void*, was the question: and it was argued by Kelynge junior, that the obligation was good, for the statute does not restrain the playing for ready money, be the sum ever so great, but such gaming only as brings men into debt, and here is no more than 100l. lost in debt or on tickets, and the watch was as ready money; and if a man lose 500l. in ready money, and 100l. more upon tick, an obligation given for securing the 100l. is not void by the statute; and so held Kelynge Chief Justice, before that the verdict was found: but Jones argued to the contrary, that if above 100l. be lost at play, and part paid presently, and a bond given for the residue, the bond is void; and it is the same, where goods are so lost and delivered immediately, and 100l. more upon tick, for which bond is given, the bond is void: and to that Twysden and Wyndham inclined, and that this statute being made for suppressing of gaming and vice, should be taken as largely as might be; but it was adjourned: but afterwards in Hillary 20 & 21, it was moved again, and then judgment was given for the plaintiff by Kelynge and Twysden, being then of his opinion, Wyndham being dead, and Moreton holding to the contrary.

[245] FITZ-WILLIAMS *against* MORE.

Executor charged *in devastavit* shall find bail, executor found bail in an Inferior Court, and if the cause be removed, in the Superior Court also. S. C. 1 Sid. 368. 1 Keb. 295, 371. *Post*, 268, *contr.*

A *scire facias* against the defendant an administrator on a *devastavit* alledged, and judgment of his proper goods, on which he brought error: and by the whole Court he shall find bail, for he being here charged in his proper goods, it is not as in the case where an administrator is charged in the testator's goods; but here it is as in his own right, and not like to *Mildmay's case* in 2 Cro. nor to *Goldsmith and Platt's case* in 2 Cro. And by Twysden, an executor charged in an action as administrator on a *devastavit*, shall find bail, and so he said it had been adjudged; and if an executor finds bail in an Inferior Court, and is removed by *habeas corpus*, he shall find bail in the Superior Court: but *note*, the contrary was afterwards done in the case of *Castle and Willy*, hereafter, Trin. 23 Car. 2.

SKINNER *against* ANDREWS.

Debt on obligation, defendant pleads no award; plaintiff replies, that before exhibiting of the bill, viz. such a day, they made an award good. On issue no such award, proof may be that it is void. S. C. 1 Sid. 370. 2 Keb. 361, 388. 1 Saund. 169. *Ante* 241. 1 Saund. 118, 169, 170, 286, 287.

Debt on obligation conditioned to perform an award so that it be made before the 25th of March; the defendant pleads no award. The plaintiff replies, that before the exhibiting of the bill, viz. the 24th of March, the arbitrators made the award, and assigns a breach: on which the defendant demurs, for he ought to have pleaded, that before the 25th of March, viz. the 24th of March, he made the award; for the award might be made after the 25th of March, and yet before the exhibiting of the bill and the day is not traversable, for the award made any time after the submission before the 25th of March, was good, and nothing is here traversable but the 24th of March, and it also comes after the viz. which is never traversable; but if he had said, that before the 25th of March they had made the award, that had been traversable: and of that opinion was Kelynge, Chief Justice, and that the replication was therefore ill. The rest on the contrary held, that after the defendant has pleaded no award, he cannot have any plea which admits the award made, but that it was void in law, nor any other thing, but that *they made no such award;* and if on the evidence it does not **[246]** appear to be made before the 25th of March, the verdict shall be against the plaintiff. And they gave judgment for the plaintiff.

ALLEN *against* CUTLER.

Writs in B. R. are returnable on return-days, bills on a day certain. A *scire facias* on bail, not shewing the condition, is as a writ, but shewing the condition, is as a bill. S. C. 1 Keb. 396, 397.

A *scire facias* on a recognizance in bail on a writ of error, conditioned, if judgment be affirmed to pay the money, &c. The defendant pleads payment, but does not set forth any place where; on which the plaintiff demurred, and ruled for judgment for him for default of the venue. But then it was moved, that the writ being not returnable at a return-day, but a day certain, and not being grounded on any bill, or thing in nature of a bill, it ought to have been returnable at a return day. But if the *scire facias* had set forth the condition of the recognizance, then it had been in nature of a bill, and might be made returnable at a day certain; but here it is made use of wholly as a writ, and therefore it ought to be made returnable at a return-day; and so, as all the clerks said, was the constant usage, whereto the whole Court agreed, and stayed the judgment.

1923. 17 B. 279.
1923. 27 B.

[247] TERM. SANCT. TRIN. ANNO 20 CAR. II. IN BANCO REGIS.

COOPER *against* WITHAM.

[Followed, *Liverpool Adelphi Loan Association* v. *Fairhurst*, 1854, 9 Ex. 429. Referred to, *Osborn* v. *Gillett*, 1873, L. R. 8 Ex. 96.]

Case against the husband, for that the wife affirming her self to be sole, procured the plaintiff to marry her. S. C. 1 Sid. 375. 2 Keb. 399.

Case against the husband and wife, for that she being covert, affirmed her self to be sole, and requested the plaintiff to marry her, and lays it to be done maliciously, with intent to deceive him; whereupon he married her, whereby he was disturbed in conscience, and put to great charge by the husband. After a verdict for the plaintiff on (the issue) not guilty, it was moved in arrest of judgment, that the action does not lie; for the wife cannot by any contract or agreement charge the husband, and if he should be charged here, it would be by the wife's contract with the plaintiff to marry him; but for trespass or words she might charge the husband,

for that she may do without assent of the husband or any other; and if damage ensue thereupon, it ought to be recompensed by some body, and no other can do that but the husband. But this marriage could not be made without the assent and contract of the plaintiff (himself) and therefore it shall not charge the husband, and so held the Court, and gave judgment for the defendant: they also said, that this was felony in the wife, and Twysden said, that an action did not lie for the master for beating of his servant to death, for that he lost his service; for the party ought to be indicted for it, as is Yelv. 90. But see Latch 144, *Markham* against *Cobb*, Style 346, 347. *Dawes* against *Coveneigh*, that trespass lies for a felonious taking money after **[248]** the party has been convicted and burnt in the hand: also it was here said, that the wife had been pardoned of the felony, but that did not appear upon the record; and if she had, yet the fact sounding in contract, it seems that the action does not lie. Weston for the defendant.

PAYNE *against* BEUWMORRIS.

He has a bastard, spoken of a minister whereby he lost a chaplainship.
S. C. 1 Sid. 376. 2 Keb. 400. Nelson's Lutw. 334.

Case, for that the plaintiff being a minister free from unchastity, and agreed to be retained chaplain to the Duke of Ormond, the defendant did falsly and maliciously say of him, *He has a bastard on the other side the river, and it is so indubitable that I fear not to divulge it, and if I am troubled for it, I can justfy it*, whereby he lost the chaplainship to the Duke of Ormond; after verdict it was moved, that the chaplainship is spiritual: but the Court to the contrary, his preferment is temporal, like as a parsonage; and gave judgment for the plaintiff.

CLIPSAM *against* MORRIS.

A. indebted to the plaintiff, writes a note to the defendant to pay it, who in consideration the plaintiff would forbear a fortnight, promised to pay him. S. C. 1 Sid. 396. 1 Saund. 210. 1 Vent 9, 154. 1 Mod. 12.

Assumpsit, that whereas A. was indebted to the plaintiff, and wrote a note to the defendant to pay it to the plaintiff; the defendant on receipt of the note, promised to the plaintiff, that if he would accept of his promise for a fortnight, that he would pay it, and avers, that he tarried a fortnight; after verdict for the plaintiff it was moved in arrest of judgment, that it was no consideration, for the defendant is not the debtor, nor was the said A. obliged to stay a fortnight, whereto Twysden on the first motion inclined: but Kelynge and Moreton on the contrary held, that it did amount to an agreement generally to forbear, not only for the plaintiff, but also for A. for a fortnight: but afterwards in Hillary following it being moved again, and a case between *Newcomb and Lee* in Easter term 1650, Rot. 62, in B. R. being cited to be the very case in point, the whole Court held it to be no consideration, and gave judgment for the defendant.

[249] BARNS *against* HUGHS.

Debt lies at Westminster on a penal statute, but an indictment or information in the proper county only. S. C. 1 Vent. 8, 364. 2 Keb. 401, 424, 447, 458.

Debt on the statute of 5 Eliz. brought in the King's Bench, for using the trade of a grocer at Salisbury, and sent and tried by Nisi Prius at Salisbury: and after verdict for the plaintiff on *nil debet*, it was moved in arrest of judgment, that the action did not lie in this Court, but ought to have been brought and tried wholly in the proper county, by the statute 23 Car. 1. And for this were cited Hillary 23 Car. 1, B. R. Rot. 611. Mich. 13 Car. 1, B. R. *Brethurgle* against *Hascall*, & Mich. 1654, *Child* against *Bull*, and Trin. 1652, Rot. 1377, *Bunton* against *Shalate*. But on the other side it was said, that the action of debt did not lie at the sessions or Assizes in the country; and the stat. 5 Eliz. gives the recovery by action of debt, as well by indictment

or information; and the statute 21 Jac. 1 does not concern the statute of 5 Eliz. in any part; and therefore the statute of 21 Jac. 1 is to be taken by referring particulars to particulars, viz. *by indictment* or *information* (which will lie there) *in the proper county, but for actions of debt* (which will not lie in the proper county) *in the Superior Courts*, where it will lie; and for this were cited 1 Cro. *Farrington* against *Keymer*, and *ibid. Green* against *Gray*, Latch 192. 1 Roll. Abr. 537, Trin. 1653, B. R. *Hodges's case*. And if it should not be so, there might be a failure of justice; as if the party offends against the statute in one county, and goes and lives in another county, and the information or indictment is laid in the proper county, for there the party cannot be brought in to plead: but for debt in the Superior Court he may be brought in hither out of any county, and the issue is to be tried by Nisi Prius in the proper county. And of that opinion were all the Judges, viz. Kelynge Twysden and Moreton, Wyndham being dead; and after the case had been twice argued at the Bar, they gave judgment for the plaintiff in Hillary term next following; and they said, that the statute of 21 Jac. 1 was not made to oust actions of debt on penal statutes, but to give such remedies for them in the proper county as may be had there: but afterwards in Mich. 29 Car. 2 the **[250]** contrary opinion was held in the King's Bench, between *Clapp and Edgecombe*, which you may see hereafter.

GAUDY *against* SMITH.

You commit sacrilege every day, not actionable. S. C. 1 Sid. 376. 2 Keb. 400, 430.

Case for these words, *You are a sacrilegious person, and commit sacrilege every day:* after verdict upon not guilty, it was moved in arrest of judgment, that the words are not actionable, for sacrilege may be either by a felonious stealing of goods of the Church, which is felony, or by detaining of tithes, obligations, or other Ecclesiastical duties, which is not felony; and it being said to be done every day, it must be intended to be spoken in the last sense, for it shall not be intended that a man commits felony every day, and so, after two motions, held the Court, and gave judgment for the defendant, although the words were laid to be spoken maliciously, and to cause him to be brought in question for his life.

SMEDLY *against* HEATH.

Cheating knave, of a mercer, not speaking of his trade, not actionable. S. C. Raym. 169. 2 Keb. 404. *Vide* 1 Sid. 433.

Case for saying of him, being a mercer, *He is a cheating knave and rogue.* After verdict for the plaintiff judgment was stayed, for that the *colloquium* was laid to be of him; but not of his trade.

FREVIN AND HIS WIFE *against* PAYNTON.

Administrator shall sue the lessee in possession in the *detinet* only, for the rent. S. C. 1 Sid. 224, 379. 2 Keb. 407. But an administrator shall be sued in the *debet & detinet.*

Debt as administrator against the defendant lessee for years, for rent, and counts of a lease made to the intestate, and that he being possessed, demised to the defendant rendering rent, and brought the action in the *debet & detinet;* the defendant pleads; that the intestate before the lease to him had assigned his term; and traverses, that the intestate was possessed when he demised to the defendant; issue thereupon, and verdict for the plaintiff: and it was moved in arrest of judgment, that the declaration by the administrator in the *debet & detinet* does not lie; for although in debt against the administrator he shall be charged in the *debet & detinet;* as *Hargrave's case*, 5 Co. 31 **[251]** is, in respect of his possession; yet in debt by the administrator, of one who had a term, and made a lease, and the reversion comes to the administrator he shall sue debt for the rent in the *detinet* only, because all that he recovers shall be assets.

But where an executor is sued, he in respect of the possession and profits of the land taken by himself shall be charged of his own goods, and so held the Court, that the declaration was not good; but it is cured after verdict, by the Statute of Jeofails made at Oxford. Levinz counsel with the defendant.

DALTON *against* SUDDE.

I am no traitor, I have seen you in rebellion. S. C. 1 Sid. 381. 2 Keb. 411.

Case for saying of him, being a burgess of Parliament, and a justice of peace, *You are a scurvy fellow; I am no traitor, I have seen you in rebellion:* after verdict for the plaintiff, it was moved in arrest of judgment, that the words are not actionable; that *I am no traitor* are not, because negative, and not spoken of the plaintiff: and *I have seen you in rebellion*, are not, for *rebel* is not. Cro. Eliz. 621, 638, 878. For it may be understood of a commission of rebellion out of Chancery: also, they are spoken of times past, and perhaps a general pardon has been since he was in rebellion, if it shall be so intended. See Hob. *Cuddington* against *Wilkins:* but judgment was given for the plaintiff; for by the opposition of the words, *I am no traytor, I have seen you in rebellion*, it cannot be intended but of a traiterous rebellion; and tho' they are not spoken positively, that the plaintiff had been a traitor, or had been in a traiterous rebellion: yet by the connexion and intention of the words, the by-standers cannot intend any other thing, but that he supposed the plaintiff had been in a traiterous rebellion; and if any pardon had been afterwards, the defendant ought to have shewn it in pleading, as was done in *Cuddington and Wilkins's case*, else the Court will not intend it. Levinz for the defendant, Bigland for the plaintiff.

[252] CRISPE *against* MAYOR AND COMMONALTY OF BERWICK UPON TWEED.

Covenant to repair a house in Berwick, tried in Northumberland.

Covenant, on a covenant supposed by the declaration to be made at York, for enjoyment of lands in Berwick, and issue, that he did enjoy. The plaintiff suggests, that Berwick is in Scotland, and that Belford in Northumberland is the next English vill; and prayed a *venire facias* from Belford, and had it, and the issue was tried in Northumberland, of the neighbourhood of Belford, and a verdict for the plaintiff. And now it was moved in arrest of judgment, that Berwick is in Scotland, and ruled by the laws of Scotland; and facts done there are not triable by the laws of England, whereto it was answered, if it should not be so tried, there would be a failure of justice: for, 1. The Mayor and Commonalty of Berwick cannot be sued in Berwick, for then they would be Judges and parties. 2. A fact done in England shall be tried in and by the laws of England, and not by the laws of Scotland. They also cited 19 H. 6, 12, that so it was of things in Wales, before the union of Wales to England by the stat. H. 8, and that the case Hill. 41 Eliz. Rot. 630, between *Shepherdson and Chambers* did not pass *sub silentio*, as was objected: but to this was objected, that there the deed was laid to be made at Belford, and the trial was of Belford. Whereupon the Court inclined, that if it might be tried in England, it ought to be tried at York, where the deed is laid to be made, and not at Belford; and it was adjourned. And afterwards in Hill. 21 & 22 the case was argued again, and 3 Cro. 465 was cited, that so it was of Wales and Ireland at the common law; and Mr. Livesay, the Secondary said, that he remembered such a case of Berwick so adjudged and affirmed in error; but it was further objected, that one of the plaintiffs was dead after the verdict, and before the day *in Bank;* to which it was answered, that no continuances being entered, the judgment may now be entered as at the day *in Bank*, without any continuances; and Livesay, the Secondary said, that so it had been frequently done, as well in case of the death of the plaintiff, as of the defendant, [253] and so the Court inclined to do; but it was further adjourned, and afterwards, as I heard, judgment was given for the plaintiff.

BISHOP *against* CORBET.

Debt for tithes, if it lies in the County Court. No prohibition to Inferior Courts without a suggestion.

A prohibition was prayed to the County-Court, for staying a suit there, in debt for tithes on a *justicies*, for that it is not *debitum ex contractu*, but *ex delicto*, founded on a statute, whereof the sheriff has no power to hold plea; and the *justicies* does not enlarge his jurisdiction to other actions, but only enables him to hold pleas of greater sums than by his ordinary jurisdiction he could: and it was further moved, that the prohibition in this case is grantable, without a suggestion entered, because it is in nature of a *supersedeas;* which the Court denied; but they held this to be a case very considerable, and therefore directed a suggestion and a declaration thereupon, that the defendant might plead or demur thereto, so that the case might come judicially before the Court.

SIR HENRY NORTH *against* COX, COM' BANCO.

Prescription to have the sole pasture of a close the whole year.

Trespass by the lord of a manor: the defendant prescribes as tenant to have the sole pasture of a close, *omni tempore anni;* and the Court was divided in opinion, whether this prescription, to have the sole pasture of a close of the lord *omni tempore anni*, was good? Wylde and Archer held it good. Vaughan, Chief Justice, and Tyrrel to the contrary; and it was intended to be adjourned into the Exchequer-Chamber, but it was not. See the case in Vaughan's Rep. 251. And afterwards the same case was brought in the King's Bench, and the prescription there adjudged good.

[254] SIR JOHN LENTHALL *against* COOKE.

Marshal of the King's Bench is within the stat. 23 H. 6, yet may take an obligation for better security, and traverse the ease and favour. S. C. 1 Sid. 389. 1 Saund. 161. 1 Vent. 237. 1 Keb. 422.

Debt on obligation of 3000l. conditioned, that if Algernon Payton, a prisoner in the King's Bench, remains a true prisoner, without making any escape, that the obligation should be void; the defendant pleads the stat. 23 H. 6, and that Payton was a prisoner in execution, and the obligation made for ease and favour; on which the defendant demurs; and it was argued, that prisoners in execution ought to be kept in safe and streight custody, and an obligation for giving them liberty is void at the common law, Plowd. 64 b. and 10 Co. *Beaufage's case;* also, the marshal of the King's Bench is within the stat. 9 Co. 104 b. And the traversing of the ease and favour was immaterial, for it cannot be intended to be taken for any other thing, and the traverse ought to be, that he took it *colore officii:* but to this it was answered and resolved, that the traverse of the ease and favour is the most material thing, and it may well be intended to be taken for the better security of his imprisonment. For the prisoners of the King's Bench are so numerous, that the house cannot hold them, but they are permitted to lodge within the rules, and therefore there is good reason to take security for their true imprisonment, and constant usage has been to take such obligations; and Hill. 19 Jac. 1, B. R. Rot. 1202, was produced in Court, where in the like case an issue was taken on a traverse of the ease and favour; and thereupon verdict and judgment for the plaintiff: but by the demurrer here, the defendant had confessed the traverse, and (admitted) that it was not for ease and favour; and therefore judgment was given for the plaintiff.

[255] SUAGTER AND HIS WIFE *against* DAVIES.

Witch, I will hang you for it, is actionable. S. C. 1 Sid. 386. 2 Keb. 430. *Vide* 3 Lev. 166, 394, 395, &c. *ibid.*

Case for saying of the plaintiff's wife, *You are a witch, and I will swear it; and if you cross me too much, I will hang you for it:* after verdict for the plaintiff it was moved in arrest of judgment, that *witch* is not actionable, without saying that she had bewitched some person; for else it is not felony by the statute. But by the Court, although that the word *witch* alone is not actionable for the reason aforesaid; yet when it is further said, *and I will hang you for it*, that shews what *witch* he intends, viz. such a one as had by her witchcraft committed felony. And judgment was for the plaintiff.

SHEAPE *against* CULPEPER.

In replevin, the jury not inquiring of the value of the rent arrear, it cannot be supplied by a writ of inquiry. S. C. 1 Sid. 380. 1 Vent. 40. Raym. 170. 2 Keb. 409, 431, 536. Bull. N. P. 58.

In replevin, an avowry was for rent granted by J. S. On issue *non concessit*, the jury inquire of the value of the cattle, but do not inquire what rent was arrear, so as the beasts may be sold to satisfy it according to the new statute. Car. 2, cap. And now it was moved to have it supplied by a writ of inquiry, as was done in *Specott's case* in 5 Co. in a *quare impedit*. (But by) the Court, he may have his judgment (there) according to the common law; but the words of the statute in this case being, *That it shall be inquired by the same jury which tries the issue*, they doubted if it might be supplied by a writ of inquiry, but it being a new case they would advise. And afterwards in Trinity term 21 Car. 2 it was resolved after several debates, that it cannot be supplied by a writ of inquiry.

WHEATELY *against* LANE.

Executor charged in *debet & detinet* on a *devastavit*. S. C. 1 Saund. 216. 1 Sid. 397. 2 Keb. 544, &c. *Ante* 231, 232.

Debt in the *debet & detinet*, on a judgment against an executor, and counts, that he had wasted divers goods to the value of the debt, but does not shew the certainty of the goods **[256]** wasted. The defendant demurs on the declaration, and it was argued, that this action lies not in the *debet*, for if so, he shall, (may) charge the executor of an executor, which cannot be, because it is only a personal tort; and 9 H. 6, 9. 3 Cro. 530. 11 H. 4, 56, were cited as authorities for the defendant: to which it was answered, that this is more than a personal tort, for he is charged here with the having of goods and converting them to his own use: the executors of a sheriff shall not be charged for an escape; but if the sheriff levies the money and detains it, his executors shall be charged for it. 1 Cro. *Parkinson* against *Guildford*, and as to the case 11 H. 4 there is no *devastavit* laid. But to maintain this action were cited 11 H. 6, 7, 8, 16, 17, 18, where on a *devastavit* the executor is chargeable in the *debet & detinet*, held by Strange, Paston and Rabington. And in Mich. 1655, B. R. Rot. 711, between *Cory and Thinne* it was so adjudged; and so, as was said, had been *Medgly's case* in the Common Pleas before that adjudged; and *Harewell and Ellis's case* in B. R. Rot. 546, Pasch. 15 Car. 2. And of such opinion were the whole Court, and gave judgment for the plaintiff, Pemberton for the defendant.

ANONYMOUS.

Execution to Chester, out of the King's Bench. *Post.* 291.

It was moved to have restitution of goods, levied by a *fieri facias* out of this Court in the County-Palatine of Chester, on a judgment originally had in this Court; for that on such a judgment here no *fieri facias* lies to a County-Palatine, 21 H. 8, 35.

But where a judgment is removed hither for error, and here affirmed, execution may issue out of this Court. But the Court denied the motion, and held, that execution may well issue out of this Court to the County-Palatine, on a judgment originally given in this Court.

[257] BOLTON *against* FENNE.

Assumpsit by a treasurer of the Navy's clerk, that if he would not trouble his master for the payment of tickets, &c. (whereof the plaintiff was possessed) that he would pay them, a good consideration. S. C. 1 Sid. 392. 2 Keb. 437. 1 Danv. 61.

Assumpsit and declares, that whereas the plaintiff was possessed of several tickets for seamens wages due to them, and had solicited Sir George Carteret, Treasurer of the Navy for the payment of them, who had ordered the defendant his clerk to pay them; the defendant on the plaintiff's requesting him to pay them, in consideration that the plaintiff would no further trouble Sir George Carteret for the payment of them, did assume (*i.e.*) promise to pay them to the plaintiff. After verdict for the plaintiff on *non assumpsit*, it was moved in arrest of judgment, that here is not any consideration. *First*, For that it does not appear, that the plaintiff had any interest in the money, nor authority to receive it; for he does not shew any assignment of the bills, nor letter of attorney or other authority for the plaintiff to receive it. *Secondly*, That though she would no further trouble Sir George, yet the owners of the money may do it. But by the Court, after a verdict it shall be intended, that the plaintiff either had an interest in the bills by assignment, or authority from the seamen to receive the money, and that the defendant was ordered by Sir George to pay them; and that the intent of this promise and forbearance was no other but that the plaintiff should go no more to Sir George for the money, and thereby discover that the defendant had not paid it according to Sir George's order.

THE KING *against* TWISLETON AND OTHERS.

Information for seducing an heiress to marry him. S. C. 1 Sid. 387. 2 Keb. 432, 438.

Information, for that the defendants using to come and to be entertained at the house of another, Twisleton seduced his daughter, being his heir apparent to a great estate, to marry him; and that the defendants Twisleton, and the others, without the father's assent, carried the daughter from her father's house, and the defendant Twisleton married her: and on a trial at Bar it appeared in evidence, that the defendant Twisleton being a remote kinsman, and of small fortune, and being frequently entertained at the father's house, made love to the daughter; but **[258]** no proof was of any seducements, but common compliments among young people; and it was offered in evidence, that the encouragement to this affair proceeded from the daughter, whom the father intended to marry to another kinsman of his own name, of a more considerable estate, whom the daughter did not love so well: and that the daughter by agreement between her and the defendants, went from her father's house to a place appointed, and there met the defendants, and was married to the defendant Twisleton; whereupon the Court directed the jury, that the daughter being of tender years, viz. about sixteen, and a great fortune, this was an offence in the defendants within the information, and that they ought to find them guilty, which they indeed did, but it seemed with some doubt: and afterwards, before any fine imposed, the parties agreed.

[259] TERM. SANCT. HILL. ANNO 20 & 21 CAR. II. IN BANCO REGIS.

THURSBY *against* PLANT.

[See S. C. 1 Wms. Saund. 230, 237.]

Assignee of a reversion shall have covenant against the lessee where the lease was made, otherwise of debt. S. C. 1 Sid. 401. 1 Saund. 230, 237. 1 Vent. 10. 2 Keb. 439, 448, 463. 2 Danv. 241, 242.

Covenant, and declares, that the Earl of Lincoln was seized of lands in Lincolnshire; and at London made a lease rendering rent, and that the tenant covenanted

to pay the rent, and that afterwards the earl granted the reversion to the plaintiff, and for non-payment of the rent the action was brought and laid in London. The defendant pleads a surrender, on which issue was, and a verdict for the plaintiff; and it was moved in arrest of judgment, that the action being brought by the assignee of the reversion ought to be laid in Lincolnshire, where the land lies, (upon the privity of the estate and not at London, upon the privity of contract) where the lease was made, and cited 1 Cro. *Board* against *Cudmore;* debt for rent ought to be brought by the assignee in the county where the land lies, on the privity of estate: to which it was answered and resolved by the whole Court, that debt is maintainable only upon the privity of estate, and goes with the reversion at common law, and that an assignee could maintain it before the statute upon the privity of estate, and perception of the profits; but covenant did not go to the assignee before the statute, because it lies only on the privity of contract; and though now by the statute the covenant passes to the assignee, yet the nature thereof is not altered by the statute, but it is assignable only as a contract, and therefore ought to be brought where the **[260]** contract was made; and there is a great difference between debt for the rent which arises out of the profits of the land, and covenant which is a collateral thing, on which only damages are to be recovered. 2 Cro. *Batchellor* against *Gage.* Covenant lies against the lessee after assignment of the term, and acceptance of the rent from the assignee; but debt does not lie. 2 Cro. *Brett* against *Cumberland,* and Hill. 15 Car. 2, B. R. Rot. 1258. That covenant lies on the privity of contract after assignment; whereupon judgment was given here for the plaintiff by the whole Court, on which the defendant brought a writ of error. But as I heard the parties agreed. Jones for the plaintiff, Sanders for the defendant.

SIR THEOPHILUS BIDDOLPH *against* TEMPLE.

Debt on a judgment in covenant for the damages recovered, and judgment, and in error on the judgment in debt, bail, on the stat. 3 Jac. 12. *Ante* 245, 255. *Post,* 268.

Debt on an obligation for performance of covenants, and a breach assigned, issue, and damages, and judgment for the plaintiff, and debt brought on that judgment, and judgment by default; and error being brought of this last judgment, the question was, whether the plaintiff in the error should find bail on the stat. 3 Jac. 1? For it was agreed, not to be within the stat. of 13 Car. 2. And it was objected, that the original of this action being founded upon covenant, was not within any of the words of the stat. of 3 Jac. 1, which mentions actions of debt for payment of money only, or for rent or contract for money, and that this is none of them; and hereto Twysden inclined. But by Kelynge and Moreton, this last action on which the error is brought was for money only recovered by the first judgment, and within the words, *contracts for money;* and ruled, that bail should be found. See Mich. 29 Car. 2, B. R. *Taylor* against *Baker,* judgment in debt on an obligation for payment of money, and debt brought upon that judgment, and another judgment thereupon; and in error on the latter judgment it was doubted, whether bail should be found.

[261] BARNES *against* BRUDDEL.

She had a child, whereby she lost the favour of her parents, not actionable. S. C. 1 Vent. 4. 2 Keb. 451. 1 Sid. 396.

Case for saying of her, being a virgin of good fame, *She was with child by Simons;* whereby she was in her parents displeasure, and in danger of being put out of their house; afterwards judgment was stayed, for that the words are not actionable, there being no loss of marriage, which was the sole reason of *Anne Davies's case:* and the case in 1 Roll. 35. An action for saying, *She was with child,* whereby she lost the society of her neighbours, held not to be law; but that 3 Cro. 639, *She had a child, and if she have not a child she has made it away,* may be law, because it imports felony.

But *note,* in that case loss of marriage is laid also.

PARKER *against* AMYS, &c.

Debt against two executors, they plead a judgment against one as administrator, and well. S. C. 1 Sid. 404.

Debt against two as executors; they plead a judgment against one of them as administrator: the plaintiff demurs; and it was objected, 1. Because the action and judgment is against him as administrator, which he could have avoided by pleading in abatement, that he was executor. 2. That was only against one, which does not lie without the others; to which it was answered and resolved, that the judgment is well pleadable in bar; and as to the first was cited 3 Cro. 646, adjudged in point, and the case of *Wheatly and Lane* in this Court, *ant.* 231, 255. And as to the 2d point, 3 Cro. 437. And although the action was not well brought, yet the defendant was not obliged to plead in abatement, and put himself to greater charge, for as much as there was a true debt due, and a recovery had upon the right of the debt.

[262] WILMOTT *against* NIXON.

Case against a foreigner, for using a trade in a market-town, whereby the plaintiff, a freeman, had less trade. S. C. 2 Keb. 464. Cro. Eliz. 392. N. Lutw. 528.

Case, that whereas in Derby there is a custom, that every butcher in Derby having served an apprenticeship for seven years, might use that trade without damages of another, or from another; that the defendant not being a freeman nor having served an apprenticeship, sold flesh in Derby such a day, not being a market-day, whereby the plaintiff could not sell so much as otherwise he might, to his damage, &c. The defendant demurs: 1st. Because the custom is not laid positively in fact, that he did use; but only potentially, that he might use 22 E. 4. 2dly. There is no by-law to restrain foreigners from selling; and without a custom or by-law, any foreigner may sell in market-towns, except on the market-days. 3dly. That he sold flesh, is not sufficient; for it may be a horse, or a dog: and upon these exceptions judgment was given for the defendant.

FORTH *against* STANTON.

[See S. C. 1 Wms. Saund. 210.]

A stranger promises a creditor, if he will accept him for his debtor, to pay, &c. S. C. 2 Keb. 465. 1 Saund. 210. 1 Jo. 87.

Assumpsit, for that the defendant's testator being indebted to a stranger, who assigned the debt to the plaintiff, and authorised him to receive it; the defendant being the executor, promised the plaintiff, that in consideration he would accept him for his debtor, to pay it to the plaintiff: and upon demurrer it was adjudged for the defendant. For here is no consideration of forbearance, but to accept him for his debtor, which he is not; for he is still debtor to the first creditor: and the authority to receive it is determined by the death of the testator, and differenced it from *Russel and Haddock's case ante*, where he who had the authority to receive the debt before.

[263] JORY *against* PAWLY.

A copyholder convicted of felony has clergy. *Q.* If a forfeiture of the copyhold. S. C. 2 Keb. 451, 466. *Vide ante* 63.

Ejectment, and on not guilty and a special verdict the case was: a copyholder of inheritance is convicted of felony, and has clergy allowed before attainder; and if this be a forfeiture of his estate, so that the lord may enter without a special custom: and it was argued, that it is, for it is a determination of the will. 5 Co. *Oland's case*, 4 Co. *Brown's case*. 1 Leon. 1. A copyhold is forfeited by the committing of felony, 1 Bulst. 13. A copyholder convicted of felony is disabled to be of a jury, and so he

cannot do his service to the lord. But on the other side it was said, that a conviction does not disable from serving on a jury; and so inclined the Court; and as to the case in 1 Leon. there is a custom found, which is not so here; and the Court inclined strongly, that it is not any forfeiture without a special custom: but on the importunity of counsel it was appointed to be argued again at Bar the next term.

SALMON *against* SMITH.

Debt on a lease of four acres; the defendant pleads that the lease was of five acres, and an entry in the fifth, he ought to traverse the lease of the four acres only. S. C. 2 Keb. 467. 1 Saund. 206. 1 Sid. 405. Raym. 175.

Debt for rent, and declares on a lease of four acres of land, at 5l. rent, and for rent arrear he brought the action: the defendant pleads to part *nil debet*, and to the residue he pleads, that the lease was of the said four acres, and of one acre more; and that before the rent was arrear the plaintiff entered into the fifth acre: on which the plaintiff demurs; and the reason shewn on the argument was, for that he did not traverse, that he demised the four acres only: but on the other side it was said for the defendant, that the traverse ought to have come on the plaintiff's part, viz. he ought in his replication to have maintained the lease in the declaration, and have traversed, that he demised the fifth acre to **[264]** which it was answered, that that would be a departure from his declaration, and therefore the traverse ought to be on the defendant's part; for when he pleads another lease than that upon which the plaintiff declared, he ought to traverse the lease on which the plaintiff declared, viz. to plead the lease of the fifth acre, *absque hoc* that he demised the four acres only: and so held the Court, and gave judgment for the plaintiff.

[265] TERMINO PASCHÆ, ANNO 21 CAR. II. IN BANCO REGIS.

MAN *against* COOPER.

Act of Parliament to continue three years and to the end of the next sessions, shall continue till the end of the next session which begins after the three years. S. C. 2 Keb. 495.

Assumpsit for money received to his use, and verdict and judgment for the plaintiff; and thereupon error brought, and it was moved to have it allowed without bail, for the statute 17 Car. 2, which appoints bail in this case, was only to endure for three years, and to the end of the next session of Parliament; and that the next session after the three years, ended the first of March, 21 Car. 2. But by the Court, although that this last session ended the first of March, 21 Car. 2, and that was after the three years, yet that sessions commenced within the three years, and the statute is to be intended of a session which commenced after the three years ended afterwards; and not of a sessions which commenced within the three years, and ended after the three years. And so it was resolved in the Common Pleas this very term, as Lockhaut the Prothonotary informed me.

STONE'S CASE.

Attorney. Copyholder, privileged from being reeve by custom. S. C. 1 Ven. 16, 29. 2 Keb. 486, 491, 508. Kaym. 179. *Vide ante* 233.

A writ of privilege was granted for exempting him from being reeve to the lord of the manor of Harrow on the Hill, to collect the lord's rents there, he being an attorney of this Court; and though it was objected, that **[266]** he was a copyholder, and was by custom to serve, as a thing incident to his estate, created by the same custom, and also said, that he may execute it by deputy; yet the Court granted the writ: for as to the first it was said, that the privilege of this Court is as ancient as the custom of any manor; and as to the second, he is responsible for his deputy.

[267] TERM. SANCT. TRIN. ANNO 21 CAR. II. IN BANCO REGIS.

JURADO *against* GREGORY.

Suit here for executing a sentence in the Admiralty of Spain, for a thing done upon the land. S. C. 1 Vent. 32. 1 Sid. 418. 2 Keb. 511, 610.

A prohibition was prayed to the Admiralty on a suggestion, that the contract was made on land at Malaga in Spain, to receive merchandizes on board a ship there, and to carry them to another place: to which it was said, that though the contract was so made, yet there was a sentence on a suit in the Admiralty in Spain, and the suit here is no more than to execute that sentence here, and in such a case no prohibition lies; and cited 1 Roll. Abr. tit. Courts, sect. Admiralty, to be in point; and to that the Court inclined: but then it was said, that the sentence there was not peremptory and final to pay any thing for the non-performance, but only interlocutory, that he should receive and carry the goods according to the agreement; but here the suit is for damages for not receiving and carrying, for which an action on the case lies: whereupon it was ruled, that the plaintiff should declare on the suggestion, so that on pleading the matter might come judicially in question.

[268] CASTLE *against* WILLER EXECUTOR OF WILLER.

An executor finds bail in Inferior Court, the cause being removed he shall not find bail above: see the contrary held by Twysden, *ante* 245, *Fitz-Williams* against *More*. S. C. 1 Sid. 418. 2 Keb. 512.

The defendant was sued in the Palace-Court as executor, and was there compelled to find bail according to the course of that Court; he removes the cause by *habeas corpus*, and now the question was, whether he should find special bail here? And resolved, he should not: for tho' it be generally used, that when a cause is removed by *habeas corpus* to find bail in all cases where bail is found in the Inferior Court, yet this shall not extend to the case of an executor, where the cause did not require special bail by the course of the Court, except in the case of a *devastavit*. But in other cases where special bail is found below it shall be found here, altho' the cause of action be of a less sum, than, by the course of this Court, special bail is to be found.

POTTER *against* NORTH.

[See S. C. 1 Wms. Saund. 347, 350.]

Prescription for the sole pasture for all the year. S. C. *ante*, 253. 1 Vent. 383. 1 Saund. 350. 2 Keb. 513, 517. Vaugh. 251. Cart. 199.

In replevin the defendant makes conuzance as bailiff of Sir Henry North, for damage feasant in his freehold in Delf, parcel of a great farm within his manor of D. The plaintiff in bar of the conusance said, that there are divers freeehold and copyhold tenements within the manor, and that he is seized of a freehold tenement there; and that he, and the other freeholders, and all those whose estates they have, time out of mind, &c. together with the copyholders, have had *solam & separalem pasturam* of the said place, *omni anno omni tempore anni;* and then he pleads a custom, that the copyholders, together with the freeholders, time whereof, &c. have had *solam & separalem pasturam omni anno omni tempore anni, &c.* on which plea in bar the plaintiff demurs generally: and *first*, Exceptions were taken to the pleading, viz. 1. The prescription in himself, and all the freeholders, is not good, for each ought to prescribe for himself, and not for himself, and all the other freeholders. 2. **[269]** He prescribes for himself, and all the freeholders, together with the copy-holders; and yet he lays a custom for the copyholders, together with the freeholders, and so mixes a prescription and a custom together, which cannot be; for the one is laid in the person, and the other in the place. But he ought to have said, that he, and all those whose estate he has, together with the freeholders, and copyholders, time out of

mind, &c. have had, &c. But the Court over-ruled the exceptions, on a case between *Kettleborough and Wells*, Trin. 1654, Rot. 549, where such pleading was adjudged good. And (then) as to the matter, it was argued, that the prescription to have *solam pasturam*, and exclude the lord, is not good; for which purpose were cited Fitz. Prescription 51. Hut. 45. Co. Lit. 122. Yelv. 129. 2 Cro. 208. Yelv. 187. 2 Cro. 256, from whence they inferred, that the tenants might prescribe to have part of the profits for part of the year; but here it is to exclude the lord from all the profits, and is like a custom, to have all the common, and exclude the lord. But to this it was answered, and resolved, that this is not to exclude the lord from all the profits, for he shall have the mines, the trees, &c. and it is not like a prescription to have the whole common, and to exclude the lord, for that is repugnant; for in all cases of common the lord is to inter-common with the tenants, in the nature of commoner, and therefore to exclude the lord is repugnant to the essence of common; and judgment was given for the defendant. See Vaugh. Rep. 251, where the Court was divided in a like case, *in Communi Banco*, viz. Vaughan and Tirrel against the custom, and Archer and Wylde for it. And see hereafter in Easter term, 22 Car. 2, B. R. between *Hopkins and Robinson*, such a custom admitted to be good.

[270] FREEMAN *against* BARNES.

Lease for 100 years in trust for him in reversion: he in reversion leases for 54 years, and levies a fine to corroborate for 100 years, he is barred thereby. S. C. 1 Sid. 349, 458. 1 Vent. 55, 80, 88. 2 Keb. 521, 650, 597. Cart. 161, 195. Hard. 400, 401, &c.

Error of a judgment in ejectment in the Common Pleas, where on a special verdict the case was this. The Marquess of Winchester being seised in fee, made a lease for 100 years to attend the reversion, the lessee actually enters and makes a lease for 54 years to the defendant in the ejectment, and for confirmation of the term of 54 years, levies a fine *sur conuzance de droit;* the lessee for 54 years enters, and the lessee for 100 years being out of possession, assigns his term to the plaintiff in ejectment, against whom judgment was given in the Common Pleas, whereupon he brought error, and two points were twice argued at the Bar in this term, and Michaelmas following, by Jones and Levinz for the plaintiff in error, and by Winnington and Finch, the King's Solicitor, for the defendant; and two questions were made, 1st, If the fine, and five years possession barred the lease for 100 years? 2dly, If the assignment by the lessee for 100 years, the lessee for 54 years being in, and he out of possession, be good? And as to the first, it was argued for the plaintiff in the error, that the marquess, by his entry on the lessee for 100 years, was not a disseisor, the reversion being in himself, but was tenant at will to the lessee for 100 years. Lit. sect. 462, 463. 2dly, That the marquess by making the lease for 54 years, cannot be a disseisor for the same reason. And the lessee for years, or at will of a stranger, making a lease for years, is not a disseisor without an intent, or at most at the election of the party. Co. Lit. 153 b. Cro. Car. *Blunden* against *Baugh*. 2 Cro. *Powsly* against *Blackman*. 3dly, That the fine is no bar, because the lease for 100 years was not displaced (divested) either before, or by the fine. 5 Co. Rep. *Saffin's case*. 9 Co. *Podger's case*. The conuzor being tenant at will, it was not such an estate as would pass by the fine; for if tenant at will levies a fine, *that the parties had nothing, &c.* may be pleaded thereto. But (here) the conuzor had also the reversion in fee which passed by and satisfied the fine, but did not touch the lease at will, or for years; and as to the opinion in the case of *Isham and Morris* to the contrary, that was but a sudden ([271] opinion) and (only) on evidence; and it would be very inconvenient if a fine should bar terms for years (settled) in trust to attend the inheritance; for in all purchases, precedent mortgages and incumbrances are kept on foot for securing the estate; and if those should be barred by fines levied by the owners of the inheritance, it would destroy their own titles; and *Founds and Salisbury's case* in the Exchequer, 16 Car. 2, was held contrary to *Isham and Morris's case*, on a special verdict. Also leases in trust are not barred by fines, for they attend the estates passed by the fines, and therefore no need to bar them: Bridgman Chief

Justice of the Common Pleas, was of opinion, that the lease in the case at Bar for 100 years, was no bar; but he was removed into Chancery before the judgment given. And as to the second point they argued, that the lease for 100 years not being barred, the lessee may assign it over without entry into the land, for the possession of *cestuy que trust*, and all claiming under him, is the possession of the lessee for 100 years. Latch. 75, *Fisher's case*, tenant for years, lets at will, tenant at will lets for years, the reversion of the first lessee for years is not displaced, but is assignable over. See also 2 Cro. *Powsly* against *Blackman*. But on the other side it was argued, that leases for years are as well barred by fines as freeholds. 5 Co. *Saffin's case;* and Cro. Car. *Isham* against *Morris*, is a case in point; and they also cited *Founds and Salisbury's case;* as for them; see that case now in print in Serjeant Hardres's Reports, fo. 400. And the mischief would be great if leases for years should not be barred by fines, for if they should not, they may arise as incumbrances on the lands many years after purchases or marriage-settlements. And as to the second point they said, it is not material whether the fine be a bar or not; if it be a divesting of the estate it is not assignable without entry, and the lease for 100 years is divested by the making of the term for fifty-four years, and the fine. Tenant at will ought to be at the will of both the parties, and when a tenant at will grants a term, he thereby determines his will, and passes a new estate, which divests the reversion of the first term; and there may be a divesting of an estate without a disseisin or bar. Hob. 332. Also, there may be a disseisin or divesting at election; but who shall have the election? Not the lessee for 100 years by the marquess, but the marquess (himself) shall have the election, and here he has done that by the levying **[272]** of the fine for corroborating the new term of fifty-four years. And afterwards in Easter term, 22 Car. 2, the Court delivered their opinion, and they all, viz. Kelynge, Twysden, and Moreton, held, that the term for 100 years, was divested by the making of the lease for fifty-four years; and that the marquess shall have the election, whether it shall be divested or not, and not the lessee, who is only a trustee for the marquess, and that the marquess had made his election by levying of the fine to corroborate the term of fifty-four years; and they all agreed, that the lease for 100 years was barred by the fine, because it was turned to a right by the making of the lease for fifty-four years before the fine: and it was said by the Chief Justice, and not denied, that incumbrances kept on foot by purchasers should not be barred by fines: and also, that where a mortgagor retains the possession and pays the interest, yet the fine by a mortgagor so holding the possession, shall not bar the mortgagee; and the judgment in the Common Pleas was affirmed.

STOKES *against* STOKES.

Obligee in trust for others, releases to the obligor all demands on his own account, it does not release the obligation. S. C. 2 Keb. 530, 613. 1 Vent. 35.

Debt on obligation; the defendant pleads a release, and it is entered, reciting, that whereas J. S. had arrested the defendant in the name of the plaintiff, without his knowledge, he thereby released to the defendant all demands on his own account; and it appeared, that this obligation was taken by J. S. in the plaintiff's name, in trust for the children of J. S. and that thereupon J. S. caused the defendant to be arrested in the plaintiff's name, and thereupon the release was given; and it was adjudged, that the obligation was not released thereby; for although it was taken in the name of the plaintiff, yet it was not on the plaintiff's account, but on account of the children of J. S. and those words, *on his own account*, were put in to some purpose, and to no other purpose could it be, but to distinguish demands which he had in his own right, from such things (or demands) which he had in right or in trust for others.

[273] WELLS, EXECUTOR OF WELLS *against* WELLS.

Release of an equitable interest, a good consideration in an *assumpsit*. S. C. 1 Keb. 531. 1 Vent. 40.

Assumpsit, whereas the defendant and the plaintiff's testator had contracted to make a certain quantity of bricks for Potter, at a certain price; the defendant in consideration the plaintiff would relinquish his interest in the bargain, promised to pay him 10l. After verdict for the plaintiff it was moved in arrest of judgment, that there is no consideration, for the interest of the partnership survives to the defendant, and the plaintiff had no interest to relinquish: but judgment was given for the plaintiff, for he might have an equitable interest by the bringing in of materials, on which the defendant might be charged by a bill in equity.

HODGSON *against* HARRIS.

Statute of Limitations doe not extend to debt upon an award, or a copyhold fine. S. C. 1 Sid. 415. 2 Keb. 462, 497, 533. 2 Saund. 64, 60. Ld. Raym. 248. Com. Dig. 260. Cowp. 375.

Debt on an award; the defendant pleads the Statute of Limitations: on which the plaintiff demurs, because by Saunders it is not a debt upon a contract or lending within the words of the statute: to which it was answered by Jones, that the submission to the award is a contract to pay the sum awarded: and cited 3 Cro. 600, *Bowyer* against *Garland*. The Court inclined to the opinion, that it was not within the statute: and Twysden said, that debt for a copyhold fine had been adjudged not to be within the statute; whereupon Jones offered to waive the demurrer and go to issue, which Saunders refused; and it was adjourned.

THE LADY BROUGHTON *against* HOLTE.

Petit judicium omitting damages, ill on a special demurrer. S. C. 2 Keb. 514. Raym. 182. *Vide ante.*

Trespass for taking his cattle; the defendant makes a special justification; the plaintiff replied and averred the justification, and concluded *et hoc paratus, &c. unde petit judicium si ab actione præcludi debet:* the defendant demurred specially, because it is not concluded *petit judicium & dampna sua sibi adjudicari;* whereupon the plaintiff by rule of Court, upon payment of costs, had liberty to amend.

[274] TERM. SANCT. MICH. ANNO 21 CAR. II. IN BANCO REGIS.

PORDAGE *against* COLE.

[See S. C. 1 Wms. Saund. 319.]

Agreement to pay 70l. for a house, *for*, does not make a condition precedent, but it is a mutual agreement. S. C. 1 Vent. 183. 1 Sid. 423. 1 Saund. 319. Raym. 183. Roll. 14. 2 Keb. 542. 2 Danv. 229, pl. 1.

Debt on an obligation for 70l. The defendant demands oyer of it, which is entered thus; Memorandum, *That such a day it is agreed between the plaintiff and defendant, that the defendant the first of October next, pay the plaintiff* 70l. *for such a house; in witness whereof we have hereto mutually set our hands and seals:* on which the defendant demurred; and it was now objected for the defendant, that the declaration was ill, it not having averred that the plaintiff had conveyed the house to the defendant, and that *pro* (for) is a condition precedent, 7 Co. *Ughtred's case;* and if it be not a condition precedent the defendant has no remedy for the house; for though that both sealed, yet it is not an indenture of two parts, nor like to the case in 3, *Hoe* against

Taylor, it is agreed between the parties lessee to repair, lessor to find great timber; where it is a mutual covenant. To which it was answered, It ought to be intended that the house was conveyed before, for it is not to pay 70l. for the conveyance of the house, but for the house itself; and the Court held it a mutual covenant: and if the house was not conveyed before, as it may be intended it was, the defendant may have an action of covenant for the house, for it is to be intended, that the plaintiff sealed to the defendant another part, by these words, *have mutually set their hands and seals;* and upon the first **[275]** argument, they gave judgment for the plaintiff, on which the defendant brought a writ of error, and the judgment was affirmed in the Exchequer-Chamber.

DOWSE *against* SWAYNE.

Action for causing him to be arrested for 500l. to hinder him of bail, where only 200l. was due. S. C. 1 Sid. 424. Raym. 176. 1 Mod. 4. 2 Keb. 546. 1 Salk. 14, 15.

Case, and declares, that the defendant having no cause of action beyond the value of 40l. did falsly and maliciously bring an action against him by bill of privilege in the Common Pleas, where no sum is expressed in the writ, and caused the sheriff to arrest him for 500l. and to hold him to such bail as he could not find, whereby he was forced to lie in prison such a time. The defendant pleads, that he had cause of action to the value of 200l. *absque hoc*, that he informed the sheriff that he had cause of action for 500l. and after verdict for the plaintiff, it was moved in arrest of judgment, that there was a just cause of action, as appears as well by the declaration, as by the plea, and the enlarging of the sum is not any crime; for a man may not certainly know his proper cause of action, or what is due to him. (But) the Court to the contrary. It is laid, that he did falsly and maliciously charge him with a greater sum than is due, to hinder him of bail, and it is so found by the jury, and thereby he was forced to lie in prison; wherefore the action well lies; and gave judgment for the plaintiff.

STRIBLER *against* JONES AND WATERS.

Case for falsly procuring him to be arrested for 500l. where the plaintiff had no cause of action, or at least not so great a cause.

Case, and declares, that the defendant falsly and maliciously devising to dampnify him, and to hinder him from going about his affairs, sued a *latitat* against him out of the King's Bench in trespass, with *ac etiam assumpsit* for 500l. and caused him to be arrested and imprisoned for such a time, whereas in truth he had not any cause of action, *vel saltem non tantum causam actionis.* After verdict for the plaintiff, it was moved in arrest of judgment, that it is not positively said, *that he had not cause of action;* but *none, or at least not so great;* and it is not so great if it fails but of 1s. of so much. But the Court to the contrary, it is found to be done maliciously, wherefore judgment was ruled for the plaintiff. But for that **[276]** the *teste* and return of the *lat'* was not certainly shewn, the Court would advise upon this execution.

SEAMONE *against* MORE.

Inchanter, and madest a bullock run mad, &c. not actionable. S. C. 1 Sid. 424. 2 Keb. 548.

Case for these words, *Thou art an inchanter, and inchantedest a bullock, and madest him run mad about the common.* After verdict judgment was stayed; for an inchanter is no more than a cheat, who deals in charms to cheat, and is not a witch; and to make a bullock run mad about the common may be by chasing and chasing him.

DRAKE *against* HILL.

He is fled and gone (of a merchant) *and I shall lose my money.* S. C. 1 Sid. 424. Raym. 184. 2 Keb. 549.

Case for saying of the plaintiff, being a merchant, *He is fled and gone; and I shall lose my money;* and at another day, *He is a beggarly fellow, not worth a groat; nor able to pay his debts.* After verdict, and entire damages, it was moved, that the last words are not actionable, and the damages being intire, no judgment could be. *Beggarly fellow* is not, nor is *not worth a groat*, and cited *Moone and Monham's case* to be so adjudged; and *not able to pay his debts*, is not; for a man of a great ability may have his estate so out of his hands that he cannot pay his debts; but the Court were of opinion, that the last words were as actionable as the first; but on the importunity of Serjeant Maynard, who moved it, the judgment was stayed for a fortnight.

[277] EARL OF PETERBOROUGH *against* SIR JOHN MORDANT.

Scandalum magnatum for saying *I met my lord's servant, who I know not, but my lord sent to take my purse.* S. C. 1 Vent. 59. 1 Sid. 434. 2 Keb. 537, 559, 605. *I heard a bird sing, or I dreamed J. S. stole a horse.*

Scandalum magnatum, for that the defendant said to J. S. servant of the earl, *I met J. D.*, (another servant of the earl) *whom I do not know, but my lord sent after me to take my purse*, judgment by default, and before a writ of inquiry executed, the judgment was stayed on Jones's motion; for that it is not positively said, *that my lord sent him to take my purse, but I do not know but he did.* Also it is not said, that he sent to rob him, but to take his purse, which might be by way of trespass: but now it was answered by North, that though the words are not positive and affirmative, that the earl sent him, yet they are tantamount in the understanding of the common people; and such oblique words have been adjudged actionable in the case of a commoner, and much more in the case of a peer. As, *I heard a bird sing, that you have committed felony; or I dreamed so:* and although it is not here said, *feloniously* to take the purse, which might be a good exception in the case of a common person, yet it is otherwise in the case of a peer. Crompt. Jurisdiction of Courts, 13 Leon. 336. And of that opinion was the Court after several motions, and gave judgment for the plaintiff.

BURNET *against* HOLDEN, EXECUTOR OF GREENHILL.

Judgment *in assumpsit* had after the defendant's death, and before the day *in Bank*. S. C. 1 Mod. 6. Raym. 210.

A *scire facias* against the defendant as executor on a judgment *in assumpsit* against the testator: the defendant demands oyer of the judgment, on which it appeared, that the testator died after the verdict had for the plaintiff on *non assumpsit;* and before the day in Bank (leaving the defendant his executor) and the judgment on which the plaintiff brought the *scire facias*, was entered the next term, on the new statute made at Oxford, and the defendant pleads a debt due to him **[278]** by obligation of the testator for 100l. and a judgment by the testator to the Lord Arlington; and that he had not assets beyond 40l. which he retained to satisfy himself, and the Lord Arlington: on which the plaintiff demurs, and now the principal question was, If this judgment to the plaintiff shall so relate as to be to all intents as a judgment had against the testator in his life? And the case was argued at the Bar three several times, viz. in Mich. 21 Car. 2, and in Hillary following, and afterwards in Trin. 23 Car. 2, when Hale was Chief Justice, by Coleman, and twice by Saunders for the plaintiff, and by Jones, Winnington, and Levinz for the defendant. And for the plaintiff it was argued, that by the aid of the statute, this judgment is now made a judgment against the testator, although he was dead before; and is unavoidable, and so is payable before debts on obligations: also, that the judgment had by the Lord

Arlington, whereon no *scire facias* is sued, is not pleadable against this judgment on which a *scire facias* is sued. But for the defendant it was argued, that the intent of the statute was solely to make the judgment good, and not voidable by error; for the statute says, *for avoiding suits and delays, be it enacted, that the death of the defendant after verdict, and before the day in Bank, shall not be assigned, so that it be entered within such a time afterward.* *Q.* But it does not say, that the judgment shall be good and effectual as if he had been living; for after the death of the testator, a retainer to satisfy himself (his own debt) before the judgment, had been a good administration; and now by the judgment afterwards it shall be a mal administration, and a *devastavit*, by satisfying a debt on an obligation, before a debt on simple contract, (with such judgment). And also shall make a judgment, which was good, without a *scire facias* sued thereon, not pleadable, nor satisfiable by that *scire facias* entered on this judgment on simple contract, which at the time of the testator's death was not payable 'till (after) both the debts on the judgment, and the obligation, and (all) this by relation, which is but a fiction in law. And suppose he had devised his lands, though the devise was good at his death, yet should the land be chargeable by this judgment had after his death. In Mich. 21 Car. 2, Twysden and Moreton held against the plaintiff, but Kelynge and Rainsford for the plaintiff. But in Trin. 23 judgment was given for the plaintiff by Hale and Moreton, Twysden continuing of the contrary opinion, and Rainsford saying nothing.

[279] SMITH *against* WHEELER.

A settlement with a proviso, *that if he be minded to revoke, and declare his mind by writing under his hand and seal, that he may revoke*, is personal and not forfeited by treason. 1 Hales P. C. 248. 1 Wils. 176. 3 Com. Dig. 382. 5 Com. Dig. 655. 1 Bl. Rep. 459. S. C. 1 Vent. 128. 1 Mod. 16, 38. 2 Keb. 564, 608, 644, 763, 772.

Error of a judgment in ejectment in the Common Pleas, where on a special verdict the case was, Anthony Mayne possessed of a long term, assigned it in trust for himself for life, with a power for him to make leases; and after his death in trust to raise several sums of money for several of his kindred; the residue of the trust for one of his sisters; provided, that if he left issue for his wife enseint, that he might dispose of it to his issue: and another proviso, that if he shall be minded to dispose it otherwise, and declare his mind so by writing under his hand and seal, that he might do so: he was attained of treason for the murther of King Charles I. And if the term was forfeited for the King? was the question. And adjudged in the Common Pleas, that it was not forfeited: and now it was argued by Pemberton for the plaintiff in the error, who was also plaintiff in the Common Pleas, (and judgment there given against him, being the King's patentee) and Coleman for the defendant. And afterwards in Easter term it was argued by Jones for the plaintiff, and by Winnington for the defendant. And for the plaintiff it was said, that it was fraud apparent, of which the Court might judge, for the trust was for himself, and he took the profits, he had power to make leases, and he had power to revoke; and it appears by the verdict, that the trustees did not know of the trust or estate, Lane's Rep. 42, and *Twine's case*, and *Pauncefoot's case* in 3 Cro. were cited. But on the other side it was said, that the Court could not judge of fraud, and the jury have not found any, 10 Co. *Chancellor of Oxford's case*, and the proviso to revoke is personal to himself, *if he be minded to revoke, and do revoke by writing under his hand and seal, Duke of Norfolk's case* cited in *Englefield's case*. Kelynge when he was Chief Justice, and Twysden, inclined that it was forfeited. But afterwards in Easter term, 23 Car. 2, Hale being Chief Justice, the case was argued by the whole Court *seriatim*, and it was adjudged, that the term was not forfeited, and the judgment in the **[280]** Common Pleas was affirmed; and they all held it a case directly within *The Duke of Norfolk's case*, and not a trust forfeitable to the King, according to *Sir J. Duncomb's case*, in 2 Cro. 512.

LEE *against* EDWARDS.

Quantum meruit if he provided medicines and cured, and averred he found medicines; and another *assumpsit* in consideration he had found medicines and cured. Verdict and intire damages, good. S. C. 1 Sid. 428. 1 Vent. 27, 44. 2 Keb. 559, &c. *ibid.* *Vide* Mich. 22, *infra Brown & London.* *Vide* Hard. 485. 1 Mod. 14, 285. Nelson's Lutw. 510. 2 Cro 44. *Vide post*, 298.

Assumpsit, in consideration that he would provide medicines, and would employ his endeavour, and would cure J. S. to pay him so much as he deserved; and avers, that he found medicines and employed his endeavour, and that it was of the value of 10l. And also in consideration that he had provided medicines, and employed his labour and pains, and had cured J. S. After verdict for the plaintiff it was moved in arrest, &c. That it is not averred in the first *assumpsit*, that he had cured; and it is part of the consideration that he would cure J. S. and that the damages being intire, the plaintiff could not have judgment, but by the Court, it is certain upon the whole matter that J. S. is cured; for it shall be intended after verdict, that it is the same person, the same malady, and the same cure; and they gave judgment for the plaintiff, for it is but the same cause of action laid several ways, as is usual *in assumpsit.*— See hereafter p. 298.

SIR JOHN CARN *against* OSGOOD.

He is a forsworn justice of peace, actionable though no *colloquium.* S. C. 1 Vent. 50. 1 Sid. 432. 1 Mod. 22. 2 Keb. 548, 579. Nelson's Lutw. 409, actionable. Tide Style 22, 210. 1 Mod. 23, & *ante* 52. Stra. 618, 696, 1169. 4 Bac. Abr. 504, 513, 514.

Case, for saying of him being a justice of peace (but does not lay any *colloquium* of his office of justice of peace) *He is a forsworn justice, and not fit to sit upon a Bench.* After verdict for the plaintiff it was moved in arrest of judgment, that there is not any *colloquium* of his office of justice. But by the Court, there needs not, for by the words themselves, it appears they were spoken of him in respect of his office.

[281] JEFFERIES *against* DEE, ADMINISTRATOR OF EVERARD.

An executor pleads several judgments, &c. the plaintiff may reply to all, or to as many of them as he pleases. *Vid.* 2 Saund. 48, 49. 1 Mod. 3. 2 Keb. 591. *Ante* 132, 200, 201, 255, 256, 261.

Assumpsit upon a promise of the testator for 1000l. The defendant pleads a recognizance in Chancery for 2000l. and several judgments against himself, after the exhibiting of the bill, and pleads payment of them severally, and pleads several obligations to several persons, and payment of them after the exhibiting of the bill; and that he had fully administered, and that he has not, nor at any time after the bill had any goods, except goods to the value of the several sums paid on the said several judgments and obligations, and except goods to the value of 5l. which are chargeable, *and not sufficient to satisfy the recognizance;* the plaintiff replies *by protestation*, that the judgments were had by fraud and covin, *for plea* he says, that the defendant did not pay the money on the said judgment to A. nor on the said judgment to B. &c. *and so of the rest;* and in like manner he pleads *non-payment* severally of the said several sums on the said several obligations, but omitting some of them; and for this puts himself on his country; and as to the recognizance says, it was satisfied, but kept on foot by fraud and covin: whereupon the defendant demurs; and now he excepted to the replication. *First*, For that it was double and manifold by putting all the particulars in issue, where the *non-payment* of one would have made an end of all: but it was not allowed, for the plaintiff has election to traverse one thing only, or every one, for he may be mistaken in one; and therefore it is good to traverse as many of the matters as he pleases; and so it was done in *Tresham's case*, and in *Turner's case* in Coke's Reports, and all the precedents are so. *Secondly*, It was held, that the pleading *non solvit* to

one (thing) and not to another, &c. and then concluding *et de hoc ponit se, &c.* was good, for there are several issues included under the *et de hoc ponit se, &c.* and that it is not a multifarious issue as was objected. *Thirdly*, That the omission of pleading to any of the sums paid on the obligations shall not hurt, for he may plead to as many of them as he pleases, and omit the others. *Fourthly*, Although he mistake some of the sums, to which he pleaded *non solvit*, it shall not hurt; for it is no more than if he had said nothing to them: and judgment was given for the plaintiff, I myself being of councel with the defendant.

[282] TERM. SANCT. HILL. ANNO 21 & 22 CAR. II. IN BANCO REGIS.

WILBRAHAM *against* SNOW.

[See S. C. 2 Wms. Saunders 47.]

A sheriff shall have trover for goods levied in execution taken from him. S. C. 1 Sid. 438. 1 Vent. 52. 1 Mod. 12, 30. 2 Saund. 47, 345. 2 Keb. 588. 1 Danv. 20, 4 & 5. 1 Bulst. 68. 2 Bulst. 135. 2 Mod. 245. 6 Mod. 212, 291. 2 Bac. Abr. 370. 5 Bac. Abr. 267. Cowp. 406. 2 Hawk. 67, 418. 1 Term Rep. 730.

Trover, and on *not guilty* a special verdict, viz. the sheriff took goods by a *fi. fa.* a stranger takes them from him; and whether trover lies for the sheriff was the question? It was argued by Sympson for the plaintiff, and Winnington for the defendant: and for the plaintiff it was compared to the case of a carrier, 1 Roll. Abr. 5, for whom it lies by reason of the special property which he has, seeing he is responsible for them: to which it was answered, it is not like that case, for the absolute property remains in the owner after the seizure; as Dyer 98, 99. Yelv. 44, and that the sheriff might have trespass, but not this action. But the whole Court to the contrary, the sheriff has a special property sufficient to maintain this action; and they gave judgment for the plaintiff. And by Kelynge Chief Justice, the property is altered from the owner and given to the party, at whose suit. *Quære* of this.

JONES *against* TRESILIAN.

In battery, plaintiff replies, he softly assaulted the defendant in defence of his own person. S. C. 1 Sid. 441. 1 Mod. 36. 2 Keb. 397.

Battery, the defendant pleads *son assault demesne:* the plaintiff replies, that he was standing in his gate, and that the defendant being on his horse, offered to ride over him, whereupon **[283]** he *molliter* assaulted the plaintiff in defence of his person, which is the same assault in the bar. The defendant demurs, and the replication was adjudged ill, for thereby he has now confessed he first assaulted; but he ought to have said, *molliter manus imposuit* on the plaintiff, to hinder him from riding over him: and judgment was given for the defendant.

LEECH *against* MIDGLY.

In trespass, that which comes under the *ita quod* for aggravation of damages, need not be traversed. *Q.* S. C. 1 Vent. 54. Raym. 185. 2 Keb. 590, 601.

Trespass for chasing 40 of the plaintiff's sheep, so that by that chasing they were much damnified, and one of them died. The defendant justified for damage feasant in his freehold. The plaintiff replies, and claims common in the place where, &c. The defendant rejoins, and justifies by inclosing, leaving sufficient common for all beasts levant and couchant on the plaintiff's tenement. The defendant demurs, and now by Weston and Levinz, (it was argued) the bar was ill, in not answering to the death of one of the sheep, and he ought to have traversed the driving, on which he died, and cited 3 Cro. 384, *Hill* against *Prideaux.* Jones to the contrary argued, that it need not, it coming only under the *ita quod*, which is but for aggravation of damages. And Kelynge Chief Justice held the bar good, for the reason given by Jones; and yet

in that case in 3 Cro. it came under the *ita quod*, as here. The other three held it was cured, at least by the replication over; and judgment was given for the defendant.

JEFFERSON *against* DAWSON.

Issue for part, and demurrer in Chancery for other part, and both sent hither. Judgment here on both. S. C. 1 Sid. 436. 1 Mod. 29. 2 Saund. 13, 27. 2 Keb. 387, 621. 1 Danv. 776.

A *scire facias* in the Petty-Bag in Chancery, and there as to part issue was joined, and a demurrer joined as to the other part, and the record sent hither to try the issue, which being done, and a verdict given, they also argued the demurrer here, and gave judgment on both. To which it was objected, that the issue was sent hither, because the Chancery could not try it; but that the judgment ought to be given, and the demurrer argued there. But upon argument it was resolved, that the judgment was well given upon both **[284]** here; although that the Chancery might have given judgment upon the demurrer, before it came hither.

THE KING *against* NEWMAN IN CHANCERY.

Devise of lands to a college, notwithstanding the Statute of Mortmain. *Vide* 4 Co. *Adams* v. *Lambert*. Moore Char. Uses 79, 82, 83. Moore's Rep. 640, 888, 822, 890. Hob. 136.

Information, that Stephen Newman seized of lands, devised them to Trinity College in Cambridge; for the maintenance of a scholar there; and in the will was this clause, *that if any by cavil shall hinder this devise, or that the same cannot go to the college by reason of the Statute of Mortmain, then I devise them to Robert Newman, and his heirs.* And under this pretence, that by the Statute of Mortmain the college cannot have them, Robert Newman entered, and kept the possession of the lands, for which the Attorney-General brought this information to have the land established to the college: and this whole matter appearing on the bill and answer, and it being a charity, it was held by the Lord Keeper Bridgman, that it ought to be established to the college, by virtue of the stat. 43 Eliz. notwithstanding the Statute of Mortmain, and notwithstanding the clause in the will; and so it was decreed. And the Lord Keeper said, that it did not differ from *Lloyd's case*, in Hob. 136.

[285] TERMINO PASCHÆ, ANNO 22 CAR. II. IN BANCO REGIS.

COPPING *against* HARRIARD.

Arbitrators and umpire, both named by the parties, have the same day; the umpire cannot make any award. S. C. 1 Sid. 428. 2 Saund. 129 to 133. Raym. 187. 1 Mod. 15, 274. 2 Keb. 562. 2 Vent. 116. *Vide ante* 174. *Post*, 302.

Debt on obligation, conditioned to perform an award, so that it be made at or before the Feast of St. Michael; and if they made none, then to perform the umpirage of J. S. so that it be made at or before the same Feast of St. Michael. The defendant pleads, that the arbitration made no award, and that the umpire made no umpirage. The plaintiff replies, that the arbitrators made no award, but that the umpire made an umpirage; and sets it forth, and assigns a breach. The defendant demurs; and now for the plaintiff it was argued, that the submission to the umpire, although he had the same day (as the arbitrators) was not void, and cited Dyer 347. Rol. Abr. 261. And Justice Moreton doubted: but by Kelynge, Twysden, and Rainsford, the submission to the umpire was void; but if the submission had been to arbitrators, and if they had made none, then to such an umpire as they should name, it might have been good; for by their election of an umpire, they had waved the submission to themselves. But as this case is, if the arbitrators had made one award, and the umpire another, which of them should have been performed? And Twysden cited a case

between *Bernard and King*, where the umpirage in such a case was adjudged void. But the reason thereof was, as he said, because it was not pleaded, that the arbitrators had refused to make any award, so as here. And judgment was given for the defendant.

[286] HORSELY *against* POTTEN.

A horse hired to ride from Norfolk into Suffolk, action not shewn where the hard riding was. S. C. Raym. 187. 1 Sid. 457. 2 Keb. 620, 647.

Case, that where the plaintiff let to the defendant a horse to ride from Swaffam in Norfolk, to Ipswich in Suffolk, the defendant did in that journey so immoderately labour (or ride) the said horse, that he died: after a verdict for the plaintiff, it was moved in arrest of judgment, by Holt, that no place is laid where the immoderate labour was, and the journey is in two counties, and the cause of the action is the immoderate labour; and the judgment was stayed for the present; but it was afterwards given for the plaintiff, as Holt told me. See 2 Rol. Abr. 615. Litt. C. Num. 2. That in such a case all shall be tried where the action is laid.

NOELL *against* NELSON.

On *plene administravit* pleaded, judgment prayed presently. S. C. 1 Sid. 448. 1 Vent. 94. 2 Saund. 226. 2 Keb. 606, 621, 631, 666, 671. 1 Danv. 461. 2 Lev. 22. 3 Lev. 29.

Debt on an obligation, against an administrator, who pleads *plene administravit*, on which the plaintiff prays judgment according to *Shipley's case* in 8 Co. and after brought a *scire facias* for assets, which happened afterwards, and had judgment in the Common Pleas, on which error was brought here and assigned in the first judgment, viz. that it ought not to have been given on the plea of *plene administravit*, and for that *Dorchester and Webb's case* in 1 Cro. Hutton 128, and Rast. Ent. 223 & 329 were cited. But on the contrary were cited *Shipley's case*, and Trin. 13 Jac. 1, Rot. 1104, and Mich. 13 Jac. 1, Rot. 206. Both which cases were adjudged in this Court. And Kelynge, Rainsford, and Moreton held, that the judgment ought to be affirmed according to *Shipley's case*. Twysden doubted, and took an exception, for that the defendant is put *in misericordia*, though the plaintiff was not delayed; for the plea is a confession of the action. But the others said, it was not a direct confession, but *quasi* an admittance of the debt; besides, it is after imparlance. And they affirmed the judgment.

[287] WEBBER *against* TYRRELL.

The Statute of Limitations does not extend to accounts stated between merchants, but to current accounts. S. C. 2 Saund. 124. 1 Vent. 90. 2 Keb. 622, 634. *Vide* 1 Mod. 71, 268. 2 Mod. 311. *Post*, 298.

An *indebitatus assumpsit* for 1000l. in money had and received, and also on an *insimul computasset*, on which account 1000l. was due: the defendant pleads the Statute of Limitations; the plaintiff replies that he is a merchant, and sets forth the proviso for merchants accounts. But by Twysden, Rainsford, and Moreton, (in Kelynge's absence) stated accounts between merchants are not within the proviso, but only accounts current; and Jones at the Bar said, so was the constant practice; but it was adjourned.

WILSON *against* ARMORER.

Feoffment of a manor excepting and reserving Black-Acre to himself for life only. *Habend'* (except before excepted) to the use of A. in tail. Black-Acre does not pass at all. S. C. 1 Vent. 78, 87, 106. Raym. 207. 2 Keb. 642, 643, 667, 719. Borr. 2159. Daug. 478.

Debt on an obligation against the defendant as heir, and on *riens per discent* and a special verdict the case was, William Armorer, the father of the defendant, being

seised, made a feoffment of the lands in question, by the name of the manor of Preston, and all lands thereto appertaining, *except and reserving Black and White Acre*, to himself for his life only, *habend'* (except before excepted) to the use of the defendant on his marriage, and the heirs male of his body, with remainder to his right heirs: and whether Black and White Acres were assets by discent to the defendant being the heir, was the question. And it was twice argued at the Bar in two several terms, and two questions were made: *First*, If by the exception the two acres are totally excepted out of the conveyance? (for a man cannot reserve an estate to himself for life upon a feoffment) or if the exception be totally void? *Secondly*, If the acres pass by the feoffment, yet the limitation of the use does not come till after the *habend'*, and the *habend'* is of the premises except before excepted; and then no use is limited of those acres, and then the use of them results and descends to the defendant the heir, and so they are assets in his hands. **[288]** And on the second argument Kelynge, Moreton, and Rainsford inclined, that the exception was not void, but that the words, *to himself for life*, were void, and that the exception generally excepted the two acres out of the conveyance: and as to the second they held, that if the two acres passed by the conveyance, yet no use was declared of them. But Twysden on the contrary held, that the exception was totally void: but *secondly*, That no use was declared of those two acres, and so that they descended. But it was adjourned, and afterwards, viz. after Kelynge's death, and before Hale was Chief Justice, Twisden delivered the opinion of the Court, and said, that they were not all agreed, that the exception excepted the two acres totally out of the conveyance; but they all agreed, that there was no limitation of the use of those two acres, so that they resulted and descended: and they gave judgment for the plaintiff. Levinz for the plaintiff, and Serjeant Turner for the defendant.

THE KING *against* SMITH AND OTHERS COMMISSIONERS OF SEWERS.

A *certiorari* lies to commissioners of sewers, and they are fineable for proceeding afterwards. S. C. 1 Vent. 66, 67. Raym. 186. Mod. 44. 2 Keb. 635. *Vide* 1 Salk. 201.

The commissioners of sewers made a tax for the reparation of Wapping-Wall; the inquisition on which the rule was made was removed by *certiorari* into B. R. The commissioners made a new rule, and fined the inhabitants for not collecting it, on which issued another *certiorari*, and afterwards a third; and then an attachment against the commissioners, whereon they being brought into Court, it was moved for them, that by the statute 13 Eliz. c. 9, the commissioners of sewers are not obliged to obey *certiorari's* out of this Court, nor to remove their orders; and so no contempt. But by all the Court, the statute does not extend to returns on *certioraris*, but excuses them from certifying their orders into Chancery, as by the statute H. 8 they before were obliged, with intent to have the Royal assent; whereupon they were fined each of them 40l. and committed for the contempt.

[289] BERNARD *against* BERNARD.

Process awarded *secundum consuetudinem Curiæ*, is all one with *secundum cursum Curiæ*. S. C. 1 Vent. 72. 2 Keb. 626, 635, 646, 550, &c.

Error of a judgment in Hull, in *assumpsit* to deliver the possession of a house in a certain place called Hull-Bridge. *First*, For that the Court is said to be held by letters patents *secundum consuetudinem Curiæ;* and a custom cannot be since the time of H. 1, and *Long and Nethercote's case* in 1 Cro. was cited for this; but it was not allowed, for it is not said, that the process was awarded *secundum Curiæ*, time out of mind, &c. and then *secundum consuetud. consuetudinem Curiæ*, is no more than *secundum cursum Cur'*. *Secondly*, The breach is alledged, that he did not deliver the possession *licet sæpius requisit'*, which is not sufficient, for he ought to have shewn a special request, but this was not allowed; for it being to deliver it before a certain day, he had taken upon himself to do it, and then he is bound to do it before the day at his

peril without any request. *Thirdly*, It is not alledged, that Hull-Bridge was within the jurisdiction of the Court, and it may be without, and then this Inferior Court had no authority to enquire thereof, and it is the very cause of the action: to which it was answered, that it being after verdict it shall be intended within, otherwise the defendant might have demurred on the evidence, and if it had not been within, the Court there would have directed the jury against the plaintiff; and the defendant having admitted it then, shall not now assign it for error, when he might have had a prohibition, and (cited) *Cousin and Nieuson's case* in this Court, Pasch. 16 Car. 2, Rot. 278, where in case, for that he was collector of the customs in the port of Exeter, the defendant caused him to be put out of his office, and the action was brought in the Court of Exeter, and judgment for the plaintiff; and thereon error assigned, because it did not appear that the port of Exeter was within the jurisdiction of the Court of Exeter; and yet the judgment was affirmed after it had depended here two or three years; and Kelynge and Moreton held, that Hull-Bridge shall after a verdict be intended in Hull, and within the jurisdiction of the Court of Hull: but Twysden with his whole force to the contrary. **[290]** That *quidam locus vocat' Hull-Bridge*, shall not be intended a bridge in Hull, for then it should be said *The Bridge of Hull*, but it shall be intended the name of another place; and after the case had been debated three or four times in this term and in Trinity term following, and Twysden continuing earnest in his opinion, and divers cases having been adjudged according to his opinion formerly in the Marshalsea and other Inferior Courts, I persuaded my client for his expedition to consent to a reversal, and to bring a new action; which was done accordingly.

LOVE *against* WINDHAM.

[See *Doe d. Cadogan* v. *Ewart*, 1838, 7 Ad. & E. 649; 3 N. & P. 208; 1 W. W. & H. 250.]

Devise of a term to one for life, and if he dies without issue, to another. S. C. 1 Vent. 79. 1 Sid. 450. 1 Mod. 50, 114. 2 Keb. 637. 2 Chan. Cases, 14, 15. 2 Danv. 523, 526.

A man possessed of a term for years devises it to his wife for life, remainder to his first son for life, and if he died without issue, to his second son: the first son died without issue, and if the remainder to the second son was good? was the question on a special verdict; for it was objected, that here it is not *to him and his issue;* in which case it was agreed, it should go to him and his executors, and the remainder over be void: but here it is devised *to him for his life, and if he die without issue, the remainder to the second brother;* so that hereby he had only an estate for life, with an executory devise to the second son on the contingency, that he had no issue when he died; and cited 2 Roll. Abr. 406. No. 8, 9. Devise of a term to one so long as he has issue, remainder over, is good: but after divers arguments it was adjudged, that the remainder to the second son was void, and that a devise to one and his issue, with a remainder over, is all one with a devise to one for life, and if he dies without issue, to another; for a remainder of a term shall not depend on a possibility so remote as the dying without issue.

[291] TERM. SANCT. TRIN. ANNO 22 CAR. II. IN BANCO REGIS.

DRAPER *against* BLANY.

Scire facias, if it lies from the King's Bench into Wales. S. C. Raym. 171, 206. 2 Mod. 10. 2 Saund. 193. Vaugh. 395, &c. 2 Keb. 649, 657, 724. 3 Keb. 170, 401.

Judgment in the King's Bench for a debt, and a *fieri facias* to the sheriff, who returns *nulla bona;* but on a *testatum fuit*, that he had lands in Denbighshire, another *scire facias* issued to the Sheriff of Denbigh, who returns *quod breve domini Regis non currit in Wallia.* And Kelynge Chief Justice, on the first motion held, that the writ lies; the others said nothing, but ordered the sheriff to make such a return as he

would stand by, and the sheriff stood to his return: and afterwards in Mich. 22 Car. 2, it was argued by Saunders, that the writ lies, and he cited Hetl. Rep. 20. 2 Cro. 484, *Carew's case*, 2 Bulst. 156. *Bedo* against *Piper*; & *ibid.* 54, *Hall* against *Rotheram*. And by Williams for the defendant it was said, that in *Newman's case*, Hill. 1657, such a return was adjudged good. And Twysden doubting whether the writ lay, it was adjourned.

THE KING *against* THE MAYOR, &C. OF STRATFORD UPON AVON.

A town-clerk *durante beneplacito*, is removable without cause. S. C. 1 Vent. 77, 82, 342. Raym. 188. 3 Keb. 641, 656.

A *mandamus* was to restore him to the place of town-clerk there. They return their charter, whereby they are enabled to chuse a town-clerk *durante beneplacito*, and that they had removed him; but do not return any cause, nor summons to answer. Wherefore it was moved by Jones, that the return was ill. But by Kelynge, **[292]** Twysden and Rainsford, the return is good; for it is to no purpose to summon him to answer, whom they may remove without a crime.

MORRIS AND OTHERS *against* CREACH.

Obligation barred by an award. S. C. Keb. 623, 659. *Q.* 1 Mod. 36.

Debt on an obligation by three executors: the defendant pleads, that there were divers controversies between the defendant and one of the plaintiffs; whereupon they submitted themselves to the award, which awarded, that the defendant should be quit of the obligation. The plaintiff demurs, and on argument it was held by the Court, that an obligation by itself is not submittable, because it is a debt certain, otherwise it is as here, where it is submitted among other things: and Kelynge and Twysden held the plea good, notwithstanding the controversies were only between one of the plaintiffs and the defendant; but Moreton doubted, not only for the said reason, but also for that an arbitrament is not of so high a nature as an obligation, and therefore cannot be a bar. But see 45 Ed. 3, 16, an opinion, that an award by deed is pleadable in bar of an obligation. But 1 Roll. 270 is an opinion to the contrary: and it was adjourned.

HOSKINS *against* MATTHEWS AND CLARKE.

Case for excommunicating the defendant without cause. S. C. 1 Vent. 86. 1 Sid. 463. 2 Keb. 636, 663. *Post*, 297.

Case, for that the defendant falsly and maliciously, without any reasonable cause, cited and excommunicated him in the Ecclesiastical Court. After verdict, it was moved in arrest of judgment, that it does not appear for what cause the suit there was. But *per Cur'*, it is said and found to be falsly, and without any cause; and the action lies, and judgment was for the plaintiff.

[293] BEANY *against* TURNER.

Agreement to surrender a copyhold, if a surrender into the hands of two copyholders be sufficient. S. C. 1 Mod. 61. 2 Keb. 666.

Error of a judgment in the Common Pleas, where the plaintiff declares, that it was agreed between him and the defendant, that the plaintiff should surrender to the defendant certain copyhold lands, and that the defendant should pay to the plaintiff so much; and in consideration, that the plaintiff had assumed to perform the agreement on his part, the defendant had assumed to perform the agreement on his part: and avers, that he had surrendered into the hands of two copyholders, according to the custom, to the use of the defendant, and that the defendant had not paid: on

which the defendant demurs, and judgment was given in the Common Pleas for the plaintiff. And now the error assigned was, that the surrender into the hands of two copyholders, was not a good performance on the plaintiff's part. And cited 1 Cro. *Sims* against *La. Smith.* Agreement to surrender generally, he is not obliged to make a letter of attorney to surrender. And Hill. 12 Car. 2, B. R. Rot. 1735, *Burges's case* Styl. 107, and 1 Cro. *Devered* against *Ratcliffe.* (*Q.*) To which it was answered, that on an agreement to surrender generally, a surrender by any way is sufficient. But Twysden held, that this surrender was no performance. And Kelynge Chief Justice, held the contrary. But by the whole Court, here being mutual promises, there needs no averment at all of the performance, and therefore an ill averment of that which needs no averment, shall not hurt; and thereupon they all affirmed the judgment.

SIMPSON *against* QUINEY.

Custom, that lands shall descend to the elder daughter for life only. S. C. 1 Vent. 88. 2 Keb. 672, 679. 2 Danv. 550, pl. 3.

The custom of Newcastle upon Tyne, that the land shall descend to the elder daughter only for her life, was adjudged good, without argument: for the Court said, that they had adjudged it so before; which you may see in the case of *Newton and Shafto.* *Ante* 172.

[294] GRELL AND OTHERS *against* RICHARDS.

8 defendants appear by attorney, where two are infants, judgment reversed against all. *Post.* 299, 300, &c. *ib.* Stra. 783.

Error of a judgment in the Common Pleas, in trespass against eight defendants, on which they brought error, and say in the writ, that the judgment was *ad dampnum ipsorum.* The defendant appears on the *scire facias*, and pleads, *in nullo est erratum*, where the error assigned, was nonage of two of the defendants; and yet that all appeared by attorney. And afterwards in Mich. 23 Car. 2, Hale being then Chief Justice, the judgment was reversed *in toto.* Because 1st. The pleading of *in nullo, &c.* is a confession of this error in fact, it being a demurrer, and no way is left by the demurrer to try it; they ought to have pleaded to the infancy, so that issue might be taken thereon. 2dly. Although it is said, *ad dampnum ipsorum*, it is good; for it was to the damage of all to have judgment given against them; although by Hale they might have said, to the damage of the two infants.

LANGAN *against* CARNE.

Lease for 40 years, then a lease for 99 years from the end of the first term, rendering a heriot on the death of each tenant. No heriot payable till the first term ended. S. C. 1 Sid. 437. 1 Saund. 165, 166, 167. 1 Vent. 91. 2 Keb. 588, 505, 572, 577.

Ejectment, and on not guilty and special verdict, the case was: A man demises lands for forty years rendering rent; and then makes another lease for ninety-nine years, to commence after the said term of 40 years, rendering rent from the time that the second term commences, *and not before;* and then in another *reddendum* reserves capons. And then it follows, *And also yielding and paying at the death of every tenant* 3*l. in the name of a heriot.* The tenant of the second lease dies during the continuance of the first lease, and if the heriot be due, was the question. And Kelynge Chief Justice, held it due by the express **[295]** words, though he could not have any benefit of the land during the first term. But Twysden, Rainsford, and Moreton to the contrary, that the intent could not be to have him pay who could not have any profit of the land; and this appears by the words. *And also, &c.* which shews, that the heriot shall not be payable but when the rent shall be payable; and so it was adjudged by those three.

[296] TERM. SANCT. MICH. ANNO 22 CAR. II. IN BANCO REGIS.

THE KING *against* WILDE.

The Court *ex officio* ought to take notice of the beginning and end of prorogations and sessions of Parliament. S. C. 2 Keb. 686. Raym. 191.

Information on the statute 13 Car. 2, against the Norwich weavers, for having more than two apprentices; and after a verdict on not guilty for the plaintiff, it was moved in arrest of judgment, that the commencement of the Parliament was mistaken: to which it was answered, that it being a Private Act, the Court could not take notice thereof by any matter *dehors*, but if they would have advantage thereof, they ought to have pleaded *nul tiel record*. But *per Cur'* the Court is obliged to take notice of the commencement of Parliaments, and also of prorogations and sessions, and they ought to take notice, that there cannot be any such Act. See Hetl. 119, *Jenkins's case*, and Dyer 203.

YARDE *against* FORDE.

[See S. C. 2 Wms. Saund. 172.]

Case for erecting a market to the damage of the plaintiff's market. S. C. 2 Saund. 172. Raym. 195. 1 Mod. 69. 1 Vent. 98. 2 Keb. 689, 706.

Case, for that he being seised of a market, the defendant without any lawful warrant erected another market within seven miles, to the damage of his market: after a verdict for the plaintiff on not guilty, it was moved in arrest of judgment, *First*, That it is not shewn that it is another market which is held on the same day, and then no action lies, 2 Roll. 140. 22 H. 6, 14. 11 H. 4, 5 b. Regist. 107 a. b. Also *secondly*, That this is seven miles distant, and there never was an action maintained if it was not within five miles. But *per Cur'*, it being laid and found to **[297]** be without any lawful warrant, and to the damage of the plaintiff's market, judgment was given for the plaintiff.

POWELL *against* JONES.

He cannot read a declaration, spoken of an attorney, without averment that he could. S. C. Ray. 196. 1 Vent. 98, *contr.* 2 Keb. 710.

Error of a judgment in the Common Pleas for words, where the plaintiff declared, that he being an attorney, the defendant having a *colloquium* of him and his profession, said, *that he could not read a declaration*, whereby he lost one Scott his client; and on a verdict the plaintiff had judgment there: and now the error assigned was, that it is not averred, that he could read a declaration; and Twysden at first held, that the action did not lie for want of the averment: but afterwards, it being laid to be *falso*, and so found, the judgment was affirmed.

CATTEREL *against* MARSHALL.

Promise to give an obligation with sufficient sureties, where he ought to shew the penalty and the sufficiency of the sureties or not. S. C. 1 Vent. 99. 1 Mod. 70. 2 Keb. 692. *Vide* 1 Sid. 270.

Error of a judgment *in assumpsit* in the Common Pleas, where the plaintiff declared, that in consideration of 30l. paid by the plaintiff to the defendant, and that the plaintiff had taken upon him to give the defendant bond with sufficient sureties to save him harmless from such a suit, the defendant promised, &c. and says, that he gave him bond with sufficient sureties to save him harmless from the said suit; and on a verdict and judgment for the plaintiff there, it was now assigned for error, that it is not shewn of what penalty the obligation was, nor what the sureties were; and cited for this Hob. 69, 77, *Jervis's case:* but *per Cur'*, when the obligation is to be given for the payment of money, it ought to be shewn what the penalty is, and of

what sufficiency the sureties are, so that the Court may judge of the sufficiency of the penalty and the sureties: but here it being to save (harmless) against uncertain damages and costs of suit, so that the Court cannot judge of the sufficiency, he need not shew it in the declaration, but it ought to come on the evidence on (the issue) *non assumpsit*, and the Court that tries the cause shall judge of the sufficiency of the penalty and the sureties; wherefore they affirmed the judgment.

[298] BROWN *against* LONDON.

Assumpsit on the custom of merchants, &c. and a general *indebitatus* joined, and intire damages. S. C. 1 Vent. 152. 1 Mod. 285. 2 Keb. 695, 713, 758, 822. Hard. 485. 1 Danv. 27, 5.

Assumpsit, and declares on the custom of merchants and others trading in England, that if a man draws a bill on another, who accepts it, he is obliged to pay it; and that J. S. drew a bill on the defendant to pay to the plaintiff, that he had accepted it and not paid it: and also, whereas the defendant was indebted to the plaintiff on another bill of exchange, that he had promised and had not paid: after a general verdict on both promises, and intire damages given, judgment was stayed; for that no custom is laid to warrant the second promise, and without a custom the action upon a bill (of exchange) is not maintainable; and the custom laid in the first part does not extend to the second part (or count).

MARTIN *against* DELBOE.

Statute of Limitations not pleadable on accounts stated between merchants. Discontinuance after argument. S. C. 1 Sid. 465. 1 Mod. 70. 1 Vent. 89. 2 Keb. 674, 696, 717. 2 Saun. 125. *Vide ante* 287.

Assumpsit for money due on account stated between merchants; the defendant pleads the Statute of Limitations; and on agreement it was doubted, whether it appeared sufficiently on the declaration that the account was stated: and afterwards the plaintiff prayed leave to discontinue, and had it, though it was after argument.

[299] THE KING *against* LESINGHAM.

Common disturber of the peace, &c. too general. S. C. Raym. 193, 205. 1 Mod. 71, 288. 2 Keb. 687, 697. 1 Ven. 97, 104.

Information, for that the defendant being lord of the manor of D. took unreasonable distresses on divers tenants of the manor, and was a disturber of the peace, and a common oppressor: and after verdict, judgment was stayed; for the taking of unreasonable distresses is to be punished by action on the Statute of Marlbridge, cap. 4. Disturber of the peace, and common oppressor are too general. 1 Mod. Rep. 451, *Cornwallis's case.*

HAMILTON *against* VERE.

Case for loss of service for the whole term, though not yet expired. S. C. 2 Saund. 169. Raym. 200. 2 Keb. 693, 697. *Vide* 6 Mod. 1 Mod. 271.

Case, whereas the 1st of May, 1665, he had retained one A. to serve him for 9 years as apprentice, the defendant seduced him from his service such a day, whereby he lost his service for the residue of the term: and after a verdict for the plaintiff, it was moved in arrest of judgment, that the term is not expired, and yet he had declared and recovered for the loss of service for the whole residue of the term, and A. may yet return and serve him; but he ought to have declared of the loss of the service from the time of the departure, until the exhibiting of the bill: and of this opinion were Twysden and Rainsford; and in the absence of the other Judges they stayed the judgment on the argument of Saunders for the defendant, and Winnington for the plaintiff.

FOXWIST *against* TREMAYNE.

An infant and one of full age executors, join and sue by attorney. S. C. 1 Mod. 47, 72, 296. 1 Sid. 442. 1 Vent. 102. 2 Saund. 212. Raym. 198. 2 Keb. 633.

Debt brought by three executors by attorney, one of them being within age: the defendant pleads, that he is within the age of 17 years: on which the plaintiff demurs, and two points were argued at the Bar. 1st. Where an infant, and others executors, of full age, join in an action, if the infant ought to sue by guardian? 2dly. If the infant ought to be omitted, and the suit only **[300]** in the name of those of full age? And now the Court, viz. Twysden, Rainsford, and Moreton, (Kelynge being absent and sick) delivered their opinions. And as to the 1st. it was held by Rainsford and Moreton, that an infant and another executor may sue by attorney; but if they are defendants, the infant ought to be by guardian; as 2 Cro. *Westcot* against *Cotton*, 1 Roll. Abr. 288, sect. 3. And as to the 2nd they held, that all ought to be joined in the action, and that there shall not be any administration granted to another *durante minoritate*, where one of them is of age. Twysden, as to the 2d held, that they may join, and all the plaintiffs; as Yelv. 130, *Smith* against *Smith*, and 5 Co. *Prince's case:* but as to the first he held, that the infant ought to be by *prochein amie*, where he is plaintiff, as well as by guardian, where he is defendant; and in no case by attorney: for 1st he cannot make a warrant of attorney, for the warrant made by him is void. 2dly. If there should be a nonsuit, the infant would be *in misericordia*, which an infant cannot be. But upon the opinion of the other two judgment was given, that the defendant should answer over.

REEVES *against* GIBSON.

No bail in account till after judgment, *quod computet*. S. C. 1 Vent. 105. 2 Keb. 713.

In account, the plaintiff insisted upon special bail, because the defendant would go beyond sea; but it was denied by the Court: for in account no special bail is to be found until judgment *quod computet;* and so it was ruled Hill. 14 & 15 Car. 2, in this Court, between *Lewis and Bayly*, and Noy 28.

ROBERTS *against* MARRIOTT.

Plea, no award, and rejoinder not tendered, is a departure. S. C. 1 Mod. 42, 289. Raym. 94. 2 Keb. 614, 618, 702. 2 Saund. 73, 188, 189. *Ante*, 133. 2 Saund. 53, 188.

Debt on obligation conditioned to perform an award, so that it be made and tendered at the house of J. S. such a day. The defendant pleads an award: the plaintiff replies, and shews an award, and assigns a breach. The defendant rejoins, that it was not tendered at the day. The plaintiff demurs; and for the defendant it was argued, that this was no departure; for it not being tendered, and **[301]** the submission being conditional, with an *ita quod* (that it be) it is no award. To which it was answered, that the plea of no award is intended of no award at all either in fact or in law: but the rejoinder admits an award in fact, but that it is void in law for want of tender, and so it is a departure. 2 Roll. Abr. 692, pl. 10. And of this opinion were the whole Court, viz. Twysden, Rainsford, and Moreton, and gave judgment for the plaintiff.

WEST *against* DAVIES.

Trover of three ricks of hay, good. S. C. 2 Keb. 703. 1 Mod. 289. 1 Danv. 24, 26.

Trover *de tribus struibus fœni Anglice* ricks of hay: after verdict it was moved, that *struibus* is uncertain, and ought to be *de tantis carectatis*. But the Court on the contrary held it certain enough, and gave judgment for the plaintiff.

WOOTEN *against* HALE.

Covenant lies on a warranty upon a fine *sur concessit*, by a *feme covert*. S. C. 1 Sid. 466. 2 Saund. 177, 181. 2 Keb. 684, &c. 1 Mod. 66, 101, 290. 2 Danv. 50, 14.

Covenant, and declares, that John Hall, and Elizabeth his wife, levied a fine *sur concessit* with warranty of lands to the plaintiff, and the husband died, and that J. S. having a lawful title, entered and expelled the plaintiff by due process of law. The defendant by protestation, that J. S. had no lawful title for plea, says, that he did not enter and expel the plaintiff *modo & forma* as the plaintiff had declared; and on this issue verdict was for the plaintiff. And now it was moved in arrest of judgment, that the *having a lawful title*, is not sufficient: for it may be, that he had a lawful title under the plaintiff himself; as 2 Cro. 325, *Kirby* against *Hansake*, and so held the Court, viz. Twysden, Rainsford, and Moreton. 2. It was objected, that an action of covenant does not lie on this warranty in the fine *sur concessit*, by the *feme covert*. But the Court on the contrary held, that covenant lies on the warranty in this fine, as well as voucher, or a *warrantia chartæ*, on a fine by a *feme covert*, or a fine levied of lands in fee. But for the first exception judgment was stayed.

[302] DONAVAN *against* MASCALL.

Arbitrators and umpire have the same day. S. C. 1 Mod. 274. 1 Sid. 456. 2 Keb. 714. Raym. 205.

Debt on obligation, conditioned to perform an award, so that it be made at or before the 19th of February, and if they did not make any, (then) to the umpirage of such a person as the administrators should name, so that it were at or before the 20th of February. The defendant pleads no award, &c. The plaintiff replies, that the arbitrators did not make any award; but that the 19th of February they elected such a one umpire, who made his umpirage, and shewed what it was, and assigned a breach; on which the defendant demurs, and now it was argued for the defendant, that the umpirage was void, it being made before the power of the arbitrators was determined. But on the contrary it was said, that their power was determined by the election of the umpire, the umpire being elected by themselves; otherwise where the umpire is appointed by the parties submitting, and he makes his umpirage before the time limited for the arbitrators is expired. But now Twysden and Moreton strongly inclined, that the umpirage was void, and the arbitrators power not absolutely determined by the election of an umpire, they not having absolutely refused to make any award. Rainsford seemed of a contrary opinion, and it was adjourned. See *Copping and Harriard's case*, *ante* 285, and *Traverse and Twisleton's case*, *ante* fol. 174.

[303] ARCHDEACON OF ROCHESTER'S CASE.

Privilege for excusing an archdeacon from being expenditor of a farm. S. C. 1 Vent. 105. 1 Mod. 282. 2 Keb. 693.

A writ of privilege was prayed to excuse him from the office of expenditor in the level of Romney Marsh in Kent: *First*, Because he being an ecclesiastical person ought not to be put in such an office. *Secondly*, For that all the land he has in the level, is in lease for ninety-nine years; and the writ was granted by Rainsford and Moreton, they only being in Court; Moreton for the first cause, and Rainsford for the second.

JENNY *against* NORRIS.

Trover *de quadam parcella fili*. S. C. 1 Vent. 105. 1 Mod. 295. 2 Keb. 715. *Vide ante*, 301. 1 Vent. 71, 105. 1 Sid. 445. 1 Mod. 46, 294. Style 360, 358, 419. 2 Saund. 74. 6 Mod. 87.

A *quantum meruit* was in the Common Pleas, among other things *de quadam parcella fili*, and verdict and judgment for the plaintiff there; and thereupon error was brought

here, and it was assigned, that a *parcel of thread* is altogether uncertain in a *quantum meruit:* but by the Court, it is certain enough in this action or in trover, where damages only are to be recovered, and not the thing itself, as in replevin and *indebitatus assumpsit*, or a *quantum meruit pro diversis mercimoniis sibi venditis & deliberatis* is as uncertain as *parcella fili*, and yet that is good, and they affirmed the judgment.

WIMBLETON *against* HOLDRIP.

Obligation conditioned to do divers particular things, *performavit omnia* is not good without answering the particulars. S. C. 2 Keb. 710.

Debt on obligation continued to do divers particular things in the condition mentioned: the defendant pleads *performavit omnia, &c.* and upon demurrer it was adjudged an ill plea, for the particulars being expressed in the condition, he ought to plead to each particularly by itself: but where the condition is to perform all the covenants in an indenture, there he may plead *performavit omnia* generally if they are all in the affirmative, without answering particularly to every particular.

[304] THE KING *against* PAGE.

Indictment *in burgo*, and not said *pro burgo*, ill. 2 Hawk. P. C. 359. Stra. 313, 618, 865. Doug. 153, 791. 1 Term Rep. B. R. 316.

An indictment was quashed, for that it was *ad generalem sessionem pacis tent' infra burgum de L.* not saying *pro burgo*. And two other indictments were quashed the same term for the same fault.

PITS *against* PELHAM, IN THE HOUSE OF LORDS.

Devise, that lands shall be sold, and not said by whom. S. C. 2 Jo. 25. 2 Chan. Cases, 205. 1 Chan. Cases 35, 179, 180.

A man devises lands to his wife for her life, and that after her death the reversion shall be sold, and the money arising thereby, distributed between his heir and three nephews; the heir refuses to sell or to join with the wife in the sale; and on a bill exhibited in Chancery against him, to compel him to join in the sale, the bill was dismissed by the Lord Keeper Bridgman, who held the will to be void as to the sale of the reversion, it not being said who shall sell: but in the House of Peers, they on advice with the Judges reversed the dismission, and decreed, that the heir should sell; for when no person is appointed to sell, it ought to be intended that he shall sell who has the estate, which is the heir. See 5 H. 7, 12 b. by Hide, Fenwick and Fineux; a devise that lands should be sold and not said by whom, they shall be sold by the executors; and to the same intent when they are to be sold for payment of debts.

[305] TERM. SANCT. HILL. ANNO 22 & 23 CAR. II. IN BANCO REGIS.

RAVENSCROFT *against* RAVENSCROFT.

Administration granted according to the statute repealed, when granted *inverso ordine*, or by a Court which has not jurisdiction. S. C. 2 Keb. 726. *Ante* 159.

Ravenscroft died intestate, leaving Thomas his eldest son, and Ralph his second son, and divers other sons and daughters; Thomas the elder is made administrator, and Ralph the second son appeals to have it repealed and granted to him, and alledges in the delegates, that it was agreed between the sons and daughters, that Ralph should be administrator in trust for all the younger children; and that Thomas had 1000l. per annum, and all the younger children nothing; whereupon Thomas prays a prohibition, for that the administration being granted according to the statute, could not be repealed; and he had it except cause were shewn *contra* at another day; at

which day it was shewn, that there were other allegations besides those beforementioned, viz. that there were *bona notabilia;* and so the administration not grantable by the bishop of the diocess, and that it was granted, not citing such parties as ought of right to be cited, and thereupon the first rule was discharged; for when administration is granted where it is not grantable, or if they proceed *inverso ordine* or irregularly, there the administration may be repealed by the delegates notwithstanding the statute.

[306] HORSEY *against* TURGES, &c.

Executors submit to an award, the sum awarded is not attachable, not being due to the testator at the time of his death. S. C. 1 Vent. 111, &c. 2 Keb. 716, 731, 741.

Debt on obligation conditioned to perform an award, and on demurrer the case was this; the plaintiff as executor, and the defendants submit all controversies, &c. The arbitrators award, that the defendant should pay to the plaintiff 300l. and a creditor of the testator attaches this in the hands of the defendants as the testator's debt, and whether it was attachable as a debt of the testator? was the question. For it was agreed it should be assets in the hands of the plaintiff when he recovered it, the submission of the plaintiff being only as executor. And it was argued for the plaintiff, that this was not a debt due to the testator, and the custom is to attach debts due to the testator at the time of his death, which this was not, but only a debt due to the executor; although perhaps arising on a cause of action, which was in the testator, as a breach of covenant or the like, which sounds only in damage, which damage is now discharged by the new sum awarded: and if this debt be attachable in the hands of the creditor, by the same reason may the debt due on the obligation of submission, be attached in the hands of the executor himself; and to this opinion, that the sum awarded was not attachable in the hands of the defendants, Twysden and Rainsford strongly inclined; Moreton doubting upon the first argument: and afterwards judgment was accordingly given for the plaintiff, and that the sum awarded was not attachable.

THE KING *against* THE PRESIDENT AND COUNSEL OF THE MARCHES.

A *mandamus* to restore a deputy.

A *mandamus*, shewing, that Henry Wynn, was *debito modo constitut'* secretary of the Courts of the Marches, by letters patents to be exercised by himself or deputy; and that the President and Counsel had put out Luke Clapham his deputy, being duly constituted; they return, that at the time **[307]** of the delivery of the writ of *mandamus*, Luke Clapham was not constituted deputy. *Per Cur'.* Tho. a *mandamus* does not lie for a deputy, yet it lies for him who deputes him, either to have him admitted or restored; for otherwise he may be deprived of his power to make a deputy. And this return is ill, that at the time of the writ delivered he was not constituted deputy; for perhaps they had put him out of his place before the writ came to them; and therefore a peremptory writ of restitution was awarded.

TAYLOR *against* BECKET.

Venue not changed in covenant. *Vide* 2 Salk. 668, 670, &c.

Covenant against an apprentice on his indentures, for speaking words to his master's damage. The defendant moved to change the venue, for the matter of action is the words, for which an action on the case lies; and the action is brought by the plaintiff only to elect his county for the trial, and to oust the defendant of his privilege to change the venue, as he might have done had it been an action on the case. But *per Cur'*, this action is (properly) covenant in which the venue is not changeable.

WHITE *against* STUBBS.

Replication, *de injuria sua propria*, where the bar contained an ill title. S. C. 2 Keb. 712, 735. 2 Saund. 294.

Trespass for entering his close, and taking his goods, 9th of October, 20 Car. 2. The defendant pleads, that Ratcliff was seized in fee, and 23 July, 20 Car. 2, demised the place where to the defendant; and that he the 26th of July demised to the plaintiff for a quarter of a year, which ended the 26th of October, 20 Car. 2, and for that the goods were there after the quarter of the year ended, he took them damage feasant; *absque hoc*, that he took them the 9th of October, or at any time within the quarter of the year. The plaintiff replies, *de injuria sua propria absque tali causa;* on which the defendant demurs. And first it was resolved, that the replication *de injuria, &c. absque tali causa* was ill, for that the plea in bar contained title. And 2. That the traverse of the plea was ill; for it may be **[308]** that he took them before the quarter of the year, and before the demise to the defendant by Ratcliff; wherefore judgment was given for the plaintiff. And it seems the traverse ought to have been *absque hoc*, the 9th of October, or any time before the 23d of July, or during the quarter of the year.

THE DEAN AND CHAPTER OF WINDSOR *against* GOWER.

Lease of tithes for 4 years, rendering 50l. per annum, the defendant assigns the term. *Q.* If the lesse be chargeable, &c. Tid. 1 Saund. 22, 23, 209, 268, 269. 3 Lev. 227. Nels. Lutw. 299.

Debt on a lease of four years of tithes, rendering a rent of 50l. The defendant pleads, that he assigned his term to J. S. and that the plaintiff accepted him for his tenant, and received the rent reserved, 6d. *de reddit. prædict'*. The plaintiff demurs, and three questions were made and argued: 1. It was said, that it was not a rent, but a sum in gross, and in contract; for a rent cannot issue out of tithes. Co. Lit. 47, and then the assignment and the acceptance signify nothing in the case. 2. The pleading acceptance of the rent, 6 *denar. de reddit. prædict.* is senseless. 3. That the acceptance by the dean and chapter cannot be pleaded without deed, which is not done here. As to the 1st. it was said, that the privity of the contract shall go with the estate. 3 Cro. 636, *Buffkin* against *Edmunds*, the same case. To the 2nd, that a receipt of any part is an acceptance, and receipt of the whole. And to the 3d, that it may be paid in the chapter-house. The Court said nothing as to the 1st and 3d, but gave judgment for the plaintiff on the 2nd for the insensibility.

MANNINGTON *against* GUILLIMS.

Plea, bargain and sale of rent without consideration, issue *non concessit*, a verdict cures the want of consideration. S. C. 1 Vent. 108. Raym. 200. 2 Keb. 693, 739.

Replevin, avowry for rent charge for that J. S. seized of rent bargained and sold it to the avowant: issue thereon, that J. S. did not grant, and verdict for the avowant, that he did grant; and it was moved in arrest of judgment, that here is a bargain and sale, and no consideration shewn, and so it is void: but *per Cur'*, after a verdict, the consideration shall be intended to have been proved on the trial, the issue being *non concessit;* for else the jury could not have found for the avowant, **[309]** if no consideration had been proved; and the bargain and sale was void. Hutt. 54. Cro. 165, 259. Wherefore judgment was given for the avowant.

COLE *against* GREEN.

Converting brew-houses, &c. into tenements of greater value, is waste.
S. C. 2 Saund. 352, to 259. 1 Mod. 94. 1 Danv. 311.

Waste in the Hustings London, on a lease for years of a brew-house in London. The defendant pleads no waste, and issue thereon; and on the evidence it appeared, that the defendant took down the brew-house, and erected several houses in the place, and improved the rent from 120l. to 200l. per annum; and by the direction of Howel Deputy Recorder, before whom the cause was tried; for that thereby the nature of the thing, and the evidence thereof was altered, the jury found it waste, and gave single damages 200l. which were trebled to 600l. But then judgment was arrested, on motion before Sir William Wilde, the recorder himself, for the insufficiency of the verdict; because the writ of the count are *quod fecit vastum venditionem & destructionem;* and the jury found *fecit vastum, venditionem & destructionem, scil.* in pulling down the brew-house, and taking away the coppers, and the other particulars, &c. but did not find any sale of any of the particulars, upon the book-case in Long 5 E. 4, 100. In waste for felling and selling of trees, the defendant pleads, that he felled them and employed in repairs; and the plea adjudged ill, because it did not traverse the sale. And although to this it was answered, that though in a plea the sale is material, because if he sold them it is waste, although he repurchase them and imploy them in repairs; and therefore the sale is there traversable, so that it may appear to the Court, whether the employing them in repairs be waste or not; yet when *in a verdict* the waste is found, it is sufficient whether they are sold, or not: but (notwithstanding) the verdict for the said exception ruled to be insufficient, and a rule made for a new trial; whereupon the jury, in respect of the melioration, or improvement, by the direction of Sir William Wylde, before whom the new trial was, gave a verdict for the defendant, and judgment was thereupon given for the defendant.

On which judgment Cole brought a writ of error before Vaughan Chief Justice of the Common Pleas, Hale Chief Baron, Turner, and Rainsford, and Moreton Justices, assigned at **[310]** St. Martins le Grand; and upon hearing of counsel before Howel Deputy Recorder, the judgment, and both the verdicts, and the rule for the new trial (which was *quia videtur Cur' quod verdict prædict. est vitiosum & erroneum, ideo cassetur, & habeatur nova triatio*) were all certified. And before the said justices assigned, four points were argued and adjudged, viz. 1st. That the first verdict was sufficient for the reason before alledged. Rast. Entr. 695 b. 696 a. 689. Pasch. 7 Eliz. 3, pl. 1. 2ly, That both the verdicts and the rule were well certified at first on the writ of error, because the Hustings being an Inferior Court, no diminution can be aledged of certifying more than is certified at first; and if the first verdict be not certified, and the rule, &c. the erroneousness of the proceedings in the Hustings cannot appear, and so no remedy be on the writ of error; and for this were cited 8 Co. 65, *Loveday's case*, Co. Entr. 252, *Donal's case.* 3dly, That the Court here ought to reverse the judgment, because the Court below erred in setting aside the first verdict as insufficient, where it was sufficient. 4thly, That the Court here ought to give the same judgment here for the plaintiff on the first verdict, as the Court below ought to have given; and this by virtue of the words in the writ of error, *et ulterius facturi quod ad justiciam pertinet secundum leges regni & consuetudinem civitatis prædict'*, and though no precedent was produced of such a thing done before in this case, yet they said they would presume the customs of London to be according to the common law, if no precedent be shewn to the contrary; and upon this all the Judges agreed, and reversed the judgment, and gave judgment for the plaintiff on the first verdict.

On which judgment of reversal the defendant brought a writ of error in the House of Peers, and assigned error, that the jury did not come from the four next wards, which by the custom of London they ought; whereupon the defendant in the error pleads, *in nullo est erratum*, and on argument there, the Lords, with advice of the Judges, resolved these points. 1. That it was not assignable for error, being contrary to the record, because the award of the *venire facias* is *de quatuor proximis wardis*, and the writ is returned served accordingly, and is not like to the case 3 Cro. 320, nor 1 Roll. Abr. 761, M. 3, which are from more Inferior Courts, where it was assigned,

that one named *alderman* was not an **[311]** alderman, and one named *steward* of St. Catherine's was not steward: but the Courts and customs of the City of London are confirmed by Act of Parliament, and are like the Grand Sessions of Wales, or the Place Court; and 1 Roll. Abr. 758, No. 4, is: it cannot be assigned, that the deputy of the Grand Sessions before whom the Court was tried, was not deputy; and *Molins and Nesby's case*, Trin. 14 Car. 2, B. R. Rot. 1091, and *King and Allen's case* in the same Court, it cannot be assigned, that the Judge of the Marshalsea was not Judge or present in Court. *Secondly*, That *in nullo est errat'* is a demurrer, but though there is an error in fact, it is not confessed by the demurrer, it not being assignable; but the demurrer is thereupon in point of law because not assignable; on which the judgment was affirmed, and remanded to St. Martins to be executed; and there it was objected, that they could not execute it, because they had no seal to seal the execution; but for that a precedent was produced, dated 11 *Junii* 22 *Eliz.* between *Crowther and Gee*, where in the like cases, the justices sealed the writ of execution with their particular hands and seals, and so the Court resolved to have done here: but before it was done, Green the plaintiff in the error died, not having any goods in London, and Forth, alderman of London, claiming by a lease under Green, had preferred his bill in Chancery to be relieved, &c. and prayed an injunction thereby, this *waste* being a *melioration:* but he to have an injunction was ordered by the Court to enter into a recognizance to answer for Green, being an ancient man; and on hearing of the cause there, in regard there had been one verdict for the plaintiff, and another for the defendant, the Lord Keeper Bridgman, after all those proceedings, directed a new trial at the King's Bench Bar, to try in a feigned issue, *whether waste or not?* and on the trial before Hale, then Chief Justice, it was resolved to be waste notwithstanding the *melioration*, by reason of the alteration of the nature of the thing, and of the evidence thereof; and the jury gave their verdict accordingly, and 100 marks single damages, which trebled, amounted to 200l. which the Chancery compelled Cole to take.

Cole to have execution of the place wasted, had the record transmitted by *certiorari* immediately from the justices at St. Martins, into the King's Bench, (without having it certified into Chancery; and sent from thence by **[312]** *mittimus* into the King's Bench) and from thence issued a *scire facias* against the administrator of Green, and against Forth and others, surmising that they had entered into the place wasted, and still held it, and they come in and demur upon the writ thus, viz. for that the plaintiff ought not to have seisin, because *non constat'*, that Forth entered on a title under Green. *Secondly*, For that the record is not legally removed into this Court to be executed, *unde petit judicium de breve & quod breve prædict' cassetur.* And now four questions were resolved by the whole Court, viz. *First*, That the record was lawfully removed immediately into this Court by the *certiorari*, without any *mittimus* from the Chancery, on the precedents Reg. 209. F. N. B. 242, 246 B. 190 F. Reg. 160, 285, & F. N. B. 243. *Secondly*, That it being in this Court, this Court may execute it notwithstanding Hutt. 117, *Risham* against *Goodwin*, that this Court cannot execute the judgments of Inferior Courts; and this resolution was grounded on Pasch. 22 H. 7, Rot. 369. Rastal's Entr. 531. Ashton's Placita Rediviva 145. Mich. 3 Jac. 1, B. R. Rot. 2311. Hill. 3 Jac. 1, Co. B. Rot. 1819. Pasch. 4 Jac. 1, B. R. Rot. 337. Bre. Judicialia 130. Hill. 9 H. 4, Rot. 130. Thesaures Brevium 40, 41, 42. Rast. Entr. 169, 192. Co. Entr. 180, 342. Reg. 170. F. N. B. 242, 243. *Thirdly*, That the *scire facias* was good, without shewing by what title Forth entered; and this was grounded on Rast. Entr. 236. Moyle 160. 2 Bro. 110. Bre. Judicialia 155, 253. Rast. Entr. 279, 452. Reg. Judic. 20, 50. And generally in recoveries in real actions the *scire facias* is against *such and such who entered, &c. Fourthly*, It was resolved by all the justices, that the plaintiff should have judgment to have execution, and not *respondeas ouster*, because although the conclusion of the demurrer is in abatement, yet the commencement being in bar, the judgment shall be peremptory. Mich. 15 Car. 2, B. R. Rot. 703, and so it was; and the plaintiff had execution accordingly. Norton and Levinz were for the plaintiff Cole throughout this whole cause, and Finch, Jones and others for the defendant.

So where matter in abatement is pleaded in bar, and concluded in bar, judgment shall be final. 6 Mod. 102.

The REPORTS of SIR CRESWELL LEVINZ, Knt. late one of the Judges in the Court of Common Pleas, at Westminster, containing CASES HEARD and DETERMINED in the COURT of KING'S BENCH, during the time that SIR MATTHEW HALE, SIR RICHARD RAINSFORD, and SIR WILLIAM SCROGGS were CHIEF JUSTICES there; as also of certain CASES in other Courts at Westminster, during that time. Translated into English by Mr. SERJEANT SALKELD, and others of the Middle Temple. The Third Edition, Carefully Corrected. Vol. II. 1793.

[1] TERMINO PASCHÆ, ANNO 23 CAR. II. IN BANCO REGIS.

FELLOWS *against* KINGSTON.

Debt for tithes in D. and S. not shewing how much in D. and how much in S. good. S. C. 1 Vent. 126. 2 Keb. 756.

Debt upon the statute of E. 6 for tithes, and declares that he is rector of the churches of Dale and Sale, and the defendant being occupier of 400 acres of land in D. and S. had sown the same, and carried off the corn untithed: after verdict for the plaintiff, it was moved in arrest of judgment, that he ought to have shewn which part of the lands lay in D. and which in S. that the defendant might know how to answer particularly to each parcel severally, for he might have a good title to one church and not to the other. But by Hale and the Court, 'tis good, for this action is in nature of a trespass founded upon the tort; so the exception disallowed, and judgment given for the plaintiff. *Vide* Poph. 208.

[2] HOPKINS *versus* ROBINSON.

Prescription *pro sola pastura* is levant and couchant, S. C. 1 Vent. 123, 163. 2 Saund. 324. 1 Mod. 74. 2 Keb. 758, 842.

Replevin, and avows damage feasant in his freehold; the plaintiff in bar pleads a custom for the copyholders of the manor, to have *solam pasturam omni anno omni tempore anni*, and that he by licence of a copyholder put in his beasts; upon issue no such custom, and verdict for the plaintiff, it was moved in arrest of judgment. *First*, That the custom being to have *solam pasturam* and to exclude the lord was not good. *Secondly*, It is not averred that the beasts were levant and couchant upon the copyhold.

Thirdly, Commoners ought to eat the grass by the mouths of their own cattle, and not by the mouths of strangers cattle, 2 Cro. *Monk* against *Butler*. *Fourthly*, If he may licence another, yet such licence cannot be without deed; to which it was answered, *First*, That the custom is good, Co. Litt. a. for this is not common but pasture, and he does not exclude the lord from all the profits, but the pasture only, and the lord shall have the mines, coals, trees, timber, &c. *Secondly*, Here needs no levancy and couchancy, for the copyholders are to have the whole pasture, and not to have common only, for such cattle as are levant and couchant upon their own tenements, which is the measure of their common. To the *4th*, A licence *pro hac vice tantum* is good by parol, not if it were for a time certain; for that would amount to a lease of a thing in grant, which cannot be without deed. And to the *3d*, This being a right of pasture and not of common, the herbage may be eaten by the beasts of strangers, though otherwise perhaps if it were common; which is not resolved to the contrary in *Monk and Butler's case*. To all which Hale Chief Justice inclined. *Sed adjournatur*. But after, as I was informed, for I was not there present, judgment was given for the plaintiff.

[3] DAVIS *against* REYNER.

Assumpsit in consideration of forbearance of a legacy, good, tho' no assets. S. C. 1 Vent. 120. Raym. 211, 212. 2 Reb. 744, 758. 1 Danv. 53, pl. 33.

Assumpsit, and declares, that J. S. devised a legacy to the plaintiff, and made the defendant executor; and the plaintiff intending to sue him for the legacy, the defendant in consideration of forbearance, promised to pay him. The defendant pleaded divers bonds and judgments, and *nul assets ultra*, upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had assets, or no, for he is charged upon his own promise in consideration of forbearance, and a forbearance of suit for a legacy, is a sufficient consideration.

PINKENY *against* BULLOCK.

Award that one pay 10l. and the other the expences of the award, and upon performance general releases if the award be good for the releases, or all void. *Vide* 1 Vent. 121. 3 Lev. 414. 2 Keb. 761, 759, 832. 2 Danv. 532, 19. *Vide post*, 235.

Debt upon an obligation, conditioned to perform an award: defendant pleads no award. The plaintiff replies, and sets forth an award, that the defendant should pay the plaintiff 10l. and the plaintiff should pay the defendant the expences in making the award, and that upon performance of all, each should release generally to the other, and assigns for breach non-payment of the 10l. The defendant demurs. And now Jones argued, that this award was void being not mutual, for nothing is awarded to the defendant but the release, and that is not to be made till all the rest be performed, which can't be; for the award of expences in making the award is void, being matter subsequent to, and out of the submission. But Hale Chief Justice inclined, that the release ought to be made upon the performance of what is well awarded, and not be delayed till the performance of that part which is void, and so the award will be good; but it was adjourned.

Note. Afterwards the 7th of W. & M. in a case between *Bargrave and Atkins*, but entered, Hill. 5 Com. Banc. Rot. It was adjudged upon an award like this, where the aforesaid objection was made by Levinz, that upon performance of what is well awarded the release ought to be made, and that the award is good.

[4] HULME *against* SAUNDERS.

Rent reserve annually 1 Sept. by equal portions action for a year and halfs rent. S. C. 2 Keb. 743, 804. *Vide post*, 99. 3 Mod. 41, 70. 2 Vent. 129. 2 Danv. 508.

Error of a judgment in B. R. in Ireland, in debt for rent, where the plaintiff declared of a lease, paying the 1st of September annually 74l. by equal portions, and

demands 100l. for a year and half's rent; and upon *nil debet* verdict and judgment for the plaintiff: and now it was assigned for error, 1st. That the rent is a duty payable annually the 1st of September, and the words *by even portions* vain and idle, and no half-year's rent can be due. 2d. The rent for a year and half is 111l. and he demands but 100l. which is less than is due; and yet 'tis not shewn how the rest was discharged. The Court held, that judgment ought to be reversed for both causes; but this being the first time of argument, and no one there for the defendant, it was adjourned.

METHIN *against* THE HUNDRED OF ISTLEWORTH.

Inhabitants finding the robber in the presence of a justice of peace, and charging him, shall excuse the hundred. S. C. 1 Vent. 118, 225, 235. Raym. 221. 2 Keb. 760. 3 Keb. 115.

Action upon the Statute of Winton: the defendants plead a *hue and cry* levied, and that within forty days they took one of the robbers; and on issue, that they did not take any of the robbers, a special verdict found, that Sir Joseph Ash, one of the inhabitants, finding Dudly, one of the robbers, in the presence of Sir Philip Howard, a justice of the peace, he desired him to commit Dudly; and Howard undertook that he should appear next sessions, and he accordingly did appear, *& si, &c.* And now it was argued, that this was no caption by pursuit within the statute to excuse the hundred, but a casual finding him in the company of a justice of peace, and a request to commit him: but on the other side it was argued, that here is found to be a *hue and cry*, and pursuit, and charging him in the presence of a justice of peace, who had him in his power at that time, and this is sufficient; to which Hale **[5]** Chief Justice inclined: *sed adjournatur.* But afterwards Hill. 24 & 25 it was so adjudged, Jones for the defendant, Saunders for the plaintiff.

VERE *against* SMITH.

Pleads, that he accounted, rejoinder, that he was robbed, whereof he gave notice. S. C. 2 Keb. 761, 779, 830. 1 Vent. 121. *Vide* 6 Mod. 139.

Debt upon an obligation, by the plaintiff a brewer, against the defendant his clerk, conditioned to perform covenants, to account for all sums of money he should receive. Defendant pleads, covenants performed. The plaintiff replies, that such a day 26l. came to his hands, for which he has not accounted. The defendant rejoined, that he accounted *modo sequente, viz.* that certain malefactors broke into his counting-house and stole it, wherewith he acquainted the plaintiff, *et hoc paratus est verificare;* upon which the plaintiff demurred: and now it was argued, 1st. That the rejoinder is a departure, for fulfilling a covenant to account, can't be intended but by actual accounting; whereas the rejoinder does not shew an account, but an excuse for not accounting. 2. The rejoinder ought to conclude *al Pais*, being an express affirmative, that he accounted, in contradiction to what was denied in the replication, that he did not account. *Cur' contra.* To the 1st, this is an account, and no departure; to the 2d, it was better to conclude as here, than to the country; for now the plaintiff hath liberty to traverse the robbery. *Adjournatur.* But after in Trinity term the demurrer was waved, and issue taken upon the robbery.

DENNIS *against* DENNIS.

Tenant in dower may try an error in fact, assigned the first Assizes without proviso. S. C. 1 Saun. 335. 2 Keb. 76.

Error in fact assigned in a judgment in dower, viz. that the tenant was an ideot, and appeared by attorney. Issue being taken upon the ideocy, the plaintiff gave notice of trial next Assizes, and after countermanded it; nevertheless the defendant in error carried it down to trial the same **[6]** Assizes without a proviso; and held good *per Curiam*, for he was an actor in the first suit, and is the party delayed by this means;

and the issue was found for the defendant in error, and the judgment affirmed; and a precedent was cited, wherein it was so done in a writ of error out of Ireland.

COKE *against* WHORWOOD.

Award, that one shall be bound with surety, good as to the party, void as to the surety. S. C. 2 Saund. 337. 2 Keb. 767.

Assumpsit to perform an award by which the arbitrators awarded, the defendant should be bound with sufficient surety to the plaintiff for the payment of a certain sum of money; and for breach assigns, that the defendant did not become bound to the plaintiff *modo & forma* as was awarded; and upon demurrer it was adjudged, that though the award was void as to the finding of surety, it was good as to the defendant himself, and the breach well assigned, that he did not become bound; and the *modo & forma* only shall relate to himself, and not to the surety.

POLIXFEN *against* POLIXFEN.

Appellant dies, appeal abates not. S. C. 1 Vent. 133. 2 Keb. 768, 778, 779.

Sentence being given in the Ecclesiastical Court upon a will, the defendant appealed, and hanging that, died; and now the defendant his brother, came in and prosecuted the appeal in lieu of the first appellant; upon which the plaintiff prayed a prohibition; for by the appellant's death the appeal is abated, and the commission determined: but a prohibition was determined for the delegates are the proper Judges, whether or no the appeal be abated by their law; and though it be abated according to the rules of our law, yet it may be otherwise in their law; the matter is wholly of their conusance, and the commission is not determined by the death of the appellant.

[7] WATTON *against* WEDDINGTON.

Pleas in the words of the condition, good, and the Court to expound. 2 Salk. 520. 1 Saund. 316.

Debt on a bond conditioned, if a ship going such a voyage return, the perils of the sea excepted, the defendant shall pay so much, but if the ship be lost, nothing, and the obligation to be void: the defendant pleaded that the ship proceeded in her voyage such a day, and in her return was lost: upon which the plaintiff demurred, because it was not said the ship was lost *per pericula maris*, according to the words in the first part of the condition, for it might be lost by the party's own negligence: but *per Cur'*, the plea being in the words of the latter part of the condition, which makes the obligation void, as well in case the ship be lost, as if it return, perils of the sea excepted, and the defendant pay; the plea is good, and judgment was given for the defendant. Jones for the plaintiff.

THE KING *against* DRURY.

Not usury to accept a lease for 300l. per annum, conditioned to be void if he be paid his 300l. at the end of four years, for it is but an annuity determinable by the grantor, when he pleases. 3 Wils. 393. 2 Bl. Rep. 861. Cowp. 112, 770, 793.

Indictment upon the Statute of Usury, for taking 7l. 10s. for the use of 300l. for a quarter of a year, upon *non cul'* it was tried by Nisi Prius before Hale Chief Justice at Guild-Hall, where upon evidence the case fell out thus: Brown had a lease from the Earl of Suffolk, of a house for forty years, at the rent of 5l. per annum, Brown agreed with Drue to assign the term to him for 300l. but Drue having not the money, Drury by agreement with Drue, paid the 300l. and took the assignment to himself, and then Drury let the house to Drue, for thirty-nine years and three quarters of a year, after the rent of 35l. per annum, of which 5l. was to be paid to the Earl of Suffolk, and the remaining 30l. to Drury for his own use. Drue covenanted to pay the rent, and with

other covenants which are usual in leases, as for repairs, &c. and Drury covenanted, that if at the end of four years Drue paid the 300l. then the rent should cease, and he would convey the residue of the term to Drue. Per Hale Chief Justice This is not usury within the statute, for Drue was not obliged to pay **[8]** the 300l. to Drury, but is at his election to pay it if he will, and determine the rent by that means and have the term; so that it is no more in effect than a bargain for an annuity of 30l. yearly for thirty-nine years and three quarters, for 300l. to be secured in this manner, determinable sooner if the grantor pleases; but the grantee hath no remedy for his 300l. and cannot recover it, unless the grantee thinks fit to pay it back at the end of the four years, and so the acceptance of the 7l. 10s. is not usury.

But if Drury had took security for re-payment of the 300l. or it had been by any collateral agreement to be repaid, and all this method of bargaining a contrivance to avoid the statute, this had been usury; but as it is, it is no more than the purchase of 30l. Annuity for thirty-nine years and three quarters, for the sum of 300l. determinable by the grantor at the end of four years if he pleases; and accordingly the jury found the defendant not guilty.

[9] TERM. SANCT. TRIN. ANNO 23 CAR. II. IN BANCO REGIS.

1933. 1 Ch. 882.

CROSSING *against* SCUDAMORE.

Bargain and sale without money, operates as a covenant to stand seised. S. C. 1 Vent. 137, 138. 1 Mod. 175, 176. Cart. 137, 138. *Post*, 213. 3 Lev. 372.

Trespass for breaking his close; the defendant justifies as done in the freehold of Hooke, plaintiff replies it is his freehold, *absque hoc* that it is the freehold of Hooke; upon which an issue and special verdict, that Nicholas Hooke, whose heir the defendant is, was seised in fee, and 16 Decemb. 1640, in consideration of affection to his daughter under whom the plaintiff claims, made a deed to his daughter, inrolled within six months, whereby in consideration of affection, and for her portion and preferment, and other valuable considerations, he bargained, sold, aliened, infeoffed and confirmed to the said daughter, the lands in question, with a clause of warranty, and a covenant for farther assurance; and that the indenture was made for the consideration aforesaid, and no other. (No money was found to be paid) *et si pro querente pro querent': et si non* for the defendant. And if this indenture should inure as a covenant to stand seised? was the sole question. It was argued for the plaintiff, that it should operate as a covenant to stand seised; and for this was cited Co. Litt. 49, the intent of parties is to be fulfilled where it can by any rules of law 2 Roll. 598. There are several cases of this nature, though the words be improper. 8 Co. 94, a demise and grant amounts to a bargain and sale. 11 Co. 24, 25. A marriage-covenant to stand **[10]** seised to the use of his daughter, inrolled, allowed to operate as a bargain and sale. 2 Roll. 789, pl. 30. 7 Co. 40. 2 Roll. 785, pl. 25. And as to Co. Litt. 49 a. where it is held, that when a warrant of attorney is in the deed, it shall not inure by way of use against the parties manifest intent to have it inure as at common law; the contrary hath been adjudged; and as to *Pitfield and Pierce's case*, 2 Roll. 789, the deed was void in the very frame of it; and in the case cited Hill. 13 & 14 of this King, in this Court, the deed was no more than articles for making a future deed of settlement: and in *Osborne and Juge's case*, 2 Cro. 217, the reason the Court would not adjudge it to inure by way of use was, because they found out another way to make it good, by making it operate as a confirmation, the party being in possession; and so the deed good. *Lastly*, They relied upon the case of *Tebb* against *Popplethwaite*, 2 Roll. 786, 787, as a case in point.

On the other side was cited Co. Litt. *ut supra* 49 a. That as the party's intent plainly appearing by the letter of attorney in the deed to pass it at common law, it shall not pass by way of use; so here the warranty in the deed shews the party's intent was to pass it at common law; for otherwise the warranty will be of no effect, and every conveyance which in its self is void, shall not be made good by converting it into a use; for this will introduce the utmost incertainty and barbarity. 3 Cro. 856. Dyer 69, 302. 3 Cro. 394. 2 Roll. 786, and *Pitfield and Pierce's case, Foster and*

Foster's case before cited; and as to the case of *Tebb and Popplethwaite* in 2 Roll. 786, it was said, judgment was given contrary to the opinion reported. Hale Chief Justice, and Twysden held clearly upon the first argument, that this deed might operate by way of covenant to stand seised; and with the consent of Rainsford and Moreton, gave judgment for the plaintiff: upon which the defendant immediately brought a writ of error in the Exchequer-Chamber, where the judgment was affirmed; so that it is now the judgment of all the Judges of England; Winnington for the plaintiff in B. R. and Finch Attorney General for the defendant.

[11] COLEMAN AND OTHERS *against* BARD AND NELMS.

Trover de viginti mensuris & duodenis hamarum, naught.

Trover inter alia de viginti mensuris, without an *Anglice*, or specifying what measures: *et de viginti duodenis Anglice gross, hamaram Anglice hooks*, not saying what *hooks;* moreover *duodenis* being an adverb, which signifies twelve times, 'tis here insensible; but *duodenis duodecim* is Latin for a gross, *scilicet*, twelve times twelve, and so it is in the dictionary; and for these faults judgment was stayed upon the motion of Levinz, and the plaintiff for expedition, and to commence a new action, prayed a *nil capiat per billam;* which accordingly was entered.

HOLBECH *against* BENNET.

Day and place made parcel of the issue. S. C. 2 Saund. 317. 2 Keb. 750, 769, 789, 825.

Error of a judgment in replevin *in Communi Banco*, wherein Bennet was plaintiff, for taking his beasts in Fillingly-Field in Fillingly; and Holbech avowed for that the mayor and commonalty, and divers other particular persons by name were thereof seised, and by their indenture dated the 11th of March 1647, *testatum sit*, that they demised to Bennet for twenty-one years; and by indenture the first of May, 11 *Regis nunc testatum sit*, that he assigned to Holbech, and that 1° *Octobris* 11° *Regis*, Holbech at Fillingly aforesaid, demised to Bennet, rendering rent, and for rent arrear he avowed: the plaintiff Bennet, in bar said, that Holbech did not demise the said first of October at Fillingly aforesaid, *modo & forma prout*, upon which issue and verdict for the plaintiff *quod non dimisit primo die Octob. apud Fillingly modo & forma prout, &c.* upon which judgment for the plaintiff: and now it was assigned for error, that this was an immaterial issue, making the day and place of demise parcel of the issue; for a demise at any other time and place had sufficed to maintain this avowry, they being inserted only for conformity in **[12]** pleading, but that the plea should have been general, *non demisit modo & forma prout*, and the time and place omitted in the traverse, because they are not traversable; and then the avowant might have given in evidence a demise at another time and place, which had been sufficient to maintain his avowry for the rent; of which benefit he is now deprived by the plaintiff's ill bar, and the Court cannot know for whom to give judgment according to the right of the matter; wherefore this case is not remedied by the new statute, (though the contrary was urged for the plaintiff) the statute being only to cure faults when the right of the matter is tried: and of this opinion was the Court after the matter had been twice debated: but then the Court fell into a doubt what they should do in this case, for per Hale Chief Justice, the Court cannot at this day award a repleader upon a writ of error, if they reverse the judgment, as was used anciently, for which he cited Trin. 8 E. 2, Rot. 59. Trin. 11 E. 3, 75. Trin. 27 E. 3, Rot. 21. Hill. 33 E. 3, Rot. 79, where this Court awarded a repleader upon a writ of error after reversing the judgment, as the Court of Common Pleas ought to have done before judgment: but he said, this course had been disused for above these hundred years and could not be practised now. Upon which it was moved for the avowant to reverse the judgment and set the matter at large: but then Hale Chief Justice took two exceptions to the avowry. *First*, 'Tis said the mayor and commonalty and the feoffees were seised, which must be intended a joint seisin; whereas a corporation and a person natural cannot be seised jointly.

Secondly, The assignments are not pleaded positively, but by a *testatum existit*, and then if they reverse this judgment, perhaps they may give judgment for the plaintiff upon his declaration, for the faults in the avowry. *Adjournatur.* Saunders for the plaintiff, Levinz for the avowant.

[13] TATLOW OR CASTLE *against* BATEMENT.

Declaration in B. R. refers not to the first day of the term, but the filing of the bail. S. C. 1 Vent. 135. *Vide post*, 141, 176.

Trover; and upon *non cul'*, verdict for the plaintiff; and it was moved in arrest of judgment, that the action is brought before the cause of action accrued; for the conversion is laid at a day in Easter term, and the declaration is generally as of Easter term, and not at a day certain (as by *memorand' quod tali, &c.* it may be) and then this must relate to the first day of the term: but *per Cur'*, 'Tis well enough if the bail was filed after the cause of action accrued, for here no action can be depending, nor declaration delivered, until the defendant be *in custodia marescalli*, and that is never till bail filed, which filing is at a day certain: upon which it was referred to Livesay, the Secondary, to examine when the bail was filed. Saunders for the defendant.

SACHEVERAL *against* FROGAT.

Ancestor leases, rendering rent to him and his executors, the heir may bring debt for this rent. S. C. 2 Saund. 367. 1 Vent. 148, 161. Raym. 218. 2 Keb. 798, 819, 833, 839.

Debt for rent by the heir, upon a lease from his ancestor, rendering rent to him, his executors and assigns, during the term; and upon demurrer the question was, if the heir may maintain an action of debt upon this lease? It was argued for the defendant, that the action lay not for the heir, being not mentioned in the reservation, and that by the death of the lessor, the rent determined; for which they cited Owen 9, *Richmon* against *Butler*, Latch 44, 255, 264, *Sury* against *Cole*. But on the other side for the plaintiff were cited, Pasch. 22 Jac. Rot. 62, *Sury* against *Cole*, & Hill. 20 Jac. Rot. 177, *Sury* against *Brown*, and both adjudged that the rent continues; contrary to what opinion is reported by Rolle and Latch in those very cases. Hale Chief Justice, The rent being reserved to him, his executors and assigns, the rent must continue after the death of the lessor, and go to his heir, upon his apparent intent to have the rent continue after his own death, for otherwise it cannot go to his executors, and this without the words *during the term*, otherwise where the reservation is to **[14]** him, or to him and his assigns. Afterwards at another day the case having been twice argued by Jones and Hunt for the plaintiff, and by Bigland and Winnington for the defendant, judgment was given for the plaintiff.

THE KING *against* NEW-COLLEGE IN OXFORD.

Mandamus lies not for a fellow of a college, where the founder hath appointed one to visit, and no other. S. C. 1 Keb. 2, 6, 14, 103, 234, 289, 833. 2 Keb. 64, 65, 102, 165, 259, 272, 799.

A *mandamus* was granted to restore a fellow of the college, and upon the return the Court would consider, whether or no the writ lay, and after Hillary 23 & 24, upon the return, the case was argued by Jones for the plaintiff, and Coleman for the defendant; the return set forth their foundation, by which they are obliged to study so many years, and then take orders, and that the master and scholars for enormous crimes, scandalous and dangerous to the college, may expel any fellow, and that the Bishop of Winchester shall be visitor, and in case of difference, that all appeals shall be to him and no other; and that this fellow having committed an offence enormous, scandalous and dangerous to the college, and being summoned and convicted thereof by the master, and expelled according to the statutes of the college, appealed to the

Bishop of Winchester, who affirmed the first sentence. Jones took these exceptions to the return. *First*, 'Tis not returned what the offence was, so as the Court may judge whether it deserved expulsion, Co. 5, *Specot's case*, and they are not impowered to expel for any cause, but for offences scandalous and dangerous to the college, of which this Court is judge; as was adjudged in this Court, 1655, *inter Box and Woolleston*. *Secondly*, They have no power to expel but for enormous crimes; and this return is, that he was convict *de criminibus eormibus*, for *enormibus* without a dash, and omitting the letter *n*, and *eormibus* without the *n*, signifies nothing: and as to the matter he argued the *mandamus* well lay in this case, and cited 11 Co. 68, this Court hath power to give remedy by this writ, where there is no other remedy for the thing itself by assise or action; and here there is no other remedy for the thing itself, nothing but an action upon the case for damages: the head of a college may have an assize, a fellow cannot, unless the other fellows will join with him; now here the fellows are those who have injured and expelled him, and therefore will not join with him for relief. **[15]** And a college is not a spiritual corporation, and so no remedy that way by appeal to the Ordinary, and although the founder has given an appeal to the Bishop of Winchester, and to no other, this must not oust the party injured of his appeal to the King's Courts for justice. Litt. sect. 212. A custom that if goods be distrained, they shall not be replevied, is void: the same of a grant: and so if a man by his will appoint, that all differences between executors and legatees, shall be referred to, and determined by J. S. and no other person whatsoever: yet this will not oust the parties of their right to sue in the King's Court; as for precedents they cited *Dr. Widdrington's case*, and *Dr. Patrick's case* in this Court, which see before. Coleman *contra*, Suppose the return bad upon the exceptions taken to it, yet if it appear to the Court that the writ lies not, the plaintiff cannot have restitution; and if it appears that the sentence of the visitor is conclusive for the foundation. The founder may impose what terms or conditions he will upon a creature of his own making; and if they will accept the thing, they must accept it upon those conditions which he imposed and obliged it with at its creation; so it differs from the cases put of a replevin, &c. for there was a law in being directing what should be done in those cases before the grant, will, &c.——2. This is a private society, that has no influence upon the public government of the realm: *Bagge's case* he said was the first precedent of a *mandamus* of this kind; and the instances there given are all of them touching offices that concern the public; and the *mandamus's* mentioned in Ryly's Placita Parliamentaria, are no more than letters commendatory; and it does not appear by *Bagge's case;* that a *mandamus* was ever granted for restitution to private estates; if so, it may as well be granted to restore a man to his land or inheritance. 3. Colleges are foundations of bounty and charity, and every man may dispose his bounty or charity as he pleases.

Hale and Twysden, Colleges are not spiritual foundations, but private societies like inns of Court: here, per Hale, the bishop is appointed visitor and no other. He hath given sentence in this matter; what has this Court to do with it? This will cure all the faults in the return. The Spiritual Court deprives a man by sentence in a case whereof they have jurisdiction; the cause of this cannot be questioned by **[16]** assise or otherwise in any Temporal Court, so long as the sentence remains in force, but the Temporal Courts are bound by it: an officer in any Temporal Court subordinate to this Court, is by trial and judgment there deprived of his office; this Court cannot relieve him by *mandamus* so long as that judgment remains in force. This college is a creature made by the founder, and therefore it would be very hard to allow of appeals farther than he has appointed them. A *mandamus* lies to the college, but upon the return the Court is to judge whether they have power to meddle in the case or not; and now upon this return it appears that we have no power: to all which Twysden and Moreton seemed to agree, Rainsford being silent. But the opinion of the Court appearing *ut ante*, Jones desired no farther arguments, though asked that question by the Court.

CALVERLY *against* PLUMMER.

Husband not chargeable for provision for his wife taken without his consent.

Assumpsit against the defendant for diet and lodging for his wife; and upon *non assumpsit* at a trial before Hale, in Middlesex, the case was: The husband left his wife in the country, and came and lived in London twenty years, and here married another, for which he was indicted, and his wife came to London to prosecute; upon that he caused her to be arrested, and she was committed to the plaintiff the gaoler; who now sued the husband for her diet and lodging during the time she was in prison. Hale Chief Justice, The husband is not chargeable without some evidence of his assent; as that he visited his wife in prison, or by any other act approved of this provision by the gaoler. But here the contrary appears, for she came to prosecute him, and he was convicted, and had his clergy upon her prosecution; if the husband would not allow her necessaries, she ought to have complained in due course of law for her maintenance: upon which the plaintiff seeing the opinion of the Court, was nonsuit.

[17] FREAKE *against* CLARKE.

A promise to save the sheriff harmless from all escapes, if he would suffer one taken *per ca. sa.* to stay three days at his house. S. C. 1 Danv. 45, pl. 22. 1 Lev. 98, *simile.* 1 Roll. Rep. 20, pl. 11. *Vide* 1 Lev. 98, 188, &c. *ibid.*

Assumpsit, and declares that he was a bailiff, and had taken one J. S. in execution, by virtue of a warrant upon a *ca. sa.* and that the defendant in consideration the plaintiff would permit J. S. to remain at the house of J. D. in Hammersmith, till Friday next following, that he would save him harmless from all rescous and escapes, and that he permitted him to abide there till Thursday evening, when he was rescued, and the plaintiff compelled thereupon to pay the debt: after verdict for the plaintiff upon *non assumpsit*, 'twas moved in arrest of judgment by Levinz, that this consideration was unlawful, being for ease and favour to one in execution, that ought to be *in salva & arcta custodia*, 2 Bulst. 213, where a promise in consideration the other would suffer an escape, is void, and this here is to give him means and opportunity to escape; hereupon the Court at first stayed the judgment: but after on the last day of the term, judgment was given for the plaintiff, Hale saying, he expected he should have been attended with precedents: but I apprehended upon the first motion he said only, he would consider the matter himself; but being the last day of the term, and a long vacation to follow, he said, he would not delay the judgment longer, but bid us bring our writ of error if we thought fit.

[18] TERM. SANCT. MICH. ANNO 23 CAR. II. IN BANCO REGIS.

THE KING *against* CHURCHWARDENS OF KINGSCLEERE.

A *mandamus* for a sexton, steward of a court-baron, &c. 1 Vent. 143, 153. 1 Keb. 286. 2 Keb. 802.

A *mandamus* was moved for, the last day of the term by George Stroud, to restore the sexton of the parish, and day was given till the first day of this term to shew cause to the contrary. And now 'twas moved by Levinz, that this office did not concern the public, and this Court therefore cannot take notice of it, as they might of a constable, who is an officer concerned in the peace, or of a church-warden, who has the ordering of the goods of the church, or of the parish clerks, who are to keep the ornaments of the church, and to register the baptisms and funerals: but the sexton is only to ring the bells and dig the graves, and is only an officer at will, as the cowherd or swineherd of a village; and Trin. 1655, 'twas doubted if it lay for a schoolmaster, because private, and not concerning the public; for then 'twas held, that a *mandamus* lay only for officers which concern the public, as for a steward of a leet, not for the steward of a court-baron. But Hale Chief Justice said, that it

lay for the steward of a court-baron, if he be not at will only, because he is an officer of justice; and now a certificate being brought from the minister of the parish, and divers of the parishioners, that the sexton was an officer for life, and received two-pence a house yearly as wages, the *mandamus* was granted; and the same term **[19]** 'twas granted for another sexton of a parish without such certificate.

Note, These cases were before the resolution in *New-College case* before reported, but resolved after; although in *New-College case* the writ was granted before, to be considered of upon the return, which was after these cases.

BARNES *against* GLADMAN IN THE PETTY BAG IN CHANCERY.

Replication *petit judicium & damna*, omitting *debitum*, good. *Vide* 1 Lev. 222. Cro. Car. 297. 1 Saund. 98, 99. 4 Inst. 73.

Debt upon an obligation, conditioned to perform covenants in an indenture of apprenticeship: defendant pleads performance. The plaintiff replies and assigns a breach *& hoc, &c. unde petit judicium & damna sua sibi adjudicari.* Defendant demurs, *quia minus rite conclusit;* for he ought to have said, *petit judicium & debitum, & damna sua sibi adjudicari;* and so are all the precedents in Co. & Rast. Entries, except two in Coke's Entries, and those were after verdict; but this being here specially demurred upon, 'twas much insisted to be ill for this cause. But by Bridgman Lord Keeper, although it be form, yet 'tis but unnecessary form, for by the praying of judgment all is included; because when the Court gives judgment, of consequence they give judgment for the debt and damages.

JONES *against* GREENE.

Sheriff makes a warrant before the writ comes to his hands, well. S. C. 2 Saund. 298, 299. 2 Keb. 607, 838, 844. *Vide* Prox. Pag. & 3 Lev. 57, 58, 93.

Trespass for battery and imprisonment: the defendant justifies by a writ out of the King's Bench directed to the sheriff, and a warrant thereupon made to him. The plaintiff demurs specially, because it is not pleaded, that the writ was delivered to the sheriff according to the common form. To which it was answered, that it was not necessary to be so pleaded; for if in truth a writ be sued out, and he made a warrant before the writ come to his hands, 'tis well, and the precedents are both ways, as **[20]** *Dr. Bonham's case*, 8 Co. Rep. and other cases; and of this opinion was Hale, and the whole Court, and gave judgment for the defendant. Levinz counsel for the defendant.

DUNWELL AND HIS WIFE *against* MARSHALL.

Trespass for taking goods from him, and does not say whose. 2 Keb. 813.

Trespass for battery of his wife, and for taking from her an apron and a pinner. After verdict for the plaintiff, 'twas moved in arrest of judgment; 1st. That it is not alledged in whom was the property of the apron and pinner, and it can't be in the wife, it may be in a stranger, and then neither the husband nor the wife has a cause of action as to them. 2 Cro. 46, *Burser* against *Martin.* Trespass *quare equam cepit a persona*, held ill. 2d. If they were the goods of the husband, the wife ought not join with the husband for them, but the husband alone shall have the action. In the 16th of this reign 'twas so adjudged between *Stanton and his Wife, &c.* against *Hobard:* they brought trespass for beating the wife, and tearing a coat upon the body of the wife; and so held the Court now, and stayed the judgment. Levinz for the defendant.

DAVISON *against* HESLOP.

Bailiff promises his master's creditor to pay him out of the rent, if he will forbear a month. S. C. Raym. 211, 212. 2 Keb. 813. 1 Danv. 31, 11, 53, 33.

Assumpsit, that whereas Fenwicke was indebted to the plaintiff for arrears of an annuity of 117l. and appointed the defendant, then his receiver, to pay it out of the rents due at Martlemas next ensuing; and that the plaintiff and defendant accounted, and thereupon it appeared, that 117l. was due to him. The defendant promised, that if the plaintiff would forbear, he would pay it within a month after. For the plaintiff 'twas moved in arrest of judgment, that it does not appear that the defendant received any rent at Michaelmas, and the appointment was to pay it only out of the rents due at Martlemas; but to this 'twas answered, that it should be so intended now, the defendant having promised to pay it upon forbearance; and so held the Court, and gave judgment for the plaintiff. Weston **[21]** of counsel for the defendant, Levinz for the plaintiff.

WILLIAMS *against* FRY.

Devise in tail *& si &c.* to an other, 'tis not a condition, but a conditional limitation. *Vide Molloon* v. *Fitz Gerrald*, 3 Mod. Rep. 20. S. C. 3 Keb. 19. Raym. 236, 237. 1 Mod. 86, 300. 1 Vent. 199. 2 Danv. 109.

Ejectment, and upon *non cul'* and special verdict, the case was this, the Earl of Newport being seised, and having three sons now living, and two daughters, one of which daughters had issue the wife of the defendant, devised the messuage in question, called Newport-House, in the parish of St. Martin's Westminster, to the wife of the defendant in tail: provided, that if she married without the consent of the Earl of Manchester, and others, or died without issue, then to the lessor of the plaintiff, being then and still an infant. She not having notice of the condition, and being of the age of fourteen, married without the consent of the Earl of Manchester, &c. to the defendant Fry: he entered, and the lessor brought an ejectment, and the case was argued this and Hilary term following by Jones and Finch Attorney General, for the plaintiff, and by Winnington and North Solicitor General, for the defendant, and three points were argued by the counsel. 1st. If this was a condition, or a conditional limitation; the plaintiff is not heir, and so hath no right to enter; otherwise if it be a conditional limitation. 2d. Be it the one or the other, if notice thereof ought to have been given to the devisee before the estate shall be determined? 3d. If notice were necessary, whether the infancy of both parties, (for the lessor as well as the devisee, wife of the defendant were both infants) will alter the case? and afterwards in Easter term following, all the Judges concurred in opinion, and gave judgment for the defendant. 1st. That in this case the proviso does not make a condition, but a conditional limitation, (although proviso, and the words *& si* be express words of condition) contrary to what is held 10 Co. Rep. 40 b. and that in respect of the remainder, which is here limited over not to the heir, but to a stranger; for it can't be a reasonable construction of the intent of the devisor, that if there be a breach by the wife of the defendant, it shall forfeit the estate of the lessor in remainder, **[22]** but only that it shall work a determination of her own estate, and for this were cited 1 Rol. 411. 3 Co. *Wellock and Hamond's case* cited in *Boraston's case*, *ibid.* 20 b. 2 Cro. 56. Hill. 1649, B. R. Rot. 758. *Saunders's case*, 3 Cro. 753. Dyer 317. *Secondly*, That the infancy in this case is not material, for the infant takes by purchase, and is not to have age; and this is a conditional limitation express, and infants are not privileged against conditions in deed. Co. Litt. 233. Plowd. 57, 375. Cro. Condition 114. *Thirdly*, No notice of the condition was necessary, and therefore want of notice will not excuse in this case, as it did in *Corbet's case*, 4 Co. 2, because the devise here is to a stranger, and not to the heir, and the devisee might as well take notice of the condition, as of the estate devised to him, otherwise where the devise is to the heir upon such conditional limitation, for the heir might enter upon his general title as heir, without notice of the will or condition; here the defendant had no title but by the will, and yet entered. And this difference was taken and agreed, where a devise

is to one upon condition, and another is concerned, and more privy, he that is most privy shall give notice to the other; but where both are equally privy, and equally concerned, as the lessor and the defendant in this case, neither of them is obliged to give notice. 2 Cro. *Molineux's case*, 3 Leon. 95. Dyer 354. Poph. 10. 3 Co. 72. *Westby's case*, 1 Cro. *Jean* against *Thornhill*, 22 Ed. 4, 27, 28. 1 Rol. 409, *Spring and Caser's case:* and judgment was given for the plaintiff by the whole Court.

CHAPMAN *against* GALE.

General judgment against an executor, entered by mistake of the clerk, amended. *Vide* Lex Testam. 109. 1 Lev. 286. 2 Keb. 810.

Debt against an executor, who pleads *plene administravit*, and verdict and judgment for the plaintiff, which was entered generally, and thereupon error was brought, and 'twas assigned, that the judgment should have been, *de bonis testatoris si, &c.* But upon the affidavit of Astry the attorney, that he gave his clerk instructions to enter it up according to the plea, and that 'twas a mere mistake of the clerk, it was amended as a misprision of the clerk.

[23] OPY *against* PETERS.

Mutual agreements that the one should build and the other should pay, and declares that he offered to build, without saying the other hindered him. S. C. 2 Saund. 350. 1 Vent. 117, 214. 2 Keb. 811, 827. 3 Keb. 45.

Assumpsit upon two promises, the first of which was agreed to be good, but the second was that upon *colloquium* between the plaintiff and defendant, about the building of a house, 'twas agreed, that the plaintiff should build the defendant a house; and that the defendant should give him 8l. *pro opere & labore suo* in building it, and that in consideration the plaintiff promised to perform his part, the defendant promised to perform his part and that the plaintiff was always ready *& obtulit* to perform his part, and the defendant had not paid. After verdict for the plaintiff upon *non assumpsit*, and intire damages, 'twas moved in arrest of judgment, that the declaration was naught, for not having averred the defendant had hindered him, but only that he was ready *& obtulit*, and though here are mutual promises, yet the promises are only to perform the agreement, and that is conditional in its self, for in agreements executory *pro* makes a condition precedent, 8 Co. *Ughtread's case*, and this is not like 2 Cro. 44, *Prance* against *Tringer*, the bare omission of an averment; but this is a bad averment, by which it appears, that he hath not done the thing, and yet it doth not appear that the defendant hindered him, and the mutual promises do not oblige them to perform the agreement, other than according to the agreement, *scil.* that the defendant pay 8l. to the other if he built the house: and to this exception Hale strongly inclined, to which Rainsford seemed to agree. Twysden *totis viribus contra*, and that the mutual promises had cured all, and there needs no averment, and that which is here made is but surplusage; and the judgment was stayed, and so continued till Trinity term; and then being moved again that the *obtulit* after verdict supplies the want of an averment, that he was hindered, because if he had not been hindered by the defendant, the *obtulit* had been in vain, and the jury would not have found for the plaintiff, and have given him his damages; the whole Court agreed to it, and gave judgment for the plaintiff: Hale and **[24]** Twysden still continuing their different opinions as to the other matter. Pollexfen for the plaintiff, Saunders for the defendant.

FISHER *against* PATTEN.

Dutchy Court at Westminster, if it can hold plea by English bill of lands in the County Palatine. S. C. 2 Keb. 826. Constituting a Chancellor, does not constitute a Court of Equity. *Vide* 4 Inst. 199, 200. More Rep.

A prohibition was prayed to the Dutchy Court, because they held plea by English bill between party and party, of lands lying in the County Palatine, which ought only

to be in the Court of Chancery of the County Palatine, and not here in the Dutchy Court at Westminster; which ought to hold plea only of lands parcel of the dutchy, lying out of the County Palatine; for which was cited *Owen and Holt's case*, Hob. 77. On the other side was cited 4 Inst. 212, and Rolle's Prohib. 314, and the several patents and statutes constituting the dutchy were examined: and Hale Chief Justice said, that the constituting of a Chancellor does not of its self constitute a Court of Equity; for there is a Chancellor of the Garter, and there was a Chancellor of Augmentations, and yet neither of them ever held any Court of Equity; and he said, that the Statute of Edward the Fourth, gave them no Court of Equity, but a Court of Revenue, and how their Court of Equity came to be held does not plainly appear, perhaps it began in the time of H. 5, before the statute of E. 4. But he and Twysden agreeing it might be inconvenient to examine their power after so long continuance and practice, as by the precedents now produced, it appears to be used without farther examination; after it had been two or three times spoke to in this Court, and partly by admission of the parties, a prohibition was denied. Levinz counsel for the plaintiff in the prohibition, and Weston for the defendant.

[25] RIDLY *against* EGGLESFIELD.

Goods taken by pirates condemned in Scotland, and being brought into England, and a suit for them in the Admiralty after the sale, this suit in the Admiralty here is not within the statute R. 2, or H. 4. S. C. 2 Saund. 259. 1 Vent. 173. 2 Keb. 828. 1 Danv. 269, 8, 265, 12.

Case for suing in the Admiralty, contrary to the Statutes of Richard the Second, and Henry the Fourth, and declares, that the plaintiff libelled there for a ship and goods, supposing them to be taken by pirates upon the high sea, and to come afterwards to the defendant's hands upon the high sea; whereas he purchased them upon the land; and upon *non culp.* the case coming to be tried before Hale Chief Justice at Nisi Prius, appeared to be, that the goods were contraband goods going to the Dutch, in the time of the late war between the English and them, and taken by a Scotch man of war; and at the suit of the now defendant, condemned as prize by the Admiralty of Scotland, and sold to one Butcher who brought them to land and sold them to the plaintiff in England: upon which Hale doubting, caused a juror to be drawn, and directed a trial at Bar. And now upon the evidence before Hale, Twysden and Rainsford, they unanimously agreed, that this case was not within the statute, for the original cause being piracy, belongs to the Admiralty, and though the goods were condemned in the Admiralty of Scotland, that alters not the case as to the jurisdiction of the Court, but that it was pleadable in the Admiralty of England, as a judgment; (and so 'twas done in this case, and the defendant there dismissed, he being plaintiff in the Admiralty here) but neither that nor the sale at land alters the jurisdiction, the original matter being piracy, all which comes in question again, the sale at land being only matter consequential, and dependant upon the piracy. And at last by mediation of the Court, and by consent of Jones, Winnington and Levinz, counsel for the plaintiff, a juror was withdrawn, and the jury paid by both parties, and no costs, and no farther prosecution to be in the case.

[26] LUCY *against* LEVINGTON.

Covenant with the vendee, his heirs and assigns, and yet the executor brings the action. S. C. 1 Vent. 175, 176. 2 Keb. 831. 2 Danv. 86, pl. 4, 235, p. 1.

Covenant and declares, that Levington sold to Luke Lucy the plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy the same against him and Sir Peter Vanlore, their heirs and assigns, and all claiming under them; and assigns for breach, that Croke claiming under Vanlore, ejected him. The defendant pleaded, that at the time of the covenant he was seised of an indefeasible title, and that by a subsequent Act of Parliament, reciting, that Sir Peter Vanlore had settled this estate upon the Lady Mary Powell, and that certain persons had unduly

procured her to levy a fine, 'twas enacted, that this fine should be void, and that all persons might enter as if no fine had been levied; and that by force of this fine & *non aliter*, the defendant was seised, and sold and made this covenant; and that after the Act Croke claiming by title derived from the Lady Mary Powell, by the settlement of Vanlore, by virtue of the said Act of Parliament, entered and ousted him, upon which the plaintiff demurred: and for the defendant 'twas argued. *First*, That the covenant was with Lucy, his heirs and assigns, touching an estate of inheritance; therefore the action ought to be brought by the heir or assignee, whose loss it is, and not by the executor. To which 'twas answered and resolved by the Court, *that the eviction being to the testator*, he cannot have an heir or assignee of this land; and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator. 2. 'Twas argued, that the title on the covenant being good at the time of the making, and the title upon which the evidence depends, created by subsequent Act of Parliament; here is no breach, 9 Co. Rep. 106, 107, *Dame Gresham's case*. To which 'twas answered and resolved by Hale and Rainsford, that the Act does not make a new title, but removes the obstruction that kept off the old title; and they said, that doubtless Sir Peter Vanlore was named in the covenant, for the purpose that they might be secured in case this fine thus unduly obtained should be avoided. But Twysden being of a **[27]** contrary opinion, a writ of error was brought immediately. *Sed quid inde venit nescio.* Levinz of counsel for the defendant, Weston for the plaintiff.

LITHEBURY AND OTHERS *against* CORITON.

Two join in an action for not grinding at their several mills. S. C. 1 Vent. 167. 2 Saund. 115. 2 Keb. 601, 803, 838, 856. 1 Danv. 5, 6. 2 Danv. 428.

Case, for that the one plaintiff was seised of a water corn-mill, and the others of another, within the same manor, which they have repaired; and that time out of mind, &c. all tenants of the manor, of which the defendant is one, *molierunt & molire debent*, all the grain spent in their houses, at these two mills, or one of them, and that the defendant, being a tenant, did grind corn, spent in his house, at another mill. Upon which the defendant demurred: 1. Because the plaintiffs having several interests can't join in the action. But by Hale, and the whole Court, they may join, for the damage is intire to both their mills, by the grinding at this strange mill, and at neither of their mills only. But then Hale Chief Justice, took this exception to the declaration, that it is not well laid that he ought to grind at these two mills, or one of them; for it may be, all ought to be ground at one of the mills, and nothing at the other; and then the plaintiffs cannot join; but it should be, that whatever corn is not ground at one mill, ought to be ground at the other. And Twysden took another exception, that the prescription ought to be for grinding all the grain which is ground and spent in their houses; for grain may be spent there which is not ground at all, as grain for horses, swine, poultry, &c. Upon which, for expedition, Saunders of counsel for the plaintiff, prayed a *nil capiat per billam; & habuit.*

[28] THE KING *against* CLAPHAM.

Rescous returned as done to the sheriff, or his bailiff. *Vide* 1 Lev. 218 & *post*, 144.

Upon a return of rescous, the exception was taken, that the rescous was returned to be made to the bailiff; whereas the warrant and the rescue being made to the bailiff of the sheriff, and not the bailiff of a franchise, the rescous should have been returned as done to the sheriff himself, and not to his bailiff; but by the Court, 'tis good either way.

HUDSON *against* BENSON AND BARON.

Gift to the use of A. in tail, and if he die without issue, to the use that B. shall have a rent: A. makes a lease for years, and after suffers a recovery, the contingent rent is barred, and shall not charge the lease. S. C. 1 Mod. 108, 109. 3 Keb. 274, 287, 292.

Error of a judgment given in the County Palatine of Lancaster, before Wylde Justice there, in a replevin, wherein the defendants made conusance as bailiffs to Anne Morely; for that Rowland Morely being seised 23 Jan. 1616, enfeoffed Davenport, and others, to the use of himself, and the heirs males of his body, remainder in tail to divers others, remainder to his own right heirs. Provided, that if Rowland and Edward his son, and the Lady Elizabeth Morely shall all happen to die, and no issue male of Rowland, that then the said Anne Morely shall have a rent-charge of 200l. until she receive 2000l. with all charges for recovering thereof out of the profits. The first payment to commence at the first day of payment which shall happen first after all the said contingents; and then shews, that the said contingents are all passed, by which she was seised for her life; and for rent arrear, they make conusance, *scil.* for 10l. part of the rent for half a year. The plaintiff in bar of the avowry pleads, that Edward Morely, the last issue male of Rowland, levied a fine, and suffered a recovery of the land. To which bar the defendant replied, that before the fine and recovery, the said Edward made a lease for 1000 years to B. and C. which yet continues; upon which the plaintiff demurs; and Wylde adjourned the case to be argued at his chamber at London; where 'twas argued before him by Finch Attorney General, and Pemberton for the plaintiff, and by North Solicitor General, and Levinz for **[29]** the defendant, and two points were made:—1. If this contingent were barred by the recovery?—2. If the lease for 1000 years remained liable to the rent, admitting it barred as to the remainders intailed upon the estate? And for the avowant 'twas said, that the recovery can't bar this contingent use, which was not *in esse* when the recovery was suffered, and therefore no recompence in value, the reason for which common recoveries do bar, can go to this.—3 Co. *Cuppledike's case*, and therefore it is not barrable. 3 Cro. *Pell* against *Brown*. *Vide* Mo. pl. 201, a power in executors to sell after an estate-tail determined; and 2 Cro. 127, 792, a rent reserved upon a gift in tail, is not barred by a recovery: as to *Capell's case*, 1 Co. Rep. the rent was barred, because it issued out of the remainder in tail, and that was barred by the recovery: but the rent here is as it were a rent-charge upon the land, created by him that had the whole fee in him, which is like *Whitlock's case*, 8 Co. Rep. where a charge or lease made by virtue of a power upon a settlement, covers all the estates, like a precedent grant. But to this 'twas answered and resolved by Wylde, 1. That the recovery bars this rent, because it has barred all the estates chargeable with the rent, though it be admitted to arise out of the seisin of the feoffees, according to *Whitlock's case*. But 'twas agreed, that if it had been created by a grant precedent to the feoffment, it had not been barred by the recovery: and 'twas said, that *Capell's case* ruled the case in question; and that all the objections are made in *Capell's case*, which can be made to this case: viz. 1. That the rent there was charged upon the remainders, as it is in this case. 2. That common recoveries would be to no purpose, if they do not bar rents issuing out of estates in tail, as well as the estates themselves. 3. The grantee of a rent-charge can't falsify a recovery of the land. 4. 'Twas objected in *Capell's case*, as 'tis here, that the recompence in value can't extend to the rent. To which 'twas answered, that the true reason of common recoveries is not the recompence in value, but that they were common conveyances. 9 Co. Rep. *Beamond's case*. Baron and feme tenants in tail, baron levies a fine and dies, the feme survives, and suffers common recovery, this is a good bar, and yet no recompence in value can go to the estate-tail, for that was disturbed by the fine before. And as to the second 'twas argued and resolved, that the land can't be chargeable during **[30]** the term for 1000 years, because 'tis only derived out of the estate-tail in Edward, which is spent and determined, and before the end and determination of the said estate this charge was not to arise. *Note*, No notice was taken that this fine and recovery were both of them before the use of the rent arose, by which perhaps the privity and estate being altered

and destroyed before the contingent happened, the contingency could never arise, and so is barred. And after deliberation, the Judge gave judgment against the avowant; upon which this writ of error was brought, and *postea* Pasch. 26 Car. 2, B. R. the said points were argued again by Levinz for the plaintiff, in the writ of error, and by Heneage Finch the late Attorney General now Lord Keeper, and the judgment was affirmed by Hale, *& Cur'*, who concurred in both points with the judgment of Wylde, and all agreed *Capell's case*, and the reasons of it. And Hale said, *The recompence of the value is the reason of the bar by common recoveries, as to the issue in tail; but not the reason why it bars as to him in reversion or remainder;* but the reason in this case is, because *the recoveror in supposition of law is in of the estate tail, and that in judgment of law has still continuance:* as at common law the donee *post prolem suscitatam*, might have aliened and barred the donor, and a common recovery is as it were a conveyance excepted out of the Statute de Donis, and the recoveror is in of the estate which the donee had, but the issue in tail is barred to claim it, in respect of a supposed recompence by the recovery; and so the estate-tail having in judgment of law continuance, no charge upon the reversion or remainder can take place, and that is the reason of *Capell's case*, why the charge of him in remainder can't take place after a recovery suffered by the tenant in tail. And he agreed *White and Gerish's case*, in 3 Cro. that a rent reserved upon a gift in tail is not barred, but remains as a collateral charge upon the land, distrainable of common right; but if in such case there be a condition of re-entry, that is barred. Twysden doubted, if the rent were not barred in *Gerish's case;* but Hale *totis viribus* held, that it was not barred; and Hale said, that about the 9th of Eliz. it was a doubt, whether if tenant in tail, remainder for years, and tenant in tail suffer a recovery, the lease for years be barred; because being a chattel, no recompence of value could go to it? But he said, that constant experience hath allowed, **[31]** that such lease is barred. Then two exceptions were taken to the pleading. *First*, Because it is *quædam finalis concordia facto fuit, & postea concessum & concordatum;* whereas the usual form is *quidam finis se levavit*, which includes all; but when they would plead by parts they ought to shew all, and perhaps no King's silver was paid. But this exception was over-ruled, for the ancient course of pleading was in this manner. *Secondly*, The recovery is pleaded, but no execution thereof, and then the estate-tail remains till it be barred by execution sued out. But this was also over-ruled, for if no execution be sued out, then the recovery is to the use of him against whom it was had, since no other use appears: but *quære* of this reason, for before execution, how can any use of the recovery arise?

[32] TERM. SANCT. HILL. ANNO 23 & 24 CAR. II. IN BANCO REGIS.

THE KING *against* HARWOOD.

Custom of London, for city orphans to be in the custody of the mayor, &c. S. C. 1 Mod. 77, & 79. 1 Vent. 178, 180. 1 Sid. 250. Raym. 116.

Upon a *habeas corpus* to the keeper of Newgate, the return was, that the Court of Aldermen in London, are by the custom of London, guardians of all city orphans; and that if any man marry a city orphan under the age of twenty-one, without their consent, they may punish him by fine and imprisonment; and that Harwood married Mrs. Offley, a city orphan, having a portion of 800l. without their consent, for which they fined him 40l. and because he refused to pay, committed him to Newgate. To which return exceptions are now taken by Weston and Offley; *First*, That it is not returned in what place he married her, and the custom cannot extend to places out of the city, neither can it be an offence to marry a city orphan out of the city, for in the country one cannot know a city orphan from another, nor know the customs of the city. *Secondly*, This is a power to fine and imprison, without excepting a reasonable excuse, which may be shewn to the contrary. *Thirdly*, It is said he married her without their consent; but it is not said he took her *extra custodiam suam*. *Fourthly*, It is not said he refused to pay the fine, not shewing a reasonable cause to the contrary. To which it was answered by Finch Attorney General, and resolved by Hale and the whole Court, that their power would be in vain, if the custom should not extend to marriages

out of the city, for then it were but drawing a city orphan to Islington, and marrying her there, and so escape punishment; and that every one ought to take notice whom he marries, and he might have been informed by the orphan herself, though she were in the country, and besides no one was bound **[33]** to give him notice. And as to the second and forth exception, it shall be intended he could not shew a reasonable cause to the contrary. *Thirdly*, She continued in the custody of the aldermen, wheresoever she was, and then the marrying her without their consent was taking her *extra custodiam suam.*

THE MERCERS AND IRONMONGERS OF CHESTER *against* RADFORD.

The Court of Equity at Chester, grants a trial in the county at large.

They sued the defendant in the City-Court of Chester, for using the trade of a linen-draper there, which (as they alledged) no one ought but citizens and freemen: he exhibited his bill in the Exchequer-Court of Equity there to have the matter tried in an indifferent county, because the mayor and aldermen are both parties and Judges: the Exchequer hereupon granted an injunction and appointed the trial to be in the county of Chester at large. Upon this the mercers and ironmongers prayed a prohibition, which was denied; for the Chancery here directs trials for lands to be in indifferent counties; as in *Mosely and Maynard's case*, where upon a writ for land in Lancashire, the Chancery directed the trial to be by a jury of Hertford, at the Exchequer-Bar: and in *Cole and Green's case*, a trust for houses in London, 'twas tried at this Bar by a Middlesex jury.

WOOLNOUGH AND HIS WIFE *against* VIRDON.

Trin. 22, Rot. 844.

Assumpsit to convey his whole estate. S. C. 2 Keb. 708.

Assumpsit and declares, that in consideration that the plaintiff and his wife at the defendant's request, would convey to Charles Lucy, cousin and heir of Matthew Lucy, their estate in certain lands in Higham, (which were the lands of the said Matthew) in such manner as the said Charles should appoint, the defendant promised to pay them 50l. And that whereas the plaintiffs at the defendant's request, had promised to convey the said tenements to the said Charles, by such ways as he should appoint, the defendant promised to pay them another sum of 50l. and then alledges that they were always ready to convey, but Charles never **[34]** requested. The defendant pleads, that at that time the plaintiffs nor either of them had any estate in the said lands. Upon this the plaintiffs demurred; and entered a *nolle prosequi* as to the second promise, and had judgment for the first: hereupon error was brought and assigned, that there was no consideration; the plaintiffs having no estate, as is now confessed by the demurrer. But by all the Court, this is well, for the bargain was for such estate as they had, and they might have a right extinguishable by release, although they had no estate; and so they affirmed the judgment.

Nota, No notice was taken that the *nolle prosequi* was entered upon the one *assumpsit* before judgment was given upon the other; but that seems well enough upon the authority of 1 Cro. *Walsh and Bishop.*

PARSONS *against* PIERCE.

Feme sole makes a feoffment, *deins* view, and directs him to enter, they inter-marry, and then he enters. S. C. 1 Mod. 91. 1 Vent. 186. 2 Keb. 872, 882.

Ejectment; upon a special verdict the case was: A *feme sole* made a charter of feoffment to J. S. and within the view directed him to enter, without other livery. They intermarried before he entered, and after he entered: and if the livery was made good by this entry after marriage, or thereby countermanded? was the question. And it was adjudged that the feoffment was made good by this entry after marriage,

and not countermanded by the marriage: and it is not like *Force and Hemlock's case*, 4 Co. Rep. 60, where a feme devises land to a man, and they intermarry, and then she dies, there indeed the marriage is a revocation of the devise; for otherwise the devise would be irrevocable, which is contrary to the nature of the thing: but this is like the case there cited, a *feme sole* grants a reversion and marries the grantee before attornment, yet the attornment by the tenant to the grantee after the marriage, is good, and not countermanded by the marriage, because 'tis for the benefit of the husband, and the grant shall be taken most strongly against the grantor. Otherwise perhaps in that case if she had married a stranger, and so perhaps here.

[35] ZOUCH *against* CLAYE.

A. and B. seal, &c. obligation to C. and after by consent D. is added, and he seals, &c. 1 Vent. 185. 2 Keb. 872.

In debt upon an obligation, the case was thus: A. and B. delivered the bond to C. and after, by the consent of the parties, the name and addition of D. was interlined, and he also sealed the obligation and delivered it. And if the obligation by this alteration was made void against A. and B. or not, was the question? But by Hale, and the whole Court adjudged, that it was not; and that 'tis the obligation of all three, and so is Moor. Rep. pl. 738, although 3 Cro. 626 was before adjudged contrary. But as the case is in 3 Cro. the obligation was altered only by consent of the obligors, in the absence of the obligee, and without his notice, though to his use. But here 'tis by consent of all parties.

LLOYD *against* BROCKING.

A right of entry will preserve a contingent remainder. S. C. 2 Saund. 382. 1 Mod. 92. 1 Vent. 188, 189. 2 Keb. 872, 881.

Thomas Bradshaw, tenant for life, remainder to Peter Bradshaw for life, remainder to the first and tenth sons of Peter in tail, the remainder to the right heirs of Edward Bradshaw. Peter had issue a son, and then Peter and Edward levied a fine to Thomas Bradshaw, (the son of Peter being then alive) Thomas then made a feoffment in fee, and after that Peter had issue a second son, and after the first son died; all which matter appeared upon a special verdict, in ejectment upon a will by which the settlement was made: and the single point in question was, whether by the feoffment of Thomas Bradshaw, the *contingent* remainder to the second son was destroyed, he being unborn at the time of the feoffment? And 'twas by Hale, and the whole Court adjudged, not destroyed, but preserved by the right of remainder, which was in the first son, till the birth of the second son.

[36] THE BISHOP OF EXETER *against* STARR.

the bishop for caution can take an obligation to himself, or to him and his commissary, or to the King. S. C. Raym. 225. 2 Keb. 814, 436, 848, 873. *Vide* 6 Mod. 71.

Debt upon an obligation taken for caution upon an excommunication and upon demurrer, if the obligation was good or bad, was the question? And 'twas argued by Jones for the defendant, and by Masters for the plaintiff. Three objections were made against the bond; 1. That no obligation *omnino* should be taken for caution, for it must go to the executors of the bishop. F. N. B. 65. Regist. 66, 67. But *cautio pignoratitia* is good, for the goods remain in trust to compel obedience to the church. 2. If the bishop can take obligations, yet they ought not to be taken to the bishop and his commissary, or chancellor, as this is, but to the bishop only. 1 Bulst. 125. 3. If any obligation may be taken, it must be taken in the name of the King, and not of the bishop, as all recognizances are taken in the King's Courts. On the other side 'twas said, that caution is a term of the canon law, and they know best what it means. That they have three sorts of cautions; 1. *Juratory*,

by oath, which is in smaller offences, and when the party can't give other security, whereby the party makes oath to perform the sentence of the Court. 2. *Fidejussory*, by obligation and sureties. 3. *Pignoratitia*, the pledging of goods, plate, &c. All which are good: more especially this by obligation, being more for the ease of the party, and the making thereof is his own act. And as to that which is said, 1 Bulst. 122, 'tis but an *obiter* opinion, and no point in the case. Hale Chief Justice, doubted if the bond were good. Wylde held it to be good. And being moved again in Easter term following, the Court would not proceed farther in the case, because the excommunication and offence were pardoned by the general pardon. But then Hale Chief Justice said, that upon a writ *de cautione admittenda*, the bishop may take an obligation, because the writ enables him so to do; but otherwise he cannot. And now Wylde also held, that the bishop could not take the obligation in his own name, and so make the forfeiture due to himself, when it should be to the King. 1 Rol. Rep. 110.

[37] ENBRIN *against* MOMPESSON.

Administrator *durante minore* sues a *sci. fa.* against the bail, the infant being come of age.

Administrator *de bonis durante minore* J. S. obtains judgment, and in a *scire facias* against the bail 'twas pleaded, that J. S. is now of full age: whereupon the plaintiff demurred, and 'twas adjudged no plea, for the recognizance is to the plaintiff himself by name, though he be administrator *durante minore ætate tantum*, and the infant's coming of age does not hinder the plaintiff from suing a *scire facias* against the bail. But by Hale, If after the infant come of age he had sued out execution upon the principal judgment, it might have been a question, whether that ought to be sued out by him, or by the infant?

PROCTOR *against* NEWTON.

Execution by a stranger upon prior title, well pleaded without shewing what was the title. S. C. 1 Vent. 184. 2 Keb. 878. 3 Keb. 41. 2 Danv. 50, 14. 2 Saund. 178, 179.

Debt upon an obligation to perform covenants. The defendant pleaded the covenants, which were upon a sale of land to the plaintiff, that the plaintiff should enjoy the land against A. and B. and pleads performance generally. The plaintiff replies, that A. and B. *habentes jus virtute tituli eis inde fact'*, before the conveyance and covenant, entered upon him and ousted him; upon which the defendant demurred, supposing the breach too general, not shewing by whom, and by what title they entered: but the plaintiff being a stranger to the title of A. and B. Hale held it to be well enough, *dubitante Twysden, & adjournatur*. But in Trinity term after, 'twas adjudged for the plaintiff. Levinz counsel for the plaintiff, Winnington for the defendant.

[38] BADDINGTON *against* FREEMAN.

Suit against baron and feme, being an infant, she must appear by guardian.

Assumpsit against baron and feme, upon a contract for wares, by the *feme dum sola*. Verdict and judgment was for the plaintiff upon issue *non assumpsit* in the Common Pleas; and thereupon in error here 'twas assigned, that the wife was within age, and appeared by attorney, whereas it should have been by guardian. The defendant pleaded *in nullo est erratum*, which is a demurrer, supposing that she joining with her husband, ought not to be sued by guardian, but by attorney, as it is. But Hale and Twysden held it to be error, and confessed by the demurrer, it being error in fact. But because this was only assigned for delay, the plaintiff was ruled to waive his demurrer, and take issue upon the nonage. *Vide* Townsend's Tables, 205. Two precedents, where the wife in such case appeared by guardian.

HOPKINS AND PRIOR *against* WEIGGLESWORTH.

Error in fact assigned in the Exchequer-Chamber, they affirm the judgment, because they cannot try errors in fact. S. C. 3 Keb.

Trespass, and judgment against the defendant, now plaintiff in error in the Exchequer Chamber, and assigns for error the death of one defendant before the first judgment. The defendant in error pleads *in nullo est erratum*, which confesses error in fact; but the Court affirmed the judgment, for the Court of Exchequer-Chamber hath nothing to do with errors in fact. For the Court of King's Bench had power to examine errors in fact in their own judgments before the statute, and therefore the statute does not extend to this case, but only to such cases, as had no other remedy but in Parliament. Whereupon the plaintiffs brought a writ of error, *coram vobis resident' in Banco Regis*, and assigned the same error, and entered it upon the same roll. And Hale Chief Justice held, this writ does not lie here, for this must be **[39]** brought upon and recite the whole proceedings in the Exchequer Chamber.

PUREFOY *against* ROGERS.

[See S. C. 2 Wms. Saund. 380.]

Feme covert tenant for life, remainder to her first son, she and her husband accept a fine of the fee before a son born, the remainder to the son is destroyed. S. C. 3 Keb. 11. 2 Saund. 380. 2 Danv. 520. s. 17.

Ejectment, and upon not guilty and special verdict. Feme tenant for life, remainder to her first son, she married, and before a son born, he in reversion in fee, conveyed the inheritance to baron and feme; after she had issue a son, and died. *Et per Curiam*, though if she had survived her husband, she might have avoided and waived the estate taken by the fine, yet the contingent remainder to the son is utterly destroyed, he being not *in esse* when the contingency happened. For the baron and feme took by intireties. Co. Litt. sect. 673, and therefore the estate for life of the feme was merged before the contingent happened, and the possibility which the feme had of waiving the inheritance, and reviving her estate for life, will not preserve it: for contingent estates, if the particular estate that supports them continue not *in esse* when the contingent happens, never can arise, be the determination thereof by surrender, merger, feoffment or any other way: and judgment was given accordingly for the defendant; for which were cited 1 Cro. *Biggot* against *Smith*, 2 Cro. *Wood* against *Ingersole*, More pl. 459. Finch, Co. Litt. 28 a. Saunders, (afterwards Chief Justice de B. R.) for the plaintiff, and Holt, also afterwards Chief Justice of the King's Bench, for the defendant.

SEAMAN *against* DEE, ADMINISTRATOR OF EVERAD.

Attorney sues by original, he must declare as others, and not upon privilege. S. C. 2 Keb. 860, 879. 3 Keb. 15. 1 Vent. 198, 199.

Assumpsit by the plaintiff as attorney of this Court, by original, and declares *in propria persona* upon his privilege *secundum consuetudinem Curiæ*. The defendant pleads a recognizance unsatisfied, and also a judgment in debt for five thousand pounds, upon a goldsmith's note, to be paid **[40]** with interest upon demand; and this not being paid till such a time, and the interest thereby amounting to 1700l. Judgment was thereupon had against him for 7600l. and that he had not assets *ultra* 40l. chargeable to this recognizance and judgment: and upon demurrer judgment was given for the plaintiff by Hale *& totam Curiam*. *First*, The declaration is naught, declaring in this manner by privilege upon original, for the privilege of attorneys is in suits by bill; but when they sue by original, they must declare as others do in common form. But this is only form, and cured by the general demurrer. *Secondly*, The plea is ill in pleading a judgment for interest, it is a *devastavit* to let that to grow arrear, and

then suffer a judgment for it; and want of assets to pay the debt before interest incurred by the administrator, shall not now be intended, it not being expresly so pleaded.

[49] TERMINO PASCHÆ, ANNO 24 CAR. II. IN BANCO REGIS.

NEWMAN *against* KINGERBY.

Prohibition to a suit for *Fool, ass and goose* of a parson. S. C. 3 Keb. 28.

A prohibition was prayed and granted upon a suit in the Ecclesiastical Court by a parson, for calling him *fool, ass and goose*, for these are only words of heat, and do not touch him in his profession.

PINFOLD *against* THE EAST-INDIA COMPANY, NORTHEY, J. S. AND WILLOUGHBY, BY ENGLISH BILL IN THE EXCHEQUER-CHAMBER.

Merchant having stock in the East-India Company, outlawed, the King assigns the stock to a creditor, the outlawry is reversed. He is again outlawed at another's suit, to whom the King grants the estate, &c. *Q.* Who shall have it.

Northey and J. S. severally sued Bateman to outlawry before judgment; and Bateman having 500l. stock in the East-India Company, and that found by inquisition, the King made seisure thereupon, and then granted it to Northey and J. S. in satisfaction for their debts, which were by obligation, with power to sue in their own names. The company refusing to transfer the stock to them, they brought a bill in the Exchequer against the company; upon which it was decreed, that the company should transfer the stock to Northey and J. S. which accordingly they did upon a writ of execution of this decree, and entered their names in their books, and struck out the name of Bateman. J. S. assigned his interest to Willoughby, and he was by the company entered in their books for his share. Afterwards Bateman reversed the outlawry, and Northey went on with his action against him, and obtained judgment, but no execution. The King granted to Bateman a restitution *de omnibus quibus nobis non est responsum.* **[50]** Then Pinfold having a debt due to him by Bateman upon obligation, sued him thereupon, and had judgment, and outlawed him after judgment. And then the King granted this 500l. stock to Pinfold, as he had before granted it to Northey and J. S. and the company refusing to admit him creditor, he brought his bill against the company, Northey, J. S. and Willoughby, by which and upon a cross bill, and by the answers and depositions, this whole matter was disclosed. And the Court held and decreed, *First*, That the stock was well transferred by the first grant which the King made to Northey and J. S. and was not restored by that grant which the King made *de omnibus de quibus nobis non est responsum.* For the King's grant was executed by the transfer of the stock; and so the King answered as to that. *Secondly*, They made no difference between outlawries before and after judgment. *Thirdly*, They made no difference between the case of Willoughby, who was assignee to the King's assignee, and Northey, who was the King's immediate assignee. *Fourthly*, Notwithstanding that, Northey after the reversal of the first outlawry, sued and obtained judgment against Bateman, yet they held no difference between his case and the case of Willoughby, but that both of them should retain the proportions at first assigned to Northey and J. S.

STARLING *against* TURNER.

Case for denying a poll in chusing a bridgmaster. S. C. 3 Keb. 26, 32. 1 Vent. 206. 2 Vent. 25.

Case, and declares that by the custom of London, the bridge-master is chose by plurality of voices of the freemen, and that if the electors are so divided, that the majority cannot be known by the view, that the mayor ought to grant a poll; and that Starling being mayor, where upon the election the majority could not be known,

refused to grant a poll to Turner, a candidate at that election, by which he lost the office. After verdict and judgment for Turner, plaintiff in the Common Pleas, error was brought in B. R. and assigned for error, that the action lies not, because it is not shewn that he had been elected if a poll had been granted. *Sed non allocatur.* For the mayor did not do his duty, and 'tis said by that he lost the office, which after verdict is sufficient: and of that opinion were all the Judges of the Common Pleas, but Vaughan Chief Justice.

[51] *Note*, It was not a question in either of the two Courts, whether an action of the case would lie, for the bare denying or refusing of a poll, and returning another? But this seemed to be admitted by both Courts.

WATTS *against* RYMES.

Pick-pocket, not actionable. S. C. 3 Keb. 34. *Vide* 2 Salk. 694, 695.

Case, for saying to the plaintiff, *You are a pick-pocket, you picked my pocket, and took away my money, and I will justify it.* The defendant justified for other words, and traversed the words as here laid: the plaintiff maintained the speaking of the words, as here laid, and issue thereupon, and verdict for the plaintiff. But by the Court judgment was stayed, because the words themselves are not actionable, and therefore the plaintiff cannot have judgment notwithstanding the justification.

[52] TERM. SANCT. TRIN. ANNO 24 CAR. II. IN BANCO REGIS.

WHALEY *against* TANKARD.

Tenant for 99 years, if he live so long, levies a fine and dies: he in reversion shall have five years after his death to avoid the fine. S. C. 1 Vent. 241. Raym. 219. 2 Vent. 334. 2 Keb. 37. 3 Keb. 30, 37, 110.

Ejectment, upon not guilty, and a long special verdict found at York Assizes, the case was, a settlement was made, by covenant to stand seized, after divers other uses, to the use of Charles Maynel for ninety-nine years, if he live so long, the remainder to two strangers for his life to preserve the contingent remainders; remainder to the first, and so on to the tenth son of Charles in tail, the remainder to Edmund Maynel, father of the lessor in tail, the remainder to the right heirs of the covenantor. All the precedent estates being spent, Charles the 14th of October, 1656, enfeoffed the defendant, and in Hill. 1656 levied a fine to him, Edmund father of the lessor being then alive, and of full age. Edmund, father of the lessor, died the 8th of March, 1661, leaving the lessor then, and still under the age of one and twenty. Charles died the 18th of August, 1664, without issue male, leaving a daughter still alive. And the lessor entered and demised to the plaintiff, and the defendant ejected him; and the question was, whether as this case is, the lessor shall have five years after the death of Charles to avoid the fine? For so the lessor being then and still an infant, the lessor is well in point of time to avoid the fine. Or, if the entry should not have been made within five years after the fine levied? For then the right of entry is within the five years attached in the father, and so the five years passed, and the sons barred. This case **[53]** was argued at Bar by Levinz for the plaintiff, and Weston for the defendant. And for the plaintiff it was said, that if Charles had been tenant for life, he in remainder would have had five years after the death of Charles the conusor, as is held in Moor, pl. 192. 3 Cro. 254, *ibid.* 219. 3 Cro. *Salvin and Clark's case*, 9 Co. *Podger's case*, 2 Co. Inst. 519. Though it is true, he might have entered for the forfeiture in the life of tenant for life, yet he is not bound to enter, but shall have five years *de novo* allowed him, after the death of tenant for life, within the second saving of the statute of 4 H. 7, which saves future rights; and the title which comes by the determination of the estate for life, is allowed to be a new right within this saving, which first accrues to him in remainder after the death of tenant for life. But Coke in *Podger's case*, and Catlin in Plowden's Comment. 374 a. say it is otherwise, where tenant for years levy the fine; but the entry must be within five years after

the fine levied, for in that case, he in remainder hath a present right to maintain an assise for the disseisin, done unto him by levying the fine. And in this case it may be urged, as indeed it is true, that Charles is no more than tenant for years, determinable by his death. But to this it was argued for the plaintiff, that there are no words in the first or second saving of the statute to warrant this diversity, nor are there any mention there of freehold, or chattels; but the first saving of the statute saves present rights, and the second saving saves future rights, so as the entries be made within five years. Now when tenant for life levies a fine, he in reversion or remainder hath a present right to enter for the forfeiture, as well as if tenant for years levies a fine. And in this case he in remainder hath also a new right of entry when the estate determines, as much as in the case of tenant for life. If tenant for life be disseised, and a fine levied by the disseisor, it is true he in remainder cannot have an assise, because the right of freehold remains in the disseisee; but when the fine is levied by the tenant himself, there is difference between tenant for life, and tenant for years; in both cases it is a forfeiture, and he in remainder or reversion may enter, and bring his assise immediately. And the true reason why the reversion or remainder is not barred in both cases, is because they are dry estates, which yield no suit or service until the **[54]** determination of the particular estates, so that there is nothing to attract the attention of him in remainder or reversion, and make him regard the estate. And *Farmer's case*, 3 Co. though it had other ingredients in the case, as continual payment of the rent, and also a continuance of possession, yet in the principal matter 'tis a judgment in point for this case. For the payment of the rent there, when no rent was to be paid, can't make a difference; neither can the continuance of possession make a difference, for in the case as it is put 3 Cro. 254, there was a render in the fine to a stranger. But the better reason in *Farmer's case*, is the breach of trust and confidence between the lessor and lessee, and that the statute meant not to enable any one to levy fines that was not enabled at common law. And at common law it was a good plea to the fine of tenant for years, *partes finis nihil habuerunt*: 5 Co. 5, *Saffin's case*. And although the fine and the feoffment in this case were at several times, yet being both made to the same person, and to the same uses, they make only one conveyance, and one forfeiture. 1 Co. *Cromwel's case*, and 1 Cro. *Salvin and Clark's case*. It was also said and agreed by all, that the remainder to the two strangers for the life of Charles was void, they being not of blood to the covenantor, and so it was no forfeiture as to them: and lastly, that the warranty in the fine could be no bar, it being descended upon the son of the conusor. To which Weston answered, that the feoffment being made before, and the fine levied after, though both to the same person, takes off the exception of *partes finis nihil habuerunt*. And this Hale Chief Justice agreed, and said, that though in raising uses, and making conveyances, fines, feoffments, bargains, sales, &c. may be one conveyance, as in *Cromwels case*, yet *in rei veritate*, a freehold is conveyed to the feoffee immediately by the feoffment; and so *partes finis nihil habuerunt* can't be pleaded, for the freehold was in the conusee by the feoffment, though the conusor had nothing. Then Weston said, that this feoffment made by a lessee for years, who had no right to make livery, was a thing of notoriety, of which tenant in remainder ought to take notice: otherwise of tenant for, because he hath power to make livery, and hereupon would have maintained the difference of Coke in *Podger's case*, between a fine by tenant for life, and tenant for **[55]** years, relying also upon the feoffment, and the fines being made and levied at several times. But Hale said, this would not make a difference; for so it was in *Farmer's case*, and to this purpose, both are to be looked upon as one conveyance to defraud him in remainder: and he said there could be no difference between a fine levied by tenant for life and tenant for years, and the reason why in neither of these cases a fine shall bar is, for the trust and privity which is between the lessee and him in remainder, that no prejudice be done by such acts: and that the opinion of my Lord Coke was to be questioned; and the opinion of Catlin was, that it is the same both in case of tenant for life and tenant for years, which is contrary to all the books before cited: all which was agreed by Twysden, but upon the importunity of Weston, to be farther heard, *adjournatur*. *Sed postea*, no one appearing to argue it farther in Hilary term, judgment was given for the plaintiff by Hale, Rainsford and Wylde, absent Twysden.

And *note*, a writ of error was brought upon this judgment, but before it came to

be argued, the deed made in the time of King James the First, and several times viewed heretofore, and now found in this special verdict as a true deed, was at last upon a trial at Bar in this Court, found to be a forged deed, as appears hereafter in Easter term 25 Car. 2, for another part of the same estate; upon which there was no farther proceeding upon the writ of error. And in truth, at the trial at York, the defendant stood not much upon proving the deed, being confident the matter of law was for him.

THOMPSON *against* BUTLER.

Administration granted to the next of kin, there being a residuary legatee, whether revocable? S. C. 2 Keb. 23, 27, 34, 55. 1 Vent. 217.

A man makes his will, and thereby gives 2000l. to his daughter, and the residue of his estate after debts and legacies paid, to his wife, and makes J. S. his executor, and dies; J. S. died intestate, and for six years after, no one sued administration. At last the daughter sued out administration *de bonis non, &c.* and so continued four years, and during that time obtained divers judgments and decrees as administratrix. And now the wife being residuary legatee, cited the daughter into **[56]** the Ecclesiastical Court to have this administration repealed and granted to her, which the Ecclesiastical Court being ready to do, the daughter prayed a prohibition, surmising, there was no residue. Hale Chief Justice said, the reason why administration granted to the next a-kin, was not revocable after the statute of H. 8, is, because it is intended that such administrator should have the whole residue to his own use; and upon this account the Ordinary could not grant distribution, nor oblige the administrator to distribute, till the law was altered by the late statute. But that has not altered the case yet, where there is a residuary legatee, for the residuary legatee being to have the whole surplusage by the appointment of the testator, and the administrator nothing; he held, that administration, though granted to the next of kin, might be revoked and granted to the residuary legatee. But it being here alledged that there is no residue, whether that takes away this power of revocation *Curia advisare vult.* And afterwards Dr. Waller argued and affirmed, that by their constant practice, where there is a residuary legatee, administration granted to the next of kin is revocable and grantable to the residuary legatee, though there be not at present any residue, because of the possibility that a residue may still happen; and cited *The Countess of Peterborough's case*, to be so sentenced. But Dr. Masters for the daughter, denied their practice to be so; and cited *Button's case*, as sentenced contrary, there being no residue at present. Afterwards the parties agreeing in Court, the case was not judicially determined.

BOLTON *against* LEE.

Covenant *int' A.* of one part, and B. and C. of the other, & *quemlibet eorum;* A. brings an action against B. only. S. C. 3 Keb. 39, 50.

Covenant upon a charter party, between Bolton owner, and Lee and Morgan merchants, freighters of a ship, by which Bolton lent them the ship to freight a voyage to Guinea, for 48l. per month: and it was mutually covenanted between the parties, & *quemlibet eorum modo sequente*, and then followed divers covenants concerning ship tackle, and performing the voyage, and then a covenant for **[57]** payment of freight, viz. when the ship arrives at Guinea, that the freight then due should be paid in England upon notice of the arrival, and when she arrives in England, that all which should be due from the time of the last payment, was to be paid. And sets forth, that at such a time the ship arrived at Guinea, and that six months and ten days were then passed, which came to so much, whereof notice was given. And that afterwards at such a time the ship arrived in England, and that then freight at the time of the last payment for six months, and the freight since, came to 287l. 4s. and that the defendant had not paid any of the sums. The defendant demurred; and took two exceptions to the declaration, 1. That the action is brought only against one of the merchants, and not against both; and the covenant between the parties is mutual; neither does the covenant for them & *quemlibet eorum*, make it disjunctive

between the parties of both sides, but leaves it joint of the one part, and several of the other, as the duty itself is, which ought to be paid by both the defendants, each having an equal benefit; and the *quemlibet eorum* shall be referred to the plaintiff only, who is the sole party of the one side. *Sed non allocatur;* the covenant being between them & *quemlibet eorum*, is joint and several of both sides. 2. It appears by computation, that the plaintiff demands more than his due upon the first breach by 30s. and less than is due upon the second breach by 16s.: and though the first may perhaps be cured by the jury's finding less, or the plaintiff's release of the overplus; yet this demand of less than is due, is a fault incurable: so is 2 Cro. 247. *Adderton* against *Dunton, in assumpsit*, Poph. 209. Latch. 175. Style 214. Hob. 88. *Latchlow* against *Tomlinson & ibidem* 89. *Baily* against *Goad*, all *in assumpsit*, from which covenant cannot differ, for all is to be recovered in damages in both cases. And *Clotworthie's case*, 1 Cro. in annuity, and *Baily and Offord's case, ibid.* in debt, and Hill. 21 & 22 of this King *inter Hulm and Saunders* in debt. Of the other side for the plaintiff were cited 2 Cro. 498, 529, that it is good in other actions, nor in debt. Hale Chief Justice took a difference between this case of covenant and debt. And held, that after verdict it is unquestionably cured, though upon general demurrer it would be doubtful, but upon a special demurrer it is clearly naught, and **[58]** gave rule for judgment *pro querente;* saying the defendant might move it in arrest of judgment, after the writ of inquiry, if he thought good: but it was not moved, and so judgment passed absolutely for the plaintiff. Sir William Jones counsel for the plaintiff, Levinz for the defendant.

1942. 1 Ch. 463.

KING *against* MELLING.

[Applied, *Newland* v. *Shephard*, 1723, 2 P. Wms. 196; *Goodright* v. *Pullyn*, 1726, 2 Ld. Raym. 1440. Distinguished, *Ginger d. White* v. *White*, 1742, Willes, 353; *Lampley* v. *Blower*, 1746, 3 Atk. 397. Referred to, *Robinson* v. *Robinson*, 1751, 3 Atk. 737; 2 Ves. sen. 226; *Mandeville* v. *Lord Carrick*, 1795, 3 Ridgw. P. C. 365; *Malcolm* v. *Taylor*, 1831, 2 Russ. & M. 442; *Willis* v. *Hiscox*, 1839, 4 Myl. & Cr. 201; *Montgomery* v. *Montgomery*, 1845, 3 Jo. & Lat. 55; 8 Ir. Eq. R. 740; *Abbott* v. *Middleton*, 1858, 7 H. L. C. 86. Applied, *Allgood* v. *Blake*, 1872, L. R. 7 Ex. 355. Discussed, *Clifford* v. *Brooke*, 1876-80, Ir. R. 10 C. L. 184; 5 App. Cas. 447. Discussed and applied, *Sandes* v. *Cooke*, 1888, 21 L. R. Ir. 463. Referred to, *Evans* v. *Evans* [1892], 2 Ch. 189.]

S. C. 1 Vent. 214, &c. 225. 3 Keb. 42, 52, 95.

Ejectment, and upon *non culp.* a special verdict, wherein the case was, Robert Melling seised in fee, devised to Bernard Melling for life; and after his death to the issue of his body by a second wife, (he having at the time of the devise another wife) and for default of such issue to John Melling, the lessor of the plaintiff; provided, that Bernard may make a jointure to his second wife for her life, and died. Bernard entered, and during the life of his first wife suffered a common recovery to the use of him and his heirs; his said wife died, and he afterwards married the defendant, his second wife; and covenanted to stand seised to the use of himself and his second wife for their lives; remainder to the heirs of their two bodies: remainder to the right heirs of the survivor of them, and died without issue, and the defendant his second wife entered; upon whom John Melling the remainder man in the will named, entered and demised to the plaintiff. This case was argued by Coleman for the plaintiff, and Levinz for the defendant, and three points were made. 1. If Bernard took an estate tail in possession, or only an estate for life, the remainder to his issue? 2. If he took only an estate for life, and that forfeited by the recovery, yet whether or not his power to make his wife a jointure, does still remain? 3. Admitting the said power to remain, whether it has been well executed? Coleman argued he took only an estate for life, by reason of the express words in the will, and cited *Wilde's case*, 6 Co. resolved by all the Judges of England: a devise to baron and feme for life, and after their decease to their children, they having at that time children, is only to them for life, remainder to their children for life. And it is there said, **[59]** that in a devise to a man for life, and after his death to his children, the children take by remainder:

and 4 Eliz. Benloe was cited, and 1 Rol. 837. Devise to one for life, remainder to the sons of his body, and if they alien, to his daughter, resolved the father takes only an estate for life: and 1 Co. Rep. *Archer's case*, a devise to Robert for life, and after his death to the next heir male of his body, and the heirs male of the body of such heir male, is adjudged an estate for life to Robert. 2. He argued, that the power to make a jointure was forfeited and extinguished by the recovery, being not a bare power, but a power coupled with an interest; like *Albany's case*, and *Digg's case*, 1 Co. Rep. 3. He urged, that this is not a good execution of the power, admitting it not to be extinguished: for 1st. The privity of estate, upon which the power depended, is tolled by the recovery: and 2d. He having nothing of the old estate left in him, out of which the use could arise, it must arise out of his new estate gained by the recovery, which is now avoided and destroyed by the entry of John in remainder. Levinz *e contra;* and 1st. he argued, that Bernard took an estate-tail executed in him, and the issue by the second wife could not make it a contingent estate. For a gift to a man, and the heirs of his body by the wife of another person, is not a contingent, but a present estate-tail in the donee. Co. Lit. 120 b. 184 a. Plowd. Com. 35 a. And as to *Wild's case*, where it is said, a devise to a man and his wife, and after their death to their children, they having then no children, that the children after-born may take by remainder; the point was not judicially before the Court, but an *obiter dictum;* and in Benloe, 4 Eliz. Pasch. 30, the case appears to be thus: a devise to William his son for his life, and after his death to his men-children, and yet adjudged an estate-tail; so that the case cited by my Lord Coke to maintain his opinion is contrary to his opinion. And the same case is reported 1 Anders. placit. 110, without making any difference, whether he has then men-children, or not. And as to the case 1 Rol. it there appeared the devisor's intent was, that the father should be only tenant for life, the estate-tail to the son, for that the clause to restrain alienation is added only to the estate of the son. And as for *Archer's case*, there the words, *To the heirs males of the body of the heir*, as there added, manifest his intent to exclude Robert the father from **[60]** having any estate of inheritance: he also cited 1 Rol. 839, s. 4, a devise to Rose for life, and if she marry after his death, and hath heirs of her body, that the heirs should have the estate: resolved, Rose takes an estate-tail; and 2 Rol. 253, a devise to A. for life, and after his death to the heir of his body, in the singular number; and yet resolved, an estate-tail in A. And the reason why the word *issue* in a will makes an estate-tail, is because issue in a will (made by men *inops consilii*) is constructively to be taken as of the same effort with the word *heirs*. And by the rules of law, when an estate is limited to the ancestor for life, the word *heir* coming afterwards, cannot be taken to be a word of purchase. 2. He argued and agreed, that a power coupled with an interest in the same person, is destroyed by his feoffment, fine, &c. for the power is to be executed upon his own estate, and with that he has departed: but in this case, the power is not to be executed upon the estate of Bernard, supposing his estate to be for life; but it is to make his wife a jointure, which is not to take place till after his death; and to charge the reversion only, and so merely collateral to his estate for life. And such collateral powers are not destroyed by feoffments, &c. 15 H. 7, a power to executors or trustees to sell to J. S. though they make a feoffment to J. D. yet they have power to sell to J. S. 3. He said, that Bernard in this case was no more than an instrument to convey a jointure to the wife, and when she is in, she is in by the devisor; and therefore if by virtue of such a power an executor sells a rent without deed, the sale is good, for the vendee is in by the will. And though he hath here made a greater estate than he ought to her, yet what he hath so made is good for so much as he was impowered to make, and void for the residue. Co. Lit. 258 a. Where one doth less than his authority, all is void: when more than he had authority, the act is good for so much as is within his power, but void for the rest. Hale Chief Justice upon this argument held, that Bernard took only for life; for it is only by construction in wills to answer the intent of the testator, that issues are taken as of the same import with heirs; and when the devise is by express words to the father for life, it cannot be a good construction so to construe the words, *And after his death to his issues*, so as to destroy the effect of the express words before: also he held, **[61]** that the power was destroyed by the recovery, or otherwise the execution might have done well enough. Twysden

and Rainsford, being only in Court, inclined to Hale's opinion in the first point, but said nothing as to the others. *Adjournatur.* After, at another day, Hale, upon consideration of the books, changed his opinion, and held, that Bernard took an estate-tail; but Twysden and Rainsford held it only an estate for life: but all three agreed, that the power was extinct by the recovery, or otherwise the execution was well enough. But by the opinion of two against Hale, judgment was given for the plaintiff, whereupon error was brought immediately in the Exchequer-Chamber, where the judgment was reversed upon the point in law; for there all agreed, that Bernard took an estate-tail; and in Easter term, 27 Car. 2 in Camera Scaccarii the reversal was pronounced. Levinz for the plaintiff in error.

BAYLY *against* MUNDAY.

A parson makes a lease for years, which is confirmed, this does not determine by his death, as by non-residence. S. C. 1 Vent. 244, 245, 246. 3 Keb. 46, 107, 193. 3 Bac. Abr. 371, 396. Cowp. 129, 429. 2 Term Rep. 749.

Ejectment, and upon *non culp.* and a special verdict the case was, a vicar having made a lease for years, did after upon the 11th of September, the first lease being unexpired, make a new lease for twenty-one years, to commence at Michaelmas next, rendering the ancient rent, and more, payable at four days, or within twenty days after, which lease was confirmed by the bishop, being patron and Ordinary, and by the dean and chapter; the vicar died, his successor made a new lease to the lessor of the plaintiff, upon which this ejectment was brought, and the case was twice argued at Bar viz. this term by Thursby for the plaintiff, and Turner for the defendant; and Hill. 23 & 24 by Sir William Jones for the plaintiff, and Sir Richard Hardres for the defendant. And after in Trinity term judgment was given for the plaintiff by the whole Court, viz. Hale, Twysden, Rainsford and Wylde. In this case three points were argued, 1st. Whether the lease of a parson or vicar so confirmed be void by his death, according to what is said, to be adjudged in *Mott and Hale's case*, 3 Cro. upon the Statute of Non-residence, viz. if death **[62]** be a non-residence within this statute? And resolved by the whole Court, it is not: for a non-residence within the statute is a non-residence voluntary and punishable by the statute; but a dead man is not punishable: and non-residence may be excused by sickness. 6 Co. *Butler and Goodale's case*, and Moor. pl. 609, by the exhibition of the Ordinary. And in that case of *Mott and Hale*, though reported by Croke to be adjudged: Sir Francis Moore says in his report of it, the Court were divided in opinion in that point. 2. The whole Court agreed, that the reservation of this rent at four days, or within twenty days after, does not make the lease void, it being for the advantage of the successor: as suppose his predecessor dies after the four days, and within the twenty. 3. All agreed, that this lease made the 11th of September for twenty-one years, to commence at Michaelmas next, is a lease in reversion, and therefore void: but Hale said, The first lease being *in esse* does not make this a lease in reversion, but a concurrent lease, which a vicar may make, the former lease being to determine within three years; to which the rest said nothing, Twysden only seeming to disagree thereto.

REEVE *against* HOLGATE.

Of a malster, *He has cheated all the farmers at E.* without a *colloquium* of his trade, actionable. 3 Keb. 54.

Case, for saying of the plaintiff, being a malster, *habens colloquium* of him and his trade: *Have a care of him, and do not deal with him: he is a cheat, and will cheat you; he has cheated all the farmers at Epping, and dares not shew his face there, and now he is come to cheat at Hatfield.* A special verdict found all the words, but that there was no *colloquium* of his trade. *Curia.* The words themselves supply a *colloquium*, they appear to be spoke of his trade; judgment for the plaintiff.

[63] BETNIFF *against* PEPPLE.

Suit in the Spiritual Court for calling a woman *whore*. S. C. 3 Keb. 58. *Vide* Nelson's Lutw. & 1 Lev. 116. 2 Salk. 552, 692, &c.

A prohibition was prayed to the Spiritual Court, to stay a suit there for calling a woman *whore;* but denied upon consideration, having been twice debated both at Bar and Bench; for it is an ecclesiastical slander, and examinable and punishable in the Ecclesiastical Court, and it is not to be considered only as a saying of scolding and passion.

FAWCET *against* BEAVRES AND HIS WIFE.

Case for retaining his servant departed without licence. 3 Keb. 59. 6 Mod. 99, 182, 289. 1 Salk. 380.

Case, and declares that he retained A. to serve him a year, and that he went away without leave, and the defendants *satis scientes & machinantes* to deprive the plaintiff of the service of the said A. *retinuerunt & custodiverunt* the said A. *licet sæpius requisitus* to the contrary. Judgment was given *in Communi Banco* by default; whereupon error was brought and assigned, that the action lies not, for they did not intice the said servant to go away, and he of himself having deserted the service of the plaintiff, and being thereby at liberty, it was lawful for the defendants to receive him. *Sed non allocatur*, for the action lies without their incitement, they having notice that he was the hired servant of another; whereupon they affirmed the judgment.

Nota, No notice was taken of the action being brought against the husband and wife, and a *feme covert* cannot retain or contract. But perhaps the receiving and keeping him without contract, is a trespass of which a *feme covert* may be guilty, sufficient to maintain this action against her.

[64] WILLIAM JUXON *against* THE LORD BYRON.

Spiritual Court may proceed upon an Act or other temporal matter incident, as long as they proceed according to the rules of common law. S. C. 2 Salk. 537. 1 Lev. 164, 180. 2 Com. Dig. 513. 4 Bac. Abr. 261. 3 Bl. Com. 112.

Sir William Juxon prayed a prohibition to the Spiritual Court of Chester, shewing that the Archbishop of Canterbury being seized of the impropriate Rectory of Rachdale, in the county of Lancaster and diocess of Chester, demised the same to the Lord Byron for twenty-one years (about the year 1661) who afterwards mortgaged the same to Pery, who was indebted to Sir William, and went off to places unknown; whereupon it was enacted by a Private Act of Parliament, that this mortgage should be invested in Sir William Juxon, to all intents and purposes as it was in Pery: and that the Lord Byron libelled in the Ecclesiastical Court, against divers of the tenants for tithes due after the said Act: upon which Sir William Juxon came *in pro interesse suo*, and set forth all the said matter to the Court; yet they nevertheless proceeded and gave sentence against the tenants for the tithes, for which he prayed a prohibition, *First*, Because the said Court is not to meddle with the construction of Acts of Parliament. 2 Roll. 306, 307. *Secondly*, Admitting they may hold plea of a temporal matter incident in an ecclesiastical cause, according to 12 Co. 65, *Fuller and Wiscard's case*, yet this is no longer allowable than while they proceed according to the common law in that matter, for they shall not be suffered to proceed in an incident temporal matter contrary to the course of the common law. And here they have determined contrary to the course of the common law, that the rectory in effect was not well settled in Sir William by the Act of Parliament, because they have given the tithes due after the said Act, to the Lord Byron. But the prohibition was denied per Hale and the whole Court; they agreed, that the Spiritual Court, though they may try matters cognizable at common law, which fall in incidentally where the principal is ecclesiastical; yet they shall be prohibited if they proceed in the trial of

such incident temporal matter otherwise than the common law would; but they have not done so here, for the Act vests the mortgage in Sir William Juxon, as it was in Pery, and Pery being but a mortgagee and out of possession, and Byron the mortgagor in possession, Pery could not at common law have recovered the tithes till he had gained **[65]** the possession of the rectory by ejectment; no more can Sir William Juxon. But till the rectory be recovered from the Lord Byron, the tithes belong to him. So that they have given the same judgment in their Court, as this Court would have given, and this being affirmed here to be the ground of their proceeding there, a prohibition was denied without putting the Lord Byron to plead to the suggestion.

[66] TERM. SANCT. MICH. ANNO 24 CAR. II. IN BANCO REGIS.

HENLOE *against* PETERS AND BUCK.

Solicitors in ejectment committed till they find a plaintiff able to pay the costs. *Vide* 4 Mod. 379. 1 Lil. 210, 211.

Ejectment upon the demise of the Duke of Richmond, and verdict and costs taxed for the defendant, the plaintiff being not to be found, and the duke a person privileged by Parliament, and also at this time ambassador beyond sea; so that no costs could be had against him, the Court ruled, that the duke's agents Wrenham and Tilson, who gave the name of the plaintiff to Hill the duke's attorney, should pay the costs, or produce a plaintiff able to pay them, and committed them till they did so.

TOSER AND HIS WIFE *against* DAVIS.

Suit in the Spiritual Court by baron and feme for calling the baron *cuckold*. *Vide* 2 Salk. 692, 693.

The plaintiffs sued Davis in the Ecclesiastical Court, for calling Toser, *cuckold and cuckoldly knave*, whereupon a prohibition was granted *nisi causa tali die*; at which day Levinz for cause shewed, that the baron and feme joining in this suit, no prohibition ought to go, *aliter* if he had sued sole, 2 Rolle 296, for these words charge the feme with incontinence, for which it is reasonable she should be allowed this suit in the Spiritual Court to punish a defamation, which subjects her to penance there; but if the husband had sued there solely, a prohibition would have lain, for he does not incur any danger of that nature by the speaking of these words. And of that opinion was the Court, and discharged the former rule for the prohibition, and next term **[67]** a prohibition was also denied in a like case *int' Luchin & Lightbridge* upon the motion of Pollexfen.

DANIEL *against* HANSLIP.

Common when alienable. *Vide* 1 Salk. 171, 366.

In this case Hale Chief Justice said, that if a man hath common appurtenant to a messuage and land for certain number of beasts, he may alien the same; *aliter* if it be common for all his beasts levant and couchant upon the land, he cannot by his alienation sever that from the land.

WOOD *against* KIRKHAM.

Departure in pleading. 1 Saund. 109, 268, 269. 2 Saund. 189, 190.

Debt upon obligation conditioned to perform covenants: the defendant pleaded the indenture, which was to return all the effects of goods sent to Barbadoes, and that he had performed all the covenants. The plaintiff replied, that such and such goods were sent to Barbadoes, of which he had returned no effects. The defendant rejoined, that he had no order to return the effects of them: to which it was demurred, and judgment for the plaintiff; for this is a departure, there being no mention of order in the covenants: but by Hale, had the covenant been that they should return upon

order, the plea had been good. *Quære* hereof, for performance in a plea is understood actual performance, and want of order seems to be no more than an excuse of performance. *Quære tamen*, for the covenant in such case is not to be performed without order; and so *performavit omnia* may be taken, that he had performed all that he ought to perform, he not having orders.

[68] ELBOROUGH *against* GATES.

Award delivered to the parties at another day and place than appointed by the submission. S. C. 3 Keb. 89, 125.

Debt upon an obligation, conditioned to perform an award *ita quod* it be made ready to be delivered to the parties at such a day and place. The defendant pleaded no award: the plaintiff replied and set forth an award made and delivered to the parties before the day, and at another place; whereupon the defendant demurred: and Hale held the replication ill; for being but the execution of an authority, it ought to be done at the time and place appointed; *cæteri contra*, it being delivered to the parties themselves it is good, though at another day and place; and by them judgment was given for the plaintiff.

DAVENANT *against* THE BISHOP OF SARUM.

Covenant to pay all taxes, to what taxes it extends. S. C. 1 Vent. 223, 224. 2 Danv. 56, pl. 1. 3 Keb. 69.

Covenant, and declares that the bishop's predecessor was seised of these lands, and in 1635 let them, and covenanted that he and his successors should pay all taxes during the term; and for breach assigns, that such a tax was laid by Parliament for a Royal aid in 1665, and that the bishop had not paid it. The defendant demurred and had judgment: *First*, Because it is not alledged that the bishop was seised *jure episcopatus*, and in pleading seisin in all sole corporations, the pleading must shew *in quo jure* they were seised, otherwise of corporations aggregate. *Secondly*, This covenant is not good to bind the successor unless such covenants have usually been inserted in former leases which is not here shewn. *Thirdly*, If such covenants have been in former leases, yet this here cannot oblige him to pay this new tax created by Parliament, but must be understood of such taxes as were then in use, *scilicet* synodals, &c. and Hale cited a case formerly so adjudged.

[69] MORSE *against* SLUE.

[See S. C. 3 Keble, 72.]

Case against the master of a ship, for goods lost without his default. S. C. Raym. 220. 1 Mod. 85. 1 Vent. 190, 238. 3 Keb. 72, 112, 135. 1 Danv. 12. 1 Roll. Abr. 2, pl. 2, 3. Cro. Jac. 262, 330. 1 Sid. 36, 245.

Case against the master of a ship and declares upon the custom of the realm for masters of ships to keep safely goods delivered to them to carry, dangers of the sea excepted; and that the plaintiff delivered to the defendant, master of such a ship such and such goods, and he *tam negligenter* kept them that they were lost: and upon not guilty a special verdict found that A. B. and C. being owners of the ship, made the defendant master, and gave him so much pay by the month, and the plaintiff being a merchant, delivered the goods to the defendant to be transported, that he kept four men constantly in the ship to guard the same; and that this is the usual guard for such ship, but the goods were lost in port before the ship set sail: and whether the master shall be charged for this loss? was the question; the case was twice argued at Bar this term and the next; and for the defendant it was urged: *First*, That here is no cause of action against any man, for no neglect is found, the ship had the usual guard, and therefore the plaintiff himself must bear the loss, and has no action against

any one for compensation. *Secondly*, If any action will lie in this case, it lies against the owners of the ship to whom plaintiff pays freight, and not to the master, who is no more than a servant to them at a certain salary; and this is not like the case of a hoy-man, Hob. 17, for in that case the hoy-man was paid by the plaintiff, and was himself owner of the boat. But in Hillary term following judgment was given for the plaintiff per Hale, who delivered the opinion of the whole Court, and held, that this case differs not from the case of the hoy-man.

[70] Scot *against* Bell.

[Distinguished, *Butterfield* v. *Heath*, 1852, 15 Beav. 414.]

A *feme covert* joins in an alienation of her jointure, and had another made the same day without precedent articles or agreement, not fraudulent *quoad* purchasors. S. C. 3 Keb. 82.

Ejectment upon a lease by Sir Nathaniel Hobart, and upon *non culp.* in a trial at Bar, the case upon the evidence was thus: Sir Robert Bell 8 Jac. 1, upon his marriage with the Lady Mary Cheek, settled the manor of Brandon, Broking and Bardolff-farm, to the use of himself for life, remainder to their first and tenth sons in tail, the remainder to his own right heirs, and the manor of Beaupre and other lands now in question, to the use of him and his heirs; and afterwards 3 Jan. 11 Jac. 1, he being then indebted 4000l. he and his wife by fine sold the jointure lands, (having then no issue) for payment of the debts; and the same day he covenanted to stand seised of the manor of Beaupre, and the other lands now in question, to the same uses as the manor of Brandon, &c. were settled before; the debts were paid, and about fifteen or sixteen years after he happened to contract new debts, for which Sir Nathaniel Hobart being bound with him, he for the security of Hobart, 13 Car. 1, made a lease for 1000 years of the manor of Beaupre, and other the lands now in question, to the said Sir Nathaniel Hobart, Hobart was forced to pay several of the debts, and therefore by virtue of the said lease for 1000 years, demised to the plaintiff, who brought this ejectment; the question was, whether the settlement of 11 Jac. was fraudulent and avoidable *quoad* this lease? It was objected, *First*, That there were no articles precedent to this second settlement, nor any precedent agreement that it should be done in consideration the wife levied the fine for the sale of her first jointure, and so it does not appear but that the fine and sale of the first jointure was the mere voluntary act of the wife, and the new settlement also voluntary. *Secondly*, The husband without the wife might have destroyed the contingent remainders limited to sons, no son being then born, nor any mean remainder limited to preserve them, so no consideration can be (pretended) but only the estate of the wife for her life, and she is now dead; and therefore all the remainders to the sons upon the new settlement were voluntary. **[71]** But by Hale & *Curiam*, the settlement 11 Jac. is not void as to the lease for 1000 years, for the old settlement being destroyed, and the new made the same day, an agreement by him to make the new settlement, in consideration the wife would pass the fine and bar the old settlement, shall be intended, and the consideration shall extend to all the uses of the new settlement; for it shall not be presumed that the wife would have parted with her estate by the old settlement, unless the baron would make the same provision for her and her issue by the new; and though it is true, he might have destroyed the limitation to sons without his wife's concurrence, yet that point was not so well known then as it is now; and no one then would have purchased under him if she had not joined; and if they would, it had been a hard and unhandsome thing in him to have destroyed the first settlement made in consideration of the marriage, without making any new settlement in recompence thereof: whereupon notwithstanding the lands in the new settlement 11 Jac. were almost of double value to those in the first settlement 8 Jac. yet by direction of Hale, and assent of the whole Court, the jury gave their verdict for the defendant, son of Sir Robert Bell, by the Lady Mary, Sir Robert himself being now dead; Levinz being of counsel for the defendant.

THE KING *against* THE LADY BROUGHTON.

Gaoler for life commits a forfeiture, he in reversion in fee may take advantage. *Vide* 3 Lev. 288, 290.

Information against her, being keeper of the Gatehouse prison at Westminster, by virtue of a lease for years from the Dean and Chapter of Westminster, who have the inheritance of that prison; that she at divers times between the 2d of May, 22 Car. and the exhibiting this information the 24 June, 22 Car. 2, took several sums of money from several persons extortiously, and reckons twelve prisoners *nominatim:* after verdict for the King upon *non culp.* it was moved in arrest of judgment by Simpson, that this information in a criminal case, in saying *at divers times between such a day and such a day,* is too general, for every day and place ought to be particularly mentioned; *sed non allocatur,* whereupon the Court fined her 500l. seised the office, and put in another at the nomination of the dean and chapter; and though they say, that **[72]** in strictness this was a forfeiture of the whole office, yet the Court did as in the 39th of H. 6, upon a forfeiture by the marshal of this Court, who was put in for life by the Duke of Norfolk, owner of the inheritance of the office, the Court there did not seise the inheritance, but displaced the officer of the duke, and put in another at his nomination, *ut hic.*

EARL OF ATHOL IN SCOTLAND, *against* THE EARL OF DERBY.

Privilege of peers in Parliament. 2 Salk. 510, 512.

The Earl of Athol having a decree against the Earl of Derby for 7000l. the portion of his wife, who was sister to the Earl of Derby; upon a question touching the privilege of peers in Parliament, how long it lasted? the Lord Chancellor before he would grant a sequestration, sent to the Lord Hollis and other lords to be informed in this matter; who hereupon sent him two Orders of the House of Lords, the one dated the 28th of May, 1614, the other the 27th of Jan. 1628, entered in the Journal Book of the House of Lords; by which it appears that they declare their privilege commences from the *teste* of their writ of summons to Parliament; and that upon every session and prorogation their privilege is for twenty days before, and twenty days after each session, which the order says is time enough for them to come from all parts of the realm, and to return. Hereupon the Lord Chancellor ordered the sequestration to be delivered and executed immediately after the twenty days: but it is said the Commons never assented to this, but claim forty days after and before each sessions.

Nota, The sequestration was executed accordingly, but the Earl of Derby died in a small time afterwards, and his estate being intailed, the Earl of Athol lost the benefit of the sequestration.

[73] WELSH *against* BELL.

Pleads matter of fact & *hoc paratus est verificare prout Curia consideraverit.* Raym. 218. 1 Sid. 422.

Error by four persons, upon a judgment had against them all, and assigned for error, that one of them *fuit infra ætatem,* and yet all appeared *per attornat. & hoc parati sunt verificare prout Curia consideravit.* The defendant pleads *in nullo est erratum,* and now it was objected by Buck, that the assignment of error is ill concluded, for this is error in fact, and triable *per pais,* and the conclusion *prout Curia consideraverit,* puts the trial upon the Court; he cited Yelv. 58, & 1 Bulst. 37. Hale seemed to think the conclusion well enough; and that the *prout Curia consideravit,* puts the trial upon the Court; he cited Yelv. 58, & 1 Bulst. 37. Hale seemed to think the conclusion well enough; and that the *prout Curia consideraverit,* is no more than putting it to the judgment of the Court to direct the trial of the matter, as they think it ought by law to be; be it by jury or by the Court itself. *Sed adjournatur.*

COCK *against* CROSS.

An obligor makes the obligee executor, he sues the other obligor.

A. and B. were obliged jointly and severally to C. and A. made D. his executor, and died; D. made C. the plaintiff, the obligee, his executor, and died. C. the obligee brought debt upon this obligation against B. who pleaded that A. made D. his executor, who made the plaintiff his executor; and that the plaintiff had administered the goods of A. not saying to the value of the debt, nor of what value, but generally, that he administered the goods of A.; hereupon the plaintiff demurred and had judgment, for the bond being joint and several, though one of the obligors be discharged in this manner, yet the obligee may still sue the other if he hath not received a full satisfaction by the administration.

[74] TERM. SANCT. HILL. ANNO 24 & 25 CAR. II. IN BANCO REGIS.

COOKER *against* CHILD.

Indenture of charter-party, not being *inter* parties, covenants to pay to a stranger to the deed. S. C. 3 Keb. 94, 115. Debt by indenture *per testat. existit.*

Debt upon a charter-party indented, concerning freight, by Bently the master and part-owner of a ship, whereby he with consent of Cooker the other part-owner, let the ship to the defendant for a voyage, and for which the defendant covenanted to pay Bently so much as master, and covenanted with the said Bently, *necnon cum prædict' Cooker* to pay Cooker 300l. the action is now brought: the defendant demanded oyer of the indenture, which was entered thus: *This indenture charter-party witnesseth, that Bently master and part-owner of the ship*, with the consent of Cooker the other part-owner, lets the ship, &c. and then follow the covenants *ut supra.* The defendant pleads, that only he and Bently were parties, and sealed and delivered the said charter-party, and that the plaintiff was no party; upon this the plaintiff demurred: and now it was argued by Sir William Jones for the plaintiff, that this is not an indenture between parties, but only as a deed-poll, whereby the party may covenant with a stranger; for this is not between Bently of the one part, and the defendant on the other part; in which case none that is not party can have an action upon the deed; but this here being in the nature of a deed-poll, the party may covenant with other persons to do several other acts, for which every one severally may bring his action. **[75]** According to Coke 2 Inst. 673, and of that opinion was the whole Court; who held the declaration *per testat. existit.* well enough, though it be in debt and not in covenant, and that the action was well, though brought by him only to whom the debt is due; and gave judgment for the plaintiff.

PYBUS *against* MITFORD.

[See S. C. 1 Ventr. 372.]

Covenant to stand seised to the use of the heirs males of his body by a second wife, omitting himself, yet he shall take by implication. S. C. 1 Vent. 372. Raym. 228, 318. 1 Mod. 98, 121, 159, 237. 2 Danv. 556. 3 Keb. 129, 239. 2 Mod. 207, 208, 209, 211. Co. Litt. 22 b. Hob. 30. 1 Roll. Abr. 616. Jac. 2. 1 Mod. 226, 237, 175. 2 Mod. 207. 1 Vent. 372.

Ejectment upon the demise of Edward Grey, of lands in Henton Norris *in comitatu Northumbriæ;* and upon *non culp.* and a special verdict the case was thus: Michael Mitford seised of the lands in question, and of other lands, 23 Jan. 21 Jac. covenanted to stand seised immediately after the date of that indenture, to the uses of the indenture, and to no other uses; and then limited the uses of the other lands not in question, to the use of himself for life, remainder to trustees till Ralph his son by his second wife Jane, came to the age of twenty one years; and then to Ralph and the heirs males of his body, with divers remainders over; and as to the

lands in question, to the use of the heirs males of the body of the covenantor by the said Jane, the remainder to his own right heirs, proviso, that if Robert his son by a first venter, pay the sum of 1200l. to his trustees, after the death of Michael, and within five years after he attains his full age, for the use of his younger children, the said uses to cease. Michael died, leaving Robert his eldest son by a former venter, who entered, and by indenture and fine conveyed the lands in question to the use of himself and his wife, and their heirs, and died; the wife married the lessor Grey, and they levied a fine to the use of the lessor; she died 18 Car. 1. Ralph enters in 1644, and had issue the defendant and died and the jury concluded, that if any use arose to Ralph by the deed of covenant the 23d of Jan. 21 Jac. for the defendant; *& si non*, for the plaintiff. This case was argued this term by Sir William Jones for the plaintiff, and by Levinz for the defendant: and afterwards Trin. 26, by Holt junior, after Chief-Justice of this Court, for the plaintiff, and by Weston for the defendant. And afterwards the same term all the Judges, viz. Hale, Twysden, Rainsford and Wylde *seriatim* delivered their **[76]** opinions: and first it was argued for the plaintiff, that this covenant cannot inure to give an estate for life to Michael, so as to make the estate limited to the heirs of his body by Jane, an estate-tail in Michael himself; as if it had been limited to him for life, the remainder to the heirs males of his body; but this is merely a future covenant, that he will stand seised to the heirs males of his body, without any precedent use to support it like the cases 21 H. 7, 18, 19. Dyer 55. Covenants, that after his death his land shall remain and descend upon his son; and Hob. 313, *Kibbet* v. *Lea*, & 1 Co. 119. Winch. 61. *Secondly*, This cannot be good by way of future use to the heirs of the body of Michael, for they said, this is no more than a contract, and the contract of the ancestor cannot bind the heir to that which the ancestor himself was not bound to; and Michael the covenantor was not bound to raise any use to Ralph, for the use was not to arise till after the death of Michael; and as Michael was not bound with the use to Ralph, no more can Robert his son and heir be bound therewith; also it cannot be good to Ralph as a springing use by this limitation to the heirs males of the body of Ralph by Jane; for if he takes it as a springing use, then he must take it as a purchasor, and that he cannot do; for he that takes by purchase as heir male, ought to be heir and male, and so is not Ralph in this case, for Robert is his heir and not Ralph, and consequently Ralph cannot take it this way. *Thirdly*, It was urged for the plaintiff, that by the words of the covenant the use is to rise immediately after the date of the indenture, and therefore cannot arise after his death. *Fourthly*, They said, the words of the covenant are, to *stand seised to the uses in the indenture mentioned, and no other uses;* and no use is therein mentioned to Michael; and therefore no use shall arise to him for life by implication to make this an estate tail in him; but the deed as to the uses limited to the heirs males of his body by Jane, is void: to which it was answered by the counsel of the defendant, as to the first and fourth objection, that here is a good use raised by implication to Michael for his life; for of necessity all the use must be in some person, and it cannot be in any other, because no use is limited to any other person for the life of Michael, therefore it must necessarily be in Michael himself for life; and this is not like the case of a covenant, that **[77]** his lands shall descend or remain after his death, for there are no words to stand seised, the want of which is the reason of the law in those case, as in 2 Roll. 788, sect. 1. But here there are the words *covenant to stand seised*, which always operates by way of raising uses, and never to give actions of covenant thereon, as it does in the other cases; and to have uses rise by implication is not a new case, for Moor pl. 437 is so, so it was in *Fenwick and Mitford's case*, upon a feoffment, and Co. Litt. 22, and so it was in *The Lord Paget's case*, 1 Co. 154, and 1 And. pl. 270, the use limited to Farmer for the life of the Lord Paget, was void, because to a stranger, but good to the Lord Paget himself for his life by implication, and 1 Leon. 102, *Allen* against *Palmer*. A copyholder's surrender to the use of his heirs, good, and as for the words, *and to no other uses*, they are to be intended no other express uses, and not to prevent uses by implication, which are of necessity, where the express limitation of the use is not full and perfect. As if a man makes a feoffment, or covenant to stand seised to the use of J. S. for life, and to no other uses, yet still the residue of the use must be in himself by implication, for it cannot be in no body, Co. Litt. 23 a. If a man makes a feoffment, and declares the use for life or in

tail, the residue of the use is to himself by result or implication: and as to the second and third objection, they answered, *First*, That this covenant binds the land immediately (by the making of the deed) in the life of the ancestor; and though the use does not arise till after his death, yet the land was bound with it immediately; and so it may be good as a future springing use after the death of the father, without any particular estate precedent to support it: as if a man covenant after his death to stand seised to the use of J. S. and his heirs, there being no transportation of possession; in such case the estate continues in himself during the mean time, 1 Co. 154 b. A feoffment to the use of A. for life, the remainder to B. if A. refuse, B. takes presently, but if this had been by way of covenant, B. should not take till after the death of A. but the estate shall rest in the covenantor, because he parted not with the possession, and therefore he shall have the use in the mean time; and the word *immediately*, although in strictness it excludes all mean times, yet to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing; as the 18th of Edw. 1, 21, an award to **[78]** make an obligation immediately to J. S. (then absent) is intended such a convenient time as he can get to him; and 3 Co. *Butler and Baker's case* upon the statute of H. 8. That the ancestor shall leave a third part immediately to descend to the heir, the ancestor devised so much to his wife, that the third part did not descend to the heir; she refused, and yet Poph. 89, by five Judges, her refusal made this discent immediate; but for other reasons judgment was there given against those of this opinion; also in this case, the land is immediately charged with the use, though the heir is not to have it till after the death of the ancestor. And as to that objection, that Ralph is not heir to take by purchase, they answered, we are here in the case of a use, where the intent according to equity must govern, for till the statutes, all uses were determinable in Courts of Equity: and it appears here, that Michael intended that the son by his second wife, was the heir male of his body. And *The Lord Cobham's case* was also cited, he settled lands upon him, and the heirs males of his body, he was attainted of treason, and afterwards it was enacted by Parliament, that the heirs males of his body, should enjoy the land; in this case the eldest son was allowed to enjoy it by the intent of that Act, and yet he could not in law be heir to one attainted, the attainder being not avoided by the Act. Hale Chief Justice, upon the first argument held, that Michael took an estate for his own life by implication, so that this was an estate-tail executed in himself. But if this had been otherwise, whether Ralph could take by purchase as heir male, being not heir, he doubted; the rest said nothing. *Et adjournatur:* but afterwards it being argued again, Trin. 26, he and all the other Judges gave their judgment, and Hale, Rainsford and Wylde, held, that Michael took an estate for life by implication, and that this was an estate-tail executed in himself; as if the estate had been limited expresly to himself for life, and after his death to the heirs males of his body by Jane; and for that reason gave judgment for the defendant: they relied principally upon *The Lord Paget's case*, and upon *Fenwick and Mitford's case*, 1 Leon. 256, 257, Dyer 310. 2 Rolle 788. And they held the law so the rather in this case, because it is limited by way of use, wherein the intent is to be pursued; and by the proviso it appears plainly, that Robert the son and heir, shall not have the land till he first pay the 1200l. to the younger children by the second venter after the **[79]** death of Michael. And now Hale held, that suppose the estate had not been executed in the father, yet Ralph the son might take it by way of purchase, as heir male of the second venter, and this notwithstanding the rule in *Shelley's case* and other cases, that an heir generally to take by purchase as right heir, ought to be right heir in verity; for Michael here does in the same deed take notice, that he had another right heir, *scilicet*, Robert by the first venter, and yet therein limits the estate to a special heir, whom he takes notice is not his right heir. Therefore the special heir by this special limitation, may take as a special heir, and that such special heir was a person of whom the law took notice before the Statute de Donis, Fitz. Tail 23. 4 E. 3, 50. Litt. sect. 352, 353. A feoffment upon condition to make an estate-tail to baron and feme, and to the heirs males of their bodies, remainder to the right heirs of the baron; baron and feme died before the re-conveyance made, and the gift was made to the son and the heirs males of the father, and the mother procreate, and yet these words, and the *heirs males of*

the body of the father and mother, make a purchase. But as to this the other Judges who agreed with him in the judgment, said nothing. But Twysden Justice, held the covenant void, and that no use arises thereupon, but that the deed was void in this particular, and that judgment ought to be given for the plaintiff. For *first*, Ralph cannot take by purchase, being not right heir: nor *secondly*, by discent, because the estate was not executed in the father; and he said, there could not be a use by implication, but where the remainder is so limited, that by possibility it may take effect; and that if there be incapacity in the party, or if he refuse, the use is void, as it was in *Paget's case*. Also he held, that estates by implication might be by will, but not by deed, as 13 H. 7. And as to the intent it appears here, he had no intent to take an estate to himself for life; for he covenants to stand seized to the uses there after mentioned, and to no others; and there is no mention afterwards of any use to himself for life. But by the opinion of the other three justices, judgment was given for the defendant. Upon which the plaintiff immediately brought a new ejectment; wherein Levinz was counsel for him again, and thereby recovered some part of the land, but upon **[80]** another title; but no writ of error was brought by him upon the first judgment, though he was dissatisfied therewith.

WINSTON *against* PINKENY.

Lessee surrenders, rendering rent. S. C. Raym. 222. 3 Keb. 131, 137, 446, 488. 2 Danv. 501, pl. 13. 1 Vent. 242, 272. 2 Mod. 174.

The case was, tenant for life made a lease for years; the lessee for years by parol without deed, assigned his term to the tenant for life, rendering rent; and in debt for this rent the question was, whether the reservation be good? For by Bigland, this here is a surrender, and the reservation being without deed, is void. But if it had been by deed, it had been good by way of grant. 12 H. 4, 17. 9 H. 6, 43. 1 Cro. *Peto* against *Pemberton*, Dyer 251. 2 Rolle 491. To which it was answered by Leak, Although this be not good as a rent, because there is no reversion, yet it is good by way of contract as a sum in gross. To which Bigland replied, Then debt lies not till all the days are past. *Et* per Hale, Though this assignment by operation of law turns to a surrender, yet it is not an express surrender; and if it be not good by way of reservation, it is good by way of contract; and so by assent of the other justices, gave judgment for the plaintiff, though all the days were not past.

CORMEL *against* LISSET.

Debt for rent against an executor in the *debet*, must be brought where the land lies. 1 Vent. 238. 1 Sid. 240, 266. 1 Saund. 238.

Debt for rent, and lays the action in London, supposing the lease to be there made, of lands in Oxfordshire, and that the lessee entered and died; and the defendant entered as executor, and the action was brought in the *debet* and *detinet;* and upon demurrer to the declaration, judgment was given against the plaintiff, for though the defendant is sued as executor, he is charged as assignee in the *debet* and *detinet* upon the privity of estate, not upon the privity of contract; and therefore the action ought to be brought where the land lies. Levinz for the plaintiff, *& postea* Hill. 5 W. & M. was the like case, and the like judgment entered. Hill. 5 Rot. 31.

[81] ABBOT *against* CHAPMAN.

In assumpsit exoneravit must be pleaded, cannot be given in evidence.

Assumpsit for money promised upon the marriage of his daughter, and upon *non assumpsit* a trial at Guild-Hall before Hale. The defendant gave in evidence a discharge of the contract, but Hale said, he should have pleaded *exoneravit*, yet he allowed it in mitigation of damages.

DOE *against* PARMITER.

Judgment in an Inferior Court pleaded that a plaint was levied *& taliter processum fuit.* S. C. 3 Keb. 127, 128. *Post.* 93.

Trespass for taking his beasts: the defendant justified by virtue of a plaint levied in a Hundred-Court by the plaintiff against J. S. upon which *taliter processum fuit*, that the plaintiff was nonsuit, and costs taxed, and a precept to levy it; upon which he took the beasts, and traverses (*absque hoc*) that he was guilty *ante deliberationem præcepti* or after the return, upon this the plaintiff demurred. And now Holt junior argued, that this short way of pleading a judgment in Inferior Courts, is not allowable. *Sed non allocatur*, for this is well enough; setting forth that a plaint was levied, but in pleading it they ought not to begin at the judgment, *scilicet quod considerat. fuit. Secondly*, He objected, that the execution in the Hundred-Court was by *distringas*, and not by *levari facias*, and cited several books to this purpose; *sed non allocatur*, for these books where they speak of a *distringas*, must be understood of a *levari facias*, for a *distringas & sic in infinit'* would be endless in an execution. *Thirdly*, The traverse is not good, and therefore the issue thereupon makes a jeofail, for he hath taken execution before the precept delivered to him; had it been after the *teste*, it had been good, as was lately adjudged in this Court, therefore the traverse should have been before the *teste*, or after the return; *sed non allocatur*, for the traverse is in prejudice of the defendant himself, if it be taken more narrow than it need, and not to the prejudice of the plaintiff. *Fourthly*, There is no statute gives costs in this case, but 23 H. 8 and 4 Jac. and those are when the plaintiff is nonsuit after appearance; now here it does not appear there was any appearance. **[82]** *Sed non allocatur.* For advantage cannot be taken of this by pleading, but by writ of false judgment, and the judgment shall be intended good till it be avoided.

DACRES *against* DUNKIN.

Death of one plaintiff abates the writ in all cases, but death of one defendant in trespass does not abate. S. C. 3 Keb. 127. 1 Lev. 165.

Trover, the defendant pleaded in abatement, that the plaintiffs Hegham and Penrice brought another action for the same goods, which is still pending, the plaintiff replied, that Hegham and Penrice are dead, whereupon the defendant demurred; and now Raymond for the defendant said, that the death of one plaintiff in trover does not abate the writ, because the property of the goods survives, and to this purpose he cited 2 Bulst. 262, *Spring* against *Barret*, *Curia contra:* in all action the death of one plaintiff abates the writ, but in trespass the death of one defendant abates not the writ, and judgment that he should answer over. But Wylde made some doubt, if this replication were not double in assigning the death of two plaintiffs in abatement, when the death of one abates the writ as well as the death of two? But by Hale, this is not double.

THE KING *against* GREGORY.

Declar. *quod dominus Rex venit coram domino Rege* allowed. S. C. 3 Keb. 127.

Debt by the King thus: *memorandum coram domino Rege venit dominus Rex, &c. & inde producit sectam*, the defendant pleaded the King had no superior in his realm, thereupon it was demurred; and now Saunders urged, that the declaration should be in the name of the Attorney-General, *& unde Attornat. General. pro. domino Rege dicit, &c.* Sir William Jones for the King, cited Rast. Entr. 655 b. a case in point like this. And per Hale Chief Justice, this is but an unmannerly way of declaring for the King, *& adjournatur.* But afterwards in Hilary term the declaration was adjudged good.

[83] BEDINGFIELD *against* BERISFORD.

Scire for *sciri*. S. C. 3 Keb. 128. *Vide* 1 Vent. 241. Lutw. 954. 1 Sid. 406. 1 Keb. 554. *Ad veritat. dicend.* omitted in swearing the jury.

Error of *assumpsit* in the Court of Lime Regis, *First*, That the award of the *venire facias* is *per quos rei veritas melius scire poterit* for *sciri*. *Secondly*, In the entry of the jury it is *qui electi, triati & jurati dicunt super sacramentum suum*, omitting *ad veritatem de infra content. dicend.* 1 Roll. 766, Lit. p. And for these reasons the judgment was reversed, upon the motion of Levinz for the plaintiff in error.

[84] TERMINO PASCHÆ, ANNO 25 CAR. II. IN BANCO REGIS.

WHALEY *against* GREENFIELD.

Tenant in tail covenanted to stand seised to the use of himself for 99 years, if he so long liv'd, remainder over, and then levied a fine, the remainder is made good. *Vide ante* 55, 76, 77, &c. 2 Show. 4, 5. A deed found to be forged after it had been found specially, and unquestioned for 66 years. *Vide* 2 Show. 5.

Ejectment: upon evidence to a jury at Bar, the case was: tenant in tail covenanted to stand seised to the use of himself for ninety-nine years, if he so long lived, the remainder to his first son in tail, the remainder over; then he levied a fine to another: and whether this fine shall make good the estate-tail limited by the covenant, or shall inure to the conusee? was the question; for by Hale, the tenant in tail does not here limit the estate to himself for life, but for years; and therefore this is not like *Blithman's case*, 3 Cro. 279, nor *Beddingfield's case*, *ibid.* 895, where the first estate being to himself for life, is all the estate he had power to dispose of: but here by the first limitation he disposes to himself only an estate for years, so that the remainder to his son may well enough arise out of the residue of the estate-tail, which he during the rest of his life, has power to dispose of; so this is a remainder executed in the son, corroborated by the fine; like to *Duncomb and Wingfield's case* in Hob. where tenant in tail bargained and sold, and then levied a fine to another, the estate of the bargainee is hereby corroborated. This matter was designed to be found specially: but afterwards upon the evidence the deed appeared to be forged, being indeed the same upon which the special verdict between Whaly and Tankard, was before found. See before, pag. 55.

[85] GUNTER *against* CLEYTON, AT GUILD-HALL.

Case for escape upon arrest, must shew cause of action.

Case, that whereas he had good cause of action against A. and sued out a *latitat* against him, the defendant being sheriff, arrested him, and then suffered him to escape, and returned *non est inventus;* and upon the evidence before Hale, the plaintiff was nonsuit. *First*, Because he could not prove any cause of action against A. which Hale held necessary to be done; but if he had declared of a cause of action for 40s. and upon evidence had proved but 30s. that had been sufficient (*quære tamen* it being special).—*Secondly*, Because he declares upon a *latitat in placito transgress.* and the writ produced is *in placito transgressionis ac etiam billæ* 20l. which Hale held a fault incurable, *& postea* in the same term, and in the same Court, between *Cuse and Mildmay*, in debt upon a sheriff's bond, conditioned to appear and answer *in placito debiti*, judgment was given against the plaintiff upon demurrer, because the writ was *in placito transgres. ac etiam billæ*, for this writ is not *de placito debiti tantum.*

MILLER *against* GREEN.

Trover *de duobus nodis & aliis parvis tæniolis.*

Trover among other things *de duobus albis nodis, Anglice white knots, & aliis parvis tæniolis, Anglice small ribbons:* after verdict for the plaintiff it was moved in arrest

of judgment, that *aliis parvis tæniolis* is incertain, and therefore judgment was stayed, for it does not appear *quanta vel quales fuerunt.* Withens for the defendant, Levinz for the plaintiff.

DIVE *against* JENMAN.

Declares that he did not do according to the statute, and does not shew in fact what the statute required. S. C. 3 Keb. 142, 151.

Covenant, and says the defendant covenanted to build him a house, *secundum regulas præscriptas per statutum pro rædificatione Londini;* and assigns for breach, that the defendant did not cover the cantilivers with lead *secundum regulas præscriptas per statutum prædictum*, judgment by default, and a writ of enquiry, and 15l. damages. It was **[86]** moved in arrest of judgment, that the breach was not sufficiently assigned, for want of alledging in fact, that the cantilivers by the Act ought to be covered with lead; *sed per Hale*, It being said, that he did not cover them with lead, *secundum regulas per prædictum statutum præscript.* it is an averment that so the statute prescribed. Levinz for the defendant.

THE KING *against* THE CORPORATION OF WINCHELSEA.

Upon a *certiorari* to remove orders to the Cinque Ports, they returned *breve domine Regis non currit, &c.*

Certiorari was directed to the mayor and jurats and commonalty, to remove orders by them made against proprietors of lands for relief of the corporation. They returned, that time out of mind, &c. there have been five ancient vills, *scilicet*, Hastings, Dover, Sandwich, New-Romney and Hithe, called the Cinque Ports; and that time out of mind Rye and Winchelsea have been members thereof. And that time out of mind, &c. *brevia domini Regis, &c. non current nec currere debent seu consueverunt*, save only in matters touching the person of the King, felony, or appeals, and their return was adjudged insufficient; for this Court is to see that the subjects be not injured in their estates as well as in their persons, 2 Cro. *Brown's case, habeas corpus* or *mandamus* lies thither: and by these orders they have imposed levies upon the estates of the tenants; and if such orders be not examinable here, they would be equal to Acts of Parliament; and this case is not merely civil between party and party, but between the corporation and party. Also the return here was not positive, but under a *cumque* by way of recital of their privileges. Upon this the return was quashed, but no fine for contempt, because they submitted to make return of the fact. Levinz for the King.

SHAW *against* STOUGHTON.

Divers probats and administrations where goods are in several provinces or in several realms. S. C. 3 Keb. 163. *Vide* 1 Lev. 78. 1 Roll. Abr. 908, 909. Hard. 216. 2 Leon. 155. Cro. El. 283, 315. Went. 46. Swinb. 357.

It was said by Hale, and not denied, that if a man die, leaving goods in the several provinces of York and Canterbury, several administrations must be committed. And so it is of goods in England and Ireland.

[87] BROMFIELD *against* TEIGH.

Distress is incident to a drift of common. S. C. 3 Keb. 163.

Trespass for taking and detaining his beasts till five pounds paid for their deliverance. The defendant justified, for that he had a drift of common to see that the common was not surcharged, and that these beasts were a surcharge upon the common, for which he took them and detained them till the five pounds paid in satisfaction of the trespass. The plaintiff demurred, and by Sir William Jones, the prescription for a drift of common, does not of itself warrant a distress thereupon, unless he had also

prescribed to distrain. *Curia contra*, It is a thing of common right for preservation of the common; and gave judgment for the defendant.

HANSLIP *against* COATER.

Indebitatus infra jurisdictionem for wares sold, and does not say sold *infra jurisdictionem*. S. C. 3 Keb. 164.

Error of a judgment in an Inferior Court, in an *assumpsit* for wares sold, because it only laid an *indebitatus infra jurisdictionem* for the wares, but did not say they were sold *infra jurisdictionem;* and upon the multitude of precedents so adjudged, the judgment in this case was reversed; but otherwise Hale and Wylde held it might be well enough.

RANDAL *against* WRITTLE.

Rent out of gavelkind shall descend as the land. S. C. 1 Mod. 96. 3 Keb. 165. 2 Danv. 549, pl. 5.

The question was, if a rent granted out of land gavelkind in Kent, should discend to all the males equally, as the land itself out of which the rent issued? And the Court held strongly, that it should. But upon the motion of Serjeant Hardres, to be farther heard to the contrary, it was adjourned; but in Michaelmas term following it was adjudged upon argument, that the rent is of the same nature with the land, and shall descend equally to all.

[88] DISDALE *against* ILES.

Lease at will, lessor makes a present lease to another, but agrees that he shall not enter till after the day the rent upon the first lease is due, the lease at will is determined. Raym. 224. 1 Vent. 247, 248. 3 Keb. 166, 207. *Q.* 1 Lev. 144. *Ante* 80.

Debt for rent against tenant at will; the case was, the plaintiff after he had made a lease at will, made a lease for years to commence presently; but it was agreed between the lessor and the lessee for years, that he should not enter till after the day, upon which the rent of the lease at will was due. And whether this lease and agreement determined the estate at will, so that the action lay not against the tenant at will? was the question; and after some argument the Court doubted, and adjourned the cause. *Sed postea Mich. eodem anno* it was adjudged, that the estate at will was determined, and that the action lies not against the tenant at will.

HARLOW *against* BRADNOX.

Want of averring life cured by those words, *in aretro existen'*. 3 Keb. 166. *Vide ante* 50. Nelson's Lutw. 386, 387.

Replevin, the defendant makes conusance as bailiff to baron and feme, he being seised in right of the feme, for rent *in aretro existen'* the plaintiff demurred specially, because it is not averred that the wife is alive. Hale: The *in aretro existen'* is *quasi* an averment of the life of the wife; which after verdict, or upon general demurrer, would questionless be good, but this being upon a special demurrer he doubted. Twysden and Wylde held it well enough, though upon a special demurrer; whereupon judgment was given for the avowant.

[89] TERM. SANCT. TRIN. ANNO 25 CAR. II. IN BANCO REGIS.

DAVIS *against* LEVING.

Inhabitants of a market may sell in another market, notwithstanding the Statute of P. & M.

It was adjudged upon demurrer, that the inhabitants of one market-town may sell goods in another market-town, and are not prohibited by the Statute of Philip and Mary, which extends only to those who live in country towns, and come and sell their goods in market-towns.

[90] TERM. SANCT. MICH. ANNO 25 CAR. II. IN BANCO REGIS.

SEMINE *against* SEMINE.

Citation to repeal administration, but the grant affirmed, upon which an appeal was sued, and both sentences repealed. A lease made by the first administrator in the mean time, good. S. C. Raym. 224.

Administration was granted, and the administrator by virtue thereof being possessed of a term, made a lease of the land, and after was a citation to repeal the administration, but it was affirmed; upon which sentence of affirmation an appeal was sued, and the sentence of affirmation thereby repealed, and the first administration repealed, and administration granted to another. And by Hale and the whole Court, this new administrator shall not avoid the lease of the first administrator, for this is only a repeal of the sentence in the citation, and so is in the nature of a suit on the citation; and so it is all one as if the first administration had been avoided in a suit upon the citation, and not as if the appeal had originally been brought upon the first administration, which thereby had been totally annulled. 6 Co. *Packman's case.*

[91] WILSON *against* ROBINSON.

Devise of my tenant-right estate, the fee passes and not the land for life. S. C. 1 Mod. 100.

Ejectment of lands in Underbarrow in the county of Westmoreland, and in a special verdict upon not guilty, the case was, William Baldwinson seised in fee of tenant-right lands there, made his will in these words: *I devise to my cousin William Baldwinson, all my tenant-right estate at Brigisend in Underbarrow, with all that I and my father took of Rowland Hubberty, of His Majesty's lands, and the marquesses fee, with all my lands at Beckside. Item, I give* 30*s. per annum for ever to the parson, and* 20*s. per annum for ever to the poor of Underbarrow.* And what estate should pass by this devise of tenant-right estate, whether an estate for life or in fee? was the question: for it was objected that by the words *tenant-right estate,* not the estate in the lands, but the nature, quality, and particular kind of the lands was described and specified; as *all my soccage,* or all my *capite lands;* for *tenant-right* lands differ from the nature of *fee-simple* at common law, being of the nature of copyhold finable, and as copyhold pass by copy, so these pass by deed without livery; but upon every death or alienation, the tenant must be admitted as in the case of copyhold; also when he intends to pass a thing in fee, he adds the words *for ever,* as in the case of the *parson* and *poor.* 2. The subsequent words, *with all that I and my father took of Hubberty,* (what all?) not a fee simple; but all the *King's lands and the marquesses fee;* and the last words, *with all my lands at Beckside,* can pass but an estate for life. And all is one intire conjunctive clause, and therefore can pass no more than an estate for life in any part of it; otherwise were they several distinct clauses of devise, as in 1 Roll. 844. *nu.* 1, 2, and Moor. pl. 153. But the Court held that the fee of the tenant-right land passed in this case; but because it does not appear how many acres there are of the tenant-right lands, and how many of the other lands; so that the Court cannot be ascertained of the quantities, a *venire facias de novo* was awarded. —Levinz for the plaintiff, Weston for the defendant.

[92] WILDMAN *against* NORTH.

In replevin the defendant may traverse the property in bar or abatement. S. C. 1 Vent. 249.

Replevin, the defendant justified and pleaded in bar, that the beasts belonged to a stranger, *absque hoc* that they were the beasts of the plaintiff. Upon this the plaintiff demurred, because this is only matter in abatement, and not in bar; and also it amounts to the general issue. *Curia*, In trespass this would amount to the general issue; but not in replevin, and may be pleaded either in abatement or in bar. And there needs no avowry *pro retorno habendo* in this case, for the goods being not the plaintiff's, the avowant must have a return of them, 2 Cro. *Sakild* against *Shelton;* and judgment was given for the defendant.

LOUGHER *against* WILLIAMS IN SCACCAR.

Lessee covenants with the lessor and his executors, to repair, yet covenant lies for the heir. S. C. 2 Danv. 235, H. 5. *Vide ante* 13, 26. *Post*, 124. 3 Lev. 189.

Covenant as heir, upon the lease of his ancestor of lands in Glamorganshire, in the time of Queen Elizabeth, for 99 years; wherein the lessee covenanted with the lessor, his executors and administrators, to repair, and to leave the premisses in repair at the end of the term; and now the heir brought this action against the executors of the lessee; whereupon the defendant demurred. And now it was argued for the defendant, that the covenant being only with the lessor, his executors and administrators, the action lies not for the heir, *Richmond's case*, Owen's Reports. To which it was answered that this is a *covenant which runs with the land, and goes to the heir without naming him;* as *Spencer's case*, and *The Dean and Chapter of Windsor's case*, 5 Co. Also the intent of the parties appears to be, that the covenant should continue after the death of the lessor, it being with him and his executors, and therefore it does not determine by his death, *Sacheverel and Frogat's case*, Trin. the 23d of this King in B. R. upon which judgment was for the plaintiff. Seys, Serjeant, for the defendant, Levinz for the plaintiff.

[93] GOSTON *against* SEDGWICK.

Writ of error in Parliament, not determined by a prorogation of Parliament.

Error in Parliament of a judgment in B. R. was determined by a prorogation of the Parliament; and a second writ of error was brought which also determined by a prorogation in November this term, till the 7th of Jan. next. And now a third writ of error brought, and a *supersedeas* moved for to stay execution; and at last upon several debates and great search of precedents, it was granted, the prorogation here being to a day certain, and no term interposing. But by Hale, though the writs of error be abated by prorogation without default of the party, yet if a term had interposed between the *teste* and return of the writ of error, no *supersedeas* could be awarded without shewing some apparent error in the record. Though writs of error are abated by a prorogation without any default of the party. And Wylde held, that although a term did interpose between the *teste* and return of the first writ of error, yet a *supersedeas* lies in this case, because the writ of error is determined by the prorogation, without default of the party. But afterwards it was declared by the Lords, and so the law is taken to be at this day, that a writ of error does not determine by a prorogation of the Parliament.

ATKINSON *against* WOODBURN.

Judgment in Inferior Court pleadable in bar or abatement to an action in Superior Courts. *Ante* 81.

Trespass *vi & armis* in the County-Palatine Court of Lancaster. The defendant pleaded in bar a recovery for the same trespass in a court-baron; upon which the

plaintiff demurred. And Wylde Chief Justice of Assise at Lancaster, upon an adjournment to his chamber at Serjeant's-Inn; held it pleadable in bar, 40 E. 3, 27 a. 7 H. 4, 15 a. 3 H. 4, 11, 12, 20. Bro. Judgment 16. *Sed* 6 Co. 45 a. *contra*, and 5 Co. 62 a. that it is not pleadable in abatement. But after judgment was given for the plaintiff: for trespass *vi & armis* lies not in Inferior Courts; and therefore the judgment there when the action is *vi & armis*, is void; and if it be not *vi & armis* (in this case) it is not the same trespass. But he held *ut supra*, that **[94]** judgment in an Inferior Court may be pleaded in bar to an action brought in a Superior Court, and he also held it pleadable in abatement when it is for the same cause. Levinz for the plaintiff, Weston for the defendant.

EDGEBURY *against* ROSINDALE.

Covenant to run for 100l. at one time, and for 200l. more at another time; is within the Stat. of Gaming. *Vide* 4 Mod. 409. 5 Mod. 1, 4. 1 Lutw. 484. 1 Salk. 344. 2 Mod. 54, 279. *Q.* 1 Sid. 394.

Debt upon articles, whereby the plaintiff and defendant agreed to run a horse-race at D. *tali die* for 100l. and that they ran, and the plaintiff won. The defendant pleaded the covenants, whereby it was farther agreed, that at the defendant's request the plaintiff should bring the same horse to run with the other horse at another day and place for 200l. more. And then pleaded the Statute of King Charles the Second against gaming, *that if one lose more at one time than* 100l. *upon tick, all securities given for the money shall be void.* The plaintiff replied, that the defendant did not request him to run again at the other day and place: upon which the defendant demurred. And judgment was given for the defendant. For *first*, That the first 100l. was not lost, and then a new security afterwards given to run a second match for more, as it was objected was the intent of that statute, which allows the losing of 100l. upon tick: and *secondly*, Though the first 100l. and no more was lost in this case; yet here because the contract was for more than 100l. to be won or lost upon tick or credit, the whole bargain was void *ab initio*, and not made good by the event subsequent, whereby it happens that no more is lost *in toto* than 100l. and the statute being made to suppress the use of excessive gaming, shall be construed in the most extensive manner that can be to answer that end.

[95] BAKER *against* BULSTRODE.

Condition to make such release as shall satisfy the plaintiff's council, defendant must tender. S. C. 1 Mod. 104. Raym. 282. 1 Vent. 255. 2 Danv. 39, pl. 33. *Vide* 2 Cro. 661. 1 Roll. Abr. 465, pl. 29. Moor 595, 596. 3 Mod. 191, 192.

Debt upon an obligation conditioned, to seal and execute such a release as shall satisfy the plaintiff's counsel: the defendant pleaded, that the plaintiff did not tender him any release to seal; whereupon the plaintiff demurred: and now upon hearing Sir William Jones for the plaintiff, judgment was given for the plaintiff: for the defendant in this case was to tender the release to the plaintiff's counsel, to see if he approved and was satisfied with it; and the defendant hath undertaken to do it. And this is not like to *Lamb's case*, 5 Co. 22 a. 23 b. where the condition is to seal such a release as the plaintiff's counsel shall advise; for in that case the plaintiff is to procure his counsel to draw the release, and then tender it to the defendant to seal.

[96] TERM. SANCT. HILL. ANNO 25 & 26 CAR. II. IN BANCO REGIS.

PRIDEAUX *against* WARNE.

Prescription to repair a key, and to have toll of all goods brought within the river, naught, *aliter* of all goods landed within the manor. S. C. 1 Mod. 104. Raym. 232. 3 Lev. 425. 2 Danv. 429.

Replevin for taking the plaintiff's sail: the defendant avowed as seised of the manor of Padstow in the county of Cornwal, and that between Wadebridge in the

parish of Brecock and Slipper-point, in the parish of Padstow, time out of mind has been a key for lading and unlading of merchandize; which key he and all lords of this manor time out of mind, repaired, and there kept a bushel for measuring salt and other merchandize there, & *ratione inde* have had a bushel of salt (computing to the bushel 24 gallons) of every ship bringing salt between the said Wadebridge and Slipper-point, to sell, &c. as belonging to the said manor, and then lays a custom to distrain for it any reasonable part of the tackle of such ship; and that a ship of the plaintiff's laden with salt to be sold, came there, and for not paying the duty he distrained the sails; the plaintiff *protestando* that the lords of the manor had no such duty, & *protestando*, no prescription to distrain for it: he by his plea confesses the defendant is lord of the manor, and that between Wadebridge and Slipper-point, time out of mind there hath been a key as aforesaid, and the lords of the manor have repaired it: but farther he says, that the river of Padstow is ten miles long, and the manor of Padstow, a small manor of the extent of half a **[97]** mile and no more upon the said river, within which manor the said key is; and that the ship was brought to Nude, a place upon the said river *longe distans a mole prædict'*, viz. the space of seven miles. And traverses *absque hoc* that the ship was brought to the said key, or any other place within the manor; hereupon the defendant demurred, and judgment was given for the plaintiff; for the having and repairing of a key within the manor, cannot intitle him to toll out of the manor for goods not brought to the key, nor within the manor, but to a place so far distant from the manor and from the key; nor will the repair of the key and the keeping of the bushels support the prescription of toll for goods brought to another place, though upon the same river: but if this had been a port, Hale said, such prescription within the port, might be good; as it is in 21 H. 7, 16 a. and in the port of London, and divers other ports, where the owners of the ports have such prescriptions: but *Trin.* 7 *W.* 3 *in Communi Banco, sed intratur Hill.* 5 *W. & M. inter Crispe & Belwood, quod vide postea.* A prescription for the lord of a manor to keep and repair a wharf within the manor, and by reason thereof to have toll of all goods landed within the manor, though not at the wharf, was adjudged good; for originally the lord was owner of all the lands of the manor; and therefore this prescription was held good in respect of the easement in landing the goods upon his soil which is in nature of a toll-traverse; whereas this here is only in the nature of a toll through for passing in the river, which is the King's common highway, and that without having a port or other interest in the river, or any place where the goods come. And though this case of *Prideaux and Warne* was cited as an authority in the case of *Crispe and Belwood*, in opposition to the judgment there given; yet the difference between them is manifest, and the case of *Crispe and Belwood* was adjudged *ut supra* by the whole Court of Common Pleas. Blenco and Levinz for the prescription in the case of *Crisp and Belwood;* and Wright and Lutwyche Serjeant *contra.* And in the case of *Warne and Prideaux supra.* Courtney for the plaintiff and Pollexfen, after Chief Justice of the Common Pleas, for the defendant.

[98] THE KING *against* BALLOW AND NORMAN.

For clipping and coining, the judgment is drawn and hanged. S. C. 3 Keb. 278.

They were found guilty of clipping and coining, and the question was, what judgment should be given against them? And it was resolved by all the Judges in England, except Vaughan Chief Justice *de Com. Banc.* that in both cases the judgment must be; *to be drawn and hanged* without *quartering*, according to Coke, 3 Inst. 17 b. as to coining; but contrary to him there as to clipping. And Standf. pl. Cor. 182 f. as to coining.

LOMAX *against* ARMORER.

No plea of franktenement without writ. 3 Keb. 277.

Error of a judgment in dower in the Town Court of Newcastle upon Tine, was assigned by Levinz, because the plea was held upon plaint only, without writ, and pleas of freehold cannot be held without writ, 2 Cro. 101, no not by custom, F. N. B. 47.

Yet here no such custom is alledged for it. Co. 2 Inst. 3, 1, a plea of *detinue de charters* cannot be held without writ, Britt. 128 b. Co. Entr. 129, Dower in London, *per breve*. And as to fines they cannot be levied in Inferior Courts without the King's writ. 44 Edw. 3, 28, 37. 50 Ass. 9. 3 Cro. 314. Owen 93, for thereby the King would lose his silver. But in ancient demesne fines have been allowed good, because these Courts were anciently the King's Courts. No body being ready of the other side; it was adjourned: but afterwards Hill. 26 & 27, the judgment was reversed.

[99] TERMINO PASCHÆ, ANNO 26 CAR. II. IN BANCO REGIS.

VANASTON *against* MACKARLY.

Covenant to pay 8l. a year *quarternatim*.

Covenant in B. R. in Ireland, where the plaintiff declared, that he covenanted to serve the defendant five years, and the defendant covenanted to pay the plaintiff 83l. every year *quarternatim*, viz. 20l. 15s. at Michaelmas, 20l. at Lady Day, 20l. 15s. at Midsummer, and 20l. 15s. at Christmas, and assigns for breach non-payment of the whole. The defendant demanded oyer of the indenture, which was entered as aforesaid, saving that under the viz. it was 20l. at Michaelmas, and 20l. 15s. at Lady-Day. And issue was taken that the plaintiff did not serve the defendant; and in the continuance of the issue and trial and *postea* the entry was made thus: *Nisi Capitalis Justiciarius prius venerit die Lunæ, &c. inter horas secundam & tertiam post meridiem*, and the *postea* was, *die & loco infracontent' venerunt partes, &c.* and verdict and judgment was given for the plaintiff, whereupon error was here brought, and two errors assigned. *First*, The variance between the sums in the declaration and the indenture; and also that all the particulars do not amount to 83l. but come 15s. short, and without the particulars as set forth under the viz. it will not appear how much was to be paid at one day, and how much at another; nor is it shewn what the quarter days are, and the word *quarternatim* cannot supply that; neither is it said *quarternatim per æquales portiones.—Secondly*, The *postea* ought to have been *tempore & loco infra content'* and not *die & loco.* **[100]** But the Court answered and resolved, that *quarternatim* supplies all this after verdict, and that the variance under the viz. does no harm; for *quarternatim* shall be intended the usual quarter days, and that the payments were to be by equal portions; and though 83l. is not due, but the duty is less by 15s. yet the jury having given no more than is due, the demand of more will not vitiate, though in some cases the demand of less will hurt: and as to the second it appears the cause was tried and no default, and therefore it shall be intended the parties came at the time and place, judgment affirmed. W. Jones for the plaintiff in error, Levinz for the defendant.

DREW *against* BAYLY.

Administrator of a term for 100 years, made a lease for five years, rendering rent, his executor shall have the rent, and the administrator *de bonis non* the reversion. S. C. 1 Vent. 259, 275. 3 Keb. 298, 427, 475. Lex Testam. 247, 248.

Debt upon an obligation to perform covenants, and upon special pleading and demurrer the case was thus: One possessed of a term for one hundred years as administrator, made a lease for five years, rendering rent to him, his executors and assigns, and made the plaintiff his executor and died; and now in an action brought upon this obligation, and breach assigned for non payment of the rent, the question was, whether the executor of the administrator, or the administrator *de bonis non* to the first intestate, shall have the rent? By Pollexfen it was argued for the defendant, that the administrator *de bonis non* shall have it as incident to the reversion which he has without controversy; and it is not like to Co. Litt. 46 b. where the husband possessed of a term in right of his wife, makes a lease for part of the term, rendering rent, in which case the executors of the husband shall have the rent, although the wife hath the reversion, for that is, because the wife is not party to the lease, which is the sole reason of that case. And the covenant here runs along with the rent.

Gould *contra*, he cited Latch 266, 267, a case cited to be so adjudged, which being there marvelled at, Jones Justice then said, Yes, faith, it was so adjudged. And Gould said, that this case is all one with the case of Co. Litt. for there the wife is in paramount the lease [101] by survivor, and so here the administrator *de bonis non* is in paramount the lease of the first administrator, as hath been often resolved, for which reason he cannot have a *scire facias* upon a judgment obtained by the first administrator; which the whole Court agreed. And Hale said, the executor of the administrator shall have this rent, but it shall be assets in his hands liable to the debts of the intestate, for which he shall be charged as executor *de son tort;* whereupon judgment was given for the plaintiff.

And *note*, in Michaelmas term following in another case between the same parties, the same point happened again, and the Court in Hale's absence doubted; and being moved again in Trinity term, Hale himself then doubted, but after, as I was informed, that case was adjudged (as here) for the plaintiff.

HOLMS *against* TAYLOR.

Trover and *assumpsit* in one action, and not guilty as to the trover.
S. C. 5 Keb. 264, 276, 296, 302, 335. Bull. N. P. 50.

Error of a judgment *in Com. Banco*, where the plaintiff in an action joined *assumpsit* and *trover* by several declarations; and verdict and judgment was for the plaintiff in the *assumpsit*, and for the defendant in the trover. And it was argued and held by Hale, that though by the verdict the causes are now become several, yet in as much as no such action lay, the declaration is naught *ab initio*, and the judgment void: but Twysden doubted, if the severance by the verdict does not make it good, though it was bad at first. *Adjournatur.*

Nota, Hardres 166, in battery by baron and feme for battery to both, if the defendant be found *non culp.* as to the husband, this by the opinion of Bridgman Chief Baron, is cured by the verdict.

[102] HAWKINS *against* MILLS.

Roman figures good in pleading, not English. S. C. 3 Keb. 301. 2 Hawk. P. C. 340.

Error of a judgment in Excester Court, because the award of the *venire facias* was *præcept' est per Curiam quod venire fac.* XII. in figures. But being Roman figures, the Court held it well enough, *aliter*, if it had been thus 12 in English figures, and the judgment was affirmed.

SMITH *against* NEESAM.

Where the assault only is proved, no more costs than damages.
S. C. 3 Keb. 283, 292, 303, 335.

Assault and battery upon *non culp.* was tried before Hale Chief Justice at Guildhall; the jury found the defendant guilty of the assault only, and not guilty of the battery. And Hale Chief Justice certified accordingly, to have the opinion of the Court upon the new statute: and whether the plaintiff should have full costs, or no more costs than damages, which were small? was the question; and upon the first debate it was adjourned. But resolved afterwards (as I heard) that he shall not have more costs than damages, for the battery is not certified to be fully proved, but the assault only.

BROWN *against* PALFRY.

Custom to repair a chapel, and to be discharged from repair of the parish-church. *Vide post*, 163, 164, 186, 187. 3 Burr. 1689. 3 Term Rep. 107.

Prohibition to the Ecclesiastical Court of Durham, suggesting that they are a parochial chapel within another parish of Northumberland, and that the inhabitants of the chapelry have time out of mind had a parochial chapel and divine service, sacraments, &c. and have used to be exempt from the repair of the parochial church, bells, &c. in consideration of their being charged to the repair of their own chapel, and that they have usually repaired the same; and yet that the defendant, churchwarden of the parish-church, sued them to repair the said church, the parish-bells, &c. And the prohibition was granted. And at **[103]** another day afterwards a consultation was moved for, for that this whole matter was pleaded there, and sentence given; and the case of *Chapel Brimidge*, Hob. 66, was cited, wherein such a case a consultation was granted upon motion. To which it was answered, that in the case of *Chapel Brimidge* sepulture was still reserved to the parish church, which was a reservation of the ancient right, which is not in this case. Also upon examination by the Court, the suggestion there was found false; and though it was decreed there against the plaintiff in the prohibition upon pleading the custom, yet it was to try a matter there not within their jurisdiction, for they could not try customs; their law and ours differing as to the nature of customs, Latch. 48. If a custom be alledged in the Ecclesiastical Court, and denied, a prohibition lies, Latch 200, a modus is sueable there; but if denied, a prohibition lies: the bounds of a parish are not triable there, 3 Cro. 228 adjudged, and Hetley 133, and 3 Bulst. 241, a modus was sued for there, and another modus pleaded, and a prohibition granted. At last the Court ruled the prohibition should stand, which having before been granted absolutely, a consultation cannot be upon bare motion without plea; and Hale and the Court ruled the plaintiff should declare upon the prohibition, and the defendant should plead as he thought fit. Upon which he traversed the custom which was tried at Newcastle Assizes, and the jury found no such custom; upon which a consultation was granted. Levinz counsel for the plaintiff in the prohibition, Weston for the defendant. *Vide* Trin. 28 & 29, B. R. a prohibition granted in a like case, and 2 Roll. Rep. 265.

OKY *against* SELL.

Stat. 23 H. 6 is a general law. *Vide* 1 Lev. 86, 209, 254. 1 Saund. 161. 1 Sid. 383. 1 Vent. 237. Hard. 464.

Debt upon a sheriff's bond. The defendant demands oyer of the condition, which was that the defendant shall be a true prisoner, and without pleading the statute of 23 H. 6 he pleaded that he was in execution for debt, and yet this obligation was given for ease and favour *pro libertate obtinen. & sine satisfactione* of the plaintiff: hereupon the plaintiff demurred, and upon the first argument Hale Chief Justice held. *First*, That the **[104]** statute 23 H. 6 is a general law, of which the Court must take notice without pleading. 2. If it were not, yet this obligation is void by the common law. *Sed adjournatur.*

SIR RICHARD SALTONSTALL'S CASE. IN THE COMMON PLEAS.

Devise to his wife, and that she may dispose of it to which of the children she pleases. S. C. 1 Mod. 189.

A man devised lands to his wife for life, and that she may dispose thereof to any one of her children she pleases: and upon the first argument Vaughan Chief Justice, and Atkyns held, that she might give it in fee: Hugh Wyndham and Ellis, that she could not give it but for life. But it was adjourned in order to be further argued. *Hoc ex relatione servientis Willimot.*

[105] TERM. SANCT. TRIN. ANNO 26 CAR. II. IN BANCO REGIS.

WHITE *against* STRINGER. COMMONLY CALLED LORD TENHAM'S CASE.

Covenant in consideration of the marriage of his first son, to settle to him in tail, remainder to the second son, the consideration extends to the second son, and is not voluntary, nor void *quoad* purchasors. S. C. 3 Keb. 322.

In ejectment upon not guilty, a trial was at Bar; and upon evidence the case was: one seised in fee in consideration of marriage between his first son and A. and of a marriage-portion to be paid, which was afterwards paid, made a settlement to the first son and the heirs of his body upon A. begotten, remainder to his own right heirs; the father was then indebted. Three years after the father sold the lands for valuable consideration, and died: the first son and A. died without issue. And whether the remainder limited to the second son be fraudulent and void *quoad* a purchasor, he having notice of the settlement, and a covenant in his deed of purchase against all incumbrances, save this remainder to the second son, against which he had taken a collateral security? was the question. Serjeant Maynard for the plaintiff urged, that this was void as to the purchasor. For *first*, the consideration of the marriage, and the portion, extends not to the second son, no more than if the father upon the marriage and for the marriage-portion, had settled it to the first son and the heirs of his body; and after on the same day had settled the reversion upon the second son in tail, the remainder to his right heirs; this second settlement had been voluntary and void as to purchasors. *2dly*, Though **[106]** there be notice of the settlement, and though it be excepted out of the covenant, &c. in the deed of purchase; that will not alter the case, for one that hath notice of a fraudulent deed, may falsely purchase, knowing that cannot hurt him. But Hale Chief Justice, and Wylde held clearly, to which also Rainsford agreed, *dubitante* Twysden; that though one and the same deed may be upon good consideration as to one, and voluntary as to another in some cases, yet not in this. *First*, It cannot be imagined that he intended to deceive a purchasor after the determination of an estate-tail, which might endure for ever, when the consideration of the purchase, as well as the remainder itself, by reason of the first estate-tail, was of so small a value. *Secondly*, The purchasor is not deceived in this case, for he not only had notice, but also collateral security against this remainder. Accordingly the jury gave their verdict, that the remainder was not void, but good against the purchasor.

MAYOR AND COMMONALTY OF LONDON *against* DEPUTEE.

In debt for scavage ley gager lies not. S. C. 2 Salk. 683, 684. 1 Show. 75. 3 Keb. 337. *Post*, 142, 174. 1 Lev. 15.

Debt, and declares that the mayor and commonalty time out, &c. have had *scavage* of all ships that come into their port, and that all their customs are confirmed by Act of Parliament, Rich. 2, and that the defendant in a ship brought into port so many deal-boards, for which he ought to pay so much for custom as scavage: the defendant waged his law, whereupon the the plaintiff demurred: and upon the first argument the Court gave judgment for the plaintiff: the action being founded upon a debt arising upon custom confirmed by Act of Parliament, though Co. Ent. 118 was cited *contra*. In debt for an amercement in a court-baron, founded upon a prescription to amerce, *ley-gager* lies: so Benl. 39 in debt upon a by-law, founded upon a custom to make by-laws. And the statute though it confirms their customs, does not alter the debt, but leaves that as it was before, still due upon the custom, as 2 Cro. *Bradshaw's case*, debts upon simple contracts assigned to creditors by virtue of the Statute of Bankrupts, though in debt for them the defendant may wage his law. But the Court said, in the cases cited by amerciaments upon by-laws, the debt is not immediately founded upon the custom, but upon the **[107]** amerciament, by the by-laws, &c. which by custom are warranted. But in this case the debt itself is immediately founded upon the custom confirmed by Act of Parliament. Simpson for the plaintiff, Levinz for the defendant.

BLACKBORNE AND HIS WIFE, AND ANNE HAIGH, *against* GREAVES AND OTHERS.

Baron and feme join, the trover being before marriage, the conversion after. S. C. 3 Keb. 62, 263, 329.

Trover for 200 load of wood, and declares, that the wives of the two plaintiffs *dum solæ* lost the wood; and that after Blackborn and his wife married, and the defendants afterwards converted: upon *non culp.* a special verdict found, that John Haigh was seised of copyhold land where the wood grew, and had issue three daughters the defendants, by his first wife; and the two plaintiffs his daughters, and John his son by a second wife; and that he surrendered to the issue of the said three daughters for eleven years, remainder to his two daughters for five years, the remainder to the three daughters by his first wife, remainder to his right heirs. The father died, the three daughters were admitted, John the brother died, the years expired, the three daughters entered and cut the trees, and the jury concluded, that if the admittance of the defendants was the admittance of him in remainder, for the plaintiffs; if not, for the defendants. And judgment was given for the plaintiffs, that the admittance of the three daughters was the admittance of John the brother in remainder as right heir, and so an actual seisin in him to make a *possessio fratris*, which makes the land discend from him to the two plaintiffs, his sisters of the whole blood, and not to all his sisters as heirs to their father; the authorities relied upon were 4 Co. 23 a. 3 Cro. 504. But then the trover being laid before the marriage, and the conversion after, it was objected, that baron and feme could not join, but the baron ought to sue without the wife, for the conversion is the cause of action. But the Court held it well with or without the wife; for the inception of the cause of action was in the wife by the trover, though not consummate till the conversion afterwards. Levinz for the plaintiffs, Weston for the defendants.

[108] *Nota*, In a case between *Powes and his Wife* against *Marshal*, the trover was before marriage, and the conversion after; and the Court was divided upon it, whether the wife could join with the husband. Twysden and Wyndham held she ought to join. Hyde Chief Justice, and Kelynge *contra*, which case is now reported 1 Sid. 172. But now all the Court agreed she might join in this case, or he might sue alone, for the reason aforesaid.

CRAGG *against* NORFOLK.

Assise arraigned, and day given to plead to the writ. S. C. *Post*, 120.

Assise for the office of Serjeant at Mace to the House of Commons, the assise was arraigned, and day given to plead; at the day the tenant took exceptions to the writ. *First*, Because it was *audiend'* for *ad audiend'; sed non allocatur*, it may be *audiend'* as well as *ad audiend'*. *Secondly*, The return of the writ was *coram nobis apud Westmonasterium*, whereas it should be *ubicunque fuerimus in Anglia;* for if the Court should remove from Westminster, the tenant is not bound to appear. *Sed non allocatur.* So it was when this Court followed the King. Then the day was appointed for the trial; whereupon the plaintiff made title by a patent from King James I. reciting a former grant to another, and this to commence from the determination thereof: *per Curiam* resolved, this recital is not evidence, whereupon he was forced to go to the Rolls, and procure the Master of the Rolls to let the roll be brought into Court, which was done accordingly. Then being put to prove seisin, he proved only, that he went to the House of Commons and demanded his place, but received no fees. But that in an action of the case for disturbance, he received 300l. damages, and this was held a sufficient seisin by some of the Judges, the damages being recovered in satisfaction of the fees while he was out of possession of the office: but others were of a contrary opinion, and so the matter was intended to be found specially: but afterwards the plaintiff would not stand to that, but became nonsuit.

Nota, 1 *W. & M. in Communi Banco*, in an assise for the office of Master of the Wardrobe, which King Charles II. gave to the Lord Mountague, but after turned him

out, and granted it to the Lord Preston; whereupon the Lord Mountague [109] brought an assize: it was held by the whole Court, that the grant being in reversion as here, and reciting the former grant, was not evidence, upon which he was also forced to go to the Master of the Rolls, and procure him to send the roll of the first grant, which he did; and the Court in the mean time stayed and proceeded in other points of the assize.

LENTHAL *against* LENTHAL.

Gaoler suffers a voluntary escape in A. who comes back to prison, and escapes again in the time of a succeeding gaoler, he is chargeable. S. C. 3 Keb. 487. Bull. N. P. 69.

Debt against William Lenthal, son and heir of Sir John Lenthal, Marshal of the King's Bench, for the escape of one committed in execution in the life-time of his father, by whose death that office descended to the defendant; and alledges that he had him in execution, and suffered him to escape; upon *nil debet* the cause was tried before Hale Chief Justice, and was thus: The father suffered a prisoner to make a voluntary escape, the prisoner came back in a small time after to prison, and there was actually in prison at the death of Lenthal the father; and so continued afterwards in the son's time, till he suffered him to escape again: and whether he should be charged for the escape in his own time, after a voluntary escape before suffered by his father? was the question: for it was urged for the defendant, that after the voluntary escape by the father, he could not take him again in execution, though the party himself might, if done without his consent; and though he returned to prison, yet he was not thereby a prisoner, neither could either the father or the son detain him there. But for the plaintiff it was said, that it might be very mischievous, if he should be allowed to execute himself in such a manner, for the marshal commonly suffers prisoners in execution to go out upon security, and when he is sued for escapes, he pleads fresh pursuit and recaption; and so they go out and return at their pleasure; and if the successor might thus excuse himself, by saying, that his predecessor suffered the party to make a voluntary escape, though the successor had him actually in prison, all the creditors in England, of prisoners committed in the time of a former gaoler, may be thus cheated; for it will be easy for the successor to prove a voluntary escape [110] by his predecessor, though the creditor may not prove it voluntary; upon this the matter was found specially, as was also the same point between other parties the same term. And *postea* Trin. 27, upon consideration of 1 Roll. 902, *Lord Robert's case*, and Hob. 202, *Sheriff of Essex's case*, the Court having as they said, considered the matter, *scilicet*, Hale, Twysden, Wylde and Rainsford, without argument at Bar, gave judgment for the plaintiff in this case of *Lenthal and Lenthal*.

BROWN *against* COLLINS.

Executor wastes, and dies, his estate is not chargeable for this *devastavit*. S. C. 1 Vent. 292.

The sittings after the term this case was tried before Hale at Guild-hall; an executor wastes the goods of his testator, and died, leaving assets, and this defendant his executor: and whether the defendant should be charged *quoad* these assets? was the question: and Hale held the *devastavit* to be a personal tort, which died with him that did it. But upon the importunity of Saunders, of counsel for the plaintiff, he suffered it to be found specially. And afterwards Pasch. 27 Car. 2 it was adjudged by the whole Court according to this opinion of Hale.

CURTIS *against* DAVIS.

Administrator sued for debt *in proprio jure*, and for another debt as administrator. S. C. *post*, 228.

Assumpsit naming herself administratrix of J. S. and declares that the defendant was indebted to her 30l. but does not say he was indebted to her as administratrix.

But then declares of another debt due to her as administratrix, and that upon account between them the defendant was found indebted to her in another 30l. which he promised to pay; upon *non assumpsit* a general verdict was given, and entire damages. Whereupon it was moved in arrest of judgment, that the first promise is, and must be intended of a debt due to the plaintiff *in proprio jure*, for **[111]** although she names herself administratrix, and in the end of her declaration produces letters of administration, yet that is only to warrant the second declaration, which is *in jure intestati*. To which it was answered, that admitting the first promise to be *in jure proprio*, yet the last being grounded upon an account with herself, and the promise made to herself in her own time, both may be joined in one declaration, and a general verdict and entire damages given; also it may well enough be intended after verdict, that the first debt was due to her as administratrix, though it is not expresly so alledged. To all which Hale, Rainsford and Wylde agreed, and gave judgment for the plaintiff. Twysden *totis viribus contra:* upon which a writ of error was brought immediately. But I never heard what became thereof.

THE KING *against* NEWTON.

Indictment for trespass, forgery and publishing, found guilty *de transgres. & forgeria prædicta*, the publication included. *Post*, 221. In Counties Palatine writs of process are directed to the Chamberlain, indictments, &c. to the Judges.

Indictment for forging and publishing a deed at Chester, sent to Chester and there tried, and found guilty *de transgressione & forgeria præd.* And this was found to be insufficient, for nothing is found as to the publication. *Sed non allocatur: de transgressione prædicta* includes it: as a trespass of assault and battery, jury finds him guilty *de transgressione & insultu præd.*, this includes the battery, and so it has been adjudged. Another exception was, that the *mittimus* was sent to the Justices of Assise at Chester, and not to the Chamberlain as it ought: *sed non allocatur*, it ought to be so in writs of process, they are directed to the Chamberlain, to command the sheriff to execute them, but not to command the Judges to try a cause; for all indictments, informations, records, &c. to be tried, are immediately sent to the Judges in all Counties Palatine, and not to the Chamberlain, &c. See the like case hereafter, Pasch. 30 Car. 2, *int. Regem and Marriot.*

[112] THE KING *against* THE INHABITANTS OF THE COUNTY OF NOTTINGHAM.

Repair of a bridge in Nottingham, tried in Middlesex. Two inhabitants appear for them and the rest.

Information was against them for not repairing a bridge upon the Trent, between Newark and Mansfield, *comitatu Nottingham*, which time out of mind they have and ought to repair: two of the inhabitants in name of themselves and the rest, pleaded, that the Lord Limington, and other persons, owners of certain lands, called Bridglands, ought to repair it *ratione tenuræ; absque hoc* that the inhabitants of the county, time out of mind, have and ought to repair it: the Attorney General replied, that the inhabitants ought to repair, &c. *absquæ hoc* that the Lord Limington ought, and they rejoined, that the Lord Limington ought, &c. *ut supra*, and so issue was joined: upon which the Attorney General surmised, that all the inhabitants are chargeable; and after trial by an indifferent county, *per assensum partium præceptum est vicecom. Middlesex, &c.* upon which a trial was at Bar by a Middlesex jury, to try the right of repairing this bridge in Nottinghamshire, who found the defendants guilty.

Nota, This record, issue and trial. *First*, The defendants did not plead *non culp.* but that another ought to repair, and traverse that they ought, as per Hale, they must in this case of a bridge, that it may appear to the Court who ought to repair in case they ought not. *Secondly*, A traverse taken upon a traverse, and the issue joined upon the last traverse, that another ought to repair: and *thirdly*, The defendants nevertheless found guilty upon this issue, joining it to the first traverse, that they

ought not to repair. And all this by the direction of Hale Chief Justice, with whom the other justices agreed.

[113] TERM. SANCT. MICH. ANNO 26 CAR. II. IN BANCO REGIS.

NELTHORPE AND FARRINGTON *against* DORRINGTON.

Three joint-tenants of goods, two bring trover; defendant pleads *non culp.* and they recovered for two parts. Stra. 820. 4 Bac. Abr. 660. 5 Bac. Abr. 200. Cowp. 219. Bull. N. P. 35.

Trover by the plaintiffs, assignees of the commissioners of bankrupts, for divers goods, was tried in Middlesex upon *non culp.* before Rainsford and Wylde, *ægrotante Hale:* it appeared that the commissioners before this assignment to the plaintiffs had assigned the same goods to the plaintiffs and one Squibb: but that this assignment was afterwards cancelled, and a new one made to the plaintiffs only. And both Judges held, that though the cancelling of the first assignment does not alter the property, but it still remains in them all three, and Squibb is no party to the action, yet these two, *non culp.* being pleaded, shall recover damages by this action for two parts of the goods, and shall not be nonsuit. But the defendant might have pleaded this matter in abatement to the writ *quoad tantum*, which having not done, but pleaded *non culp.* they, though joint-tenants with another, shall recover damages for their shares: to which Sir William Jones for the plaintiff submitted, *sed hæsitanter.* But after the plaintiffs were nonsuit in this action, because they could not prove the party a bankrupt before an execution executed for these goods at the suit of another.

[114] SIR SAMUEL BERNARDISTON *against* SIR WILLIAM SOME, LATE SHERIFF OF SUFFOLK.

Case of a double return of members to Parliament. S. C. 3 Keb. 365, 389. Pollexf. 470. Nelson's Lutw. 32.

Case, and declares that a writ issued out of Chancery to the defendant, then Sheriff of Suffolk, to elect a knight of the county for the Parliament, and that the plaintiff was chosen by the majority of freeholders, and that the defendant returned the writ with an indenture of the said election, but maliciously intending to deprive the plaintiff, *de fiducia & præd' falso & deceptive, una cum indentura præd' retornavit unam alteram indenturam in Cancellaria præd' specificant' quod aliæ personæ liberi tenentes vel major pars liberorum tenentium elegerunt quendem Lionellum Tolmach, ubi revera præd' Lionellus non fuit electus per majorem numerum liberorum tenentium, ratione cujus* the plaintiff was kept out of the House of Commons, and put to great charge to prove his election in the House of Commons. The defendant pleaded *non culp.* and upon trial at Bar, Twysden Rainsford and Wylde held, and so directed the jury, that if this double return was made maliciously, they ought to find for the plaintiff, which accordingly they did, and gave him 800l. damages, though the evidence as to the malice and falsity was very slender. For the poll was granted, upon which the matter seeming doubtful, whether some of them who voted for the plaintiff had sufficient freehold to qualify them to give their votes, the sheriff by advice of counsel then present, and of some members of Parliament there also, made this double return to prevent an action for a false return, in case it should appear that some freeholders that voted for the plaintiff had sufficient freehold. And after upon examination in Parliament, the election of the plaintiff was adjudged good, and the defendant committed by them for making this double return: and now it was moved in arrest of judgment by North Attorney General, and Scroggs King's Serjeant, that this action lies not, and that no such action was ever **[115]** yet maintained in this case; for the case of *Nevil and Stroud* was never resolved, but in respect of difficulty sent to Parliament, where it never received a determination: and the reasons they urged against the action were, *First*, Because the falsity or verity of the return is only examinable in the House of Commons, who are the sole judges, and will punish such

falsities, and accordingly they have so done in this case, by committing the sheriff; and he ought not to be twice punished for the same fault; and before the statute of H. 6. no action lay for a false return, and that only gives an action of debt for 100l. *Secondly*, The right of the party is not considerable in this case, for this is not an office of profit, but of trust concerning the State. *Thirdly*, What the sheriff does in this case, he doth as a judge; for he is judge of the election, and therefore no action lies against him. *Fourthly*, What the sheriff doth in this case is *propter difficultatem* upon his doubtfulness of the matter, and Judges of Assise may *propter difficultatem* adjourn an assise; the sheriff hath done no more in this case than laid the matter before the House of Commons, that the validity of the votes may be there deliberately examined. To which it was answered by Maynard, King's Serjeant, and Sir William Jones, Solicitor. *First*, That here was malice and falsity in the sheriff, and thereby damage and charge to the plaintiff, and all this found by the jury, which is sufficient to maintain an action in all cases, whether there has been a like action in such case or no before; for actions upon the case are founded upon the particular case, which is mostly new. And the case of *Nevil and Stroud* was not for a double return, but for making no return; for there two were elected, and the sheriff made no return as to one, and for that he brought the action. *Secondly*, The commitment by the Parliament is only to punish the contempt of the sheriff as to them and the State, but not to repair the party for the damage he sustained, and thus in several respects one may be twice punished *pro uno delicto*, as it falls out often in many cases, particularly in criminal matters, wherein the party is punished for the King by indictment, and by the party for the special damage he sustained. *Thirdly*, The sheriff is not a judge of the election in this case, but a minister to take the polls, of which in point of sufficiency the House of Commons is judge. *Fourthly*, Though the statute of H. 6 gives to the party the 100l. **[116]** penalty, that will not prove this action does not lie at common law. The Parliament intended only to give a certain penalty to the party, which was considerable then, though not so considerable now, and not leave them to a jury's discretion altogether for damages. *Et adjournatur ad proximum terminum*, when Hale being in Court, he, Twysden and Wylde, for as much as the return is said to be *falso & malitiose & ea intentione* to put the plaintiff to charge and expence, and so found by the jury, held the action lay, and gave judgment for the plaintiff, Rainsford doubting; upon this a writ of error was brought in the Exchequer-Chamber, where, by North Chief Justice, and five other Judges against two, the judgment was reversed upon the matter in law, that the action lies not.

TOMLES *against* CHANDLER.

Proviso in a mortgage to redeem, obligation to perform all covenants, conditions, &c. Non-payment is a breach of the condition, &c. 1 Bac. Abr. 529.

Debt upon an obligation conditioned to perform all covenants and conditions in an indenture of mortgage, where there was a proviso, that if the mortgagor pay the money at the day, that the mortgage should be void; and for breach assigns the non-payment of the money at the day: hereupon the defendant demurred; and for the defendant it was objected, that this was no forfeiture of the bond, but of the estate, and that this condition is annexed to the estate for the benefit of the mortgagor, in order to have his estate again upon payment of the money, but not to oblige him to pay the money. Of this opinion was Hale, but Twysden *contra*, and he cited the case of *Westbrook*, Hill. 22 Car. 1, B. R. Rot. 116, to be so adjudged: upon which it was adjourned; and after at another day he brought the record of that case into Court; whereupon Hale changing his opinion, gave judgment for the plaintiff. See 2 Cro. 281, and Yelv. 206, the like case, and the like judgment.

[117] ASTMAL *against* ASTMAL.

View denied *quia constat Curiæ* the husband died seised. S. C. 3 Keb. 360, 394. *Vide* 3 Lev. 169.

Error of a judgment in dower *unde nihil habet* in Durham. The tenants demanded view, whereupon it was entered, *quia satis constat Curiæ* that the husband died seised, *negatur visus*. Upon this the tenants pleaded *ne unque seisie que dower*, and thereupon issue, and verdict for the plaintiff: but the jury found that the husband did not die seised, and gave no damages: judgment hereupon for the demandant. Upon this error was brought and assigned, that the Court ought not to have denied a view, upon this *constat Curiæ* that the husband died seised, but the plaintiff should have counterpleaded the dying seised. But upon view of the books, 25 E. 3, 17 a. 2 Inst. 481, the Court held that this being in a writ of dower *unde nihil habet*, the view was not by common law grantable in this case, and where in the books view of dower is counterpleaded, that must be intended in a writ of right of dower; and they affirmed the judgment; yet *quære* hereof. But *note*, inasmuch as in this case the tenant pleaded, he thereby took upon him notice of the lands, which peradventure cures the want of view. 1 Cro. *Wickam* against *Enfield*.

REA *against* BARNES.

The name mistaken in the breach and amended. S. C. *post*. 124. Court denied leave to discontinue in debt upon an obligation, for the plaintiff may have an action of covenant.

Debt upon a charter-party made to George Rea master of a ship, by Anne Rea his administratrix, wherein are divers covenants between him and the defendant, and in the end thereof each obliges himself to the other in 1000l. for performance of covenants, and declares right till she comes to assign the breach, and then it is *idem Georgius in facto dicit*, for *eadem Anna in facto dicit*, upon this declaration the defendant demurred; **[118]** and now his exception was, that here no breach is assigned by reason of this mistake, in setting the name of George the intestate, for the name of Ann, the administratrix. But all the declaration being right before, and in the end it being *eadem Anna profert in Curia literas administrationis*, the Court held it meerly the default of the clerk, and amendable by the statute of H. 6. *Vide* 2 Cro. 587, where such a fault is held not amendable after verdict. But after the plaintiff prayed leave to discontinue for other faults in the declaration, which the Court would not grant for want of the defendant's consent, this being an action of debt for the penalty, and he is not without remedy, for he may have another action upon the covenant.

[119] TERM. SANCT. HILL. ANNO 26 & 27 CAR. II. IN BANCO REGIS.

CORNY AND CURTIS *against* COLLINGWOOD.

In consideration the bishop would absolve the defendant's mother at the request of the defendant, from an excommunication, the defendant promised to pay him. S. C. 3 Keb. 359, 434.

Assumpsit by the plaintiffs *nuper guardian ecclesiæ de Deeping in com. Lincoln*, and declares that whereas the mother of the defendant *anno* 21 *Regis nunc*, being an inhabitant at Deeping, and taxed towards the reparation of the church, was excommunicate for non-payment; that the defendant afterwards, 1 *Junii anno* 23 *Regis nunc*, in consideration the bishop at the request of the defendant, would assoil her, promised to pay the money to the plaintiffs: and after verdict for the plaintiffs it was moved in arrest of judgment by Jones and Wingfield, that the consideration was insufficient, for nothing is here done or suffered by the plaintiffs at their request, but at the defendants request. Also it is not shewed that they were churchwardens at the time of the promise, for *nuper* churchwardens might be at any other time. *Sed*

non allocatur, for *per Hale & Curiam*, the mother hath a benefit by the absolution, which it cannot be supposed the bishop would have done, if the defendants had not promised to pay the money. Also it shall be intended the plaintiffs were then churchwardens, and prosecutors in the Spiritual Court, for otherwise they could not be concerned either to take the promise or receive the money; and it shall not be intended that the bishop would oblige the defendants to promise payment to those who had no right to receive the money; and after this had been twice moved, the Court gave judgment for the plaintiffs.

[120] CRAGGE *against* NORFOLK.

Assise taken by default, and after tried. S. C. *ante* 108. Bull. N. P. 121. Defendant in such case cannot plead or challenge, but may give in evidence.

Assise for the office of Serjeant of the Mace to the House of Commons. The plaintiff arraigned the assise the first day of the term: but the tenant being demanded made default; *ideo capiatur assisa per defaltam.* Then the demandant counted and shewed the King's patent for the office, which was read; and the jury being not yet sworn, day was given till Wednesday *prox.* when *per Curiam*, the defendant may give what evidence he can, but he cannot plead either in abatement or in bar of the assise, nor challenge. On Wednesday the cause was tried at Bar, and the plaintiff's evidence of seisin was, that one being committed by the Commons to the custody of Norfolk, the prisoner compounded for the fees with Cragge, and gave him 20s. which was held good seisin, though Norfolk was in possession of the office long before and after; for Cragge could not be disseised of the office but at his election. Also Cragge being in the lobby of the House of Commons, near the door of the House, laid his hands upon the mace, then in the hands of Norfolk, in order to take it, but Norfolk hindered him, which the Court held was good evidence, both of his seisin and disseisin; and the recognitors gave their verdict for the demandant.

LORD EURE *against* TRURON.

Error in Parliament, returnable a whole term after the *teste* of the writ.

Judgment was given in B. R. last Michaelmas term for Truron against the Lord Eure; upon which the Lord Eure brought error tested 26 Novemb. returnable in the House of Lords *ad proximam sessionem* 13 *Aprilis proximi:* upon which Levinz prayed the opinion of the Court, whether Truron the plaintiff might not take execution, here being a whole term interposing between the *teste* and return, during which time nothing can be done, so that for the apparent delay this writ of error ought not to be a *supersedeas;* especially in ejectment, and after verdict upon *non culp.* in which there can be no probability of error, and therefore **[121]** unless the defendant can shew an apparent error, as was done in *Flowrdew's case*, Pasch. 1 H. 7, pl. 5, & Pasch. 21, of this King in this Court, in the case of *Wortley* against *North*, and as was held Mich. 25, of this King, in *Goston and Sedwick's case*, the plaintiff ought not to be delayed of his execution. But Hale & *Curia* would give no rule for execution, bidding us to take it at our peril if by law we could; for executions are of course without rule of Court: but if the other side had moved for a *supersedeas*, peradventure they said they should have denied to grant it.

JENNINGS *against* HUNKIN.

Trial where the action is laid of a matter arising in another county.
8 C. 3 Keb. 350, 371, 509.

Case for calling him *perjured knave*, and laid the action in Devonshire. The defendant justified, because the plaintiff made oath in Cornwal, that he knew not that J. S. was plaintiff in such an action, *ubi revera* he knew it. Issue *de injuria sua propria absque tali causa.* And Sir William Jones now Attorney General, moved that this was

a mis-trial, and that it should have been tried in Cornwal, where the justification arises: to which it was answered, that this being tried in the county where the action is laid, it is well enough, by the express words of stat. 16 Car. 2. Hale Chief Justice, Though the words of the statute are so, yet the intent and meaning of the statute is, that it may be tried in the county where the matter in issue to be tried arises; for it is not reasonable to imagine that the Parliament intended to alter the whole course of trials, and to have things tried in foreign counties where the jury are meer strangers to the parties, to the evidence, and to the point in issue; it being the great foundation of trials by juries or *per pais*, that they might not be strangers. But the intent of that statute was only to cure trials by improper venues taken in the same county where the matter is to be tried; and the other justices agreed, that this was the reasonable intent of the statute: but then Hale said, that knowing or not knowing is matter transitory and triable in any county, although the making oath before a Judge in **[122]** Cornwal be local, and then so the issue here containing two matters, *scilicet* the making oath, and the knowing that J. S. was party in such a cause triable in two counties; a trial in either of them is good per stat. 21 Jac. which hath been ruled to extend to cases where the matter in issue arises in two counties, and the trial is by one only, as well as where the matter in issue arises in two places in one county, and the trial is by one only. To which Jones answered, that no place is here alledged where the oath was made to fix the issue as to that in Devonshire, so all may be tried in Cornwal, and that the local matter ought to draw the transitory to it, and not the transitory matter, of which no place is alledged, the local. But if issue had been taken upon the knowing, the trial had been good; for then the local matter, *scilicet* the making oath had been waived: *Curia advisare vult.*

HAWES *against* SMITH.

[Disapproved, *Segar* v. *Atkinson*, 1789, 1 H. Bl. 104.]

Executor in consideration the plaintiff at his request accounted with him promised to pay; charged *de bonis propriis.*

Error of a judgment *in assumpsit in Com. Banco* against the defendant as executor, wherein the plaintiff declared, that whereas the testator was indebted to him, the defendant assumed in consideration the plaintiff at his request had accounted with him, and was found so much in arrear, to pay it. The plaintiff had judgment *in Com. Banco de bonis propriis* of the executor, and this was assigned for error; but over-ruled as no error, for the plaintiff was not bound to account with the executor, and yet he did account at the request of the executor. *Et per Hale*, Though a bare account will not oblige an executor to pay *de bonis propriis*, yet a promise in consideration of forbearance, will; and the case is all one, for it must be intended, that an express request was made to account, and thereupon an express promise to pay; otherwise the evidence would not support the declaration; whereupon judgment was affirmed *per totam Curiam.*

[123] LOMAX *against* ARMORER.

Pleas of franktenement cannot be without writ.

Error of a judgment in dower in the Court of Newcastle upon Tine, because it was given upon a plaint without writ: for pleas of franktenement ought not to be held but upon writs original. 3 Cro. 101, & 1 Roll. are cases in point, though a custom be there alledged for holding plea of them without writs original, which is not here pretended. Hale at first doubted, if a custom had been alledged; for in London they hold assizes of fresh-force by custom without original. To which it was said, their customs are confirmed per stat. R. 2. But he said, that in other places also they try assises of fresh-force by custom. But after argument of both sides, the judgment was reversed. Levinz for the plaintiff in error.

KIRKEBRIDGE *against* WILSON.

Bond of bail *de com' Cumbr'* to the sheriff, without saying *de com' præd'*.

Debt upon an obligation to the sheriff, which was: *noverint universi, &c. Nos W. Wilson & Tho. Richards de comitatu Cumbriæ teneri Johanni Kirkebride vicecomiti,* (without saying *Cumbriæ* or *com' predict' ad respondend* the plaintiff generally, but does not say in what action). The defendant pleads the statute, whereupon the plaintiff demurred: and *First,* It was held *per Hale & Curiam,* that the obligation was good, for though the statute directs the obligation to be taken by the name of his office, yet the bail being named *de com. Cumbriæ* he shall be intended sheriff of the county, and this will supply the omission of *vicecom. com. Cumbriæ,* or *com. præd. Secondly,* Though the *latitat* be *in placito transgressionis,* upon which the arrest was, and the condition is to appear generally; whereupon it was objected, that he is bound to answer all actions, whether debt, covenant, &c. yet the Court held the obligation good: for *First,* No other action shall be intended. *Secondly,* The **[124]** words of the statute require no more than an appearance, and no words *ad respondendum, &c.* so that they are but surplusage; and it was once a doubt, whether the sheriff could bind the party *ad respondendum omnino.* But afterwards by consent, the parties waived the demurrer, and went to trial in the original action, the defendant saving the sheriff against amerciaments. Levinz of counsel for the defendant.

REA *against* BURNIS.

Covenant to pay *tantum* per ton, breach in not paying for so many tons and a hogshead. S. C. *ante* 117, 118.

Debt upon a penalty in a charter-party, whereby the defendant covenanted to pay the plaintiff 3l. per tun for goods imported, and for performance, &c. each party obliged himself to the other in a penalty, and this action was brought for the said penalty, and breach assigned in not paying for so many tons and one hogshead, which came to so much. And upon demurrer the declaration and breach was ruled ill for assigning non-payment for the hogshead; for the covenant is only to pay so much per ton; *aliter,* were it to pay *secundam ratam* of so much per ton. But now the Court suffered the plaintiff to discontinue upon payment of costs, though the action is for a penalty, and the case had been argued.

GAVEL *against* SCUDAMORE.

Causes in Inferior Courts if removed per defendant, allowed more costs than damages, *aliter* if by the plaintiff. *Post,* 234.

Trespass in the Palace-Court *ad dampnum* 4l. 19s. The defendant removed the cause in B. R. where it was tried, and 15s. damages given by the jury: and the question was upon the new statute, whether he should have more costs than damages? For it was urged for the plaintiff, that this is not an original case in the Court, but brought hither by *habeas corpus,* which is not within the statute, as it has been ruled *in Com. Banc. Curia.* This seems reasonable, being removed by the defendant; otherwise, where the removal is by the plaintiff; for so every plaintiff may commence trivial actions in Inferior Courts, and after remove them hither, and defeat the **[125]** statute, and become more vexatious now than they were before the statute: they would advise with the Judges of the Common Pleas, that the same rule as to this matter might be settled in both Courts.

MONDAY *against* PORTON.

Induction not triable in the Ecclesiastical Court.

Prohibition, and declares *quod placita de advocationibus spectant ad communem legem, & non ad Curiam ecclesiasticam;* and that he was instituted to the church of D. and

the defendant sued him in the Spiritual Court, libelling that he was instituted to the said church and inducted before Monday, and that Monday obtained a superinstitution upon him, which being a scandal to his title, he sued there to set aside the superinstitution; whereupon that Court proceeded, though this plea, there being induction, the case belonged to the common law. The defendant pleaded *non prosecutus est contra prohibitionem.* But *pro consultatione habenda* demurred. *Et per Curiam,* he ought to have a consultation, for though Porton was inducted, it does not appear Monday was inducted, and so the plea stands only upon the superinstitution, which is matter proper for the Spiritual Court. But afterwards it being shewed to the Court that Monday was inducted also, the Court stayed the consultation; so that the plaintiff might declare *de novo* upon his institution and induction. But upon this declaration the prohibition cannot stand.

WILSON *against* DONE.

Pleads that he made it appear, but does not shew how.
S. C. 3 Keb. 183, 393, 424.

Assumpsit, that whereas the defendant was bound in an obligation for payment of money, part of which was unpaid; the defendant promised, that if he made it not appear before J. S. that that part was paid, that he would pay it: the defendant pleaded, that he made it appear before J. S. that that part was paid, upon which the **[126]** plaintiff demurred, and had judgment in the Common Pleas, because he does not shew how he made it appear: and now in error upon this judgment here, the judgment was affirmed for the same reason.

BURDET *against* THRULE.

Account as receiver, and says not by whose hands. Account against one as receiver, when it should be bailiff is bad upon demurrer, but cured per judgment *quod computet per* default.

Account by the plaintiff a merchant, against the defendant a merchant, being his factor, *de placito quod reddat ei rationabilem compotum de tempore quo fuit receptor bonorum & merchandizorum ad compotum inde ei reddend',* and so declares of divers goods in particular, (but does not shew by whose hands) the plaintiff had judgment *quod computet* by default: upon which the defendant pleaded an insufficient plea before the auditors, whereupon a demurrer, and judgment for the plaintiff, and a writ of enquiry of damages. And now it was moved in arrest of judgment, that the declaration is ill. *First,* Because it charges the defendant as receiver, and does not shew by whose hands. *Secondly,* The defendant ought not to be charged as receiver in this case, but as bailiff, for he was to merchandize with the goods, and by consequence to have his expences, allowances and factorage; and judgment in account as receiver is no bar in an action of account as bailiff, Co. Litt. 172 a. 1 Roll. 119, *nu.* 9, *ibid.* 118. Let. B. *nu.* 2. 4 H. 6, 27 a. 43 E. 3, 4 b. 46 E. 3. But *per Curiam,* judgment was given for the plaintiff, for per Hale, though he should have been charged as bailiff, yet the defendant should have demurred to the declaration to take advantage of that, and this is now past by the judgment *quod computet Levinz* for the defendant.

HOW *against* STILE.

Lessor by lease and release, conveys his reversion to the lessee and J. S. to the use of himself. S. C. 3 Keb. 283, 309, 430, 452. 1 Stra. 34, 101. 2 Stra. 1092, 1253. Cruise on Rec. 48. 1 Burr. 79. 3 Bac. Abr. 452. Cowp. 704. 1 Term Rep. 741.

Ejectment, and upon *non culp.* and a special verdict found at Bar, the case was: Coke being seised, made a lease to Fountain for ninety-nine years and two years after by lease and release he conveyed the inheritance to the said Fountain, and another to the use of Coke and the heirs of his body, with divers remainders over: and whether

by this conveyance the lease for ninety nine years was merged **[127]** in all or in part? was the question. And Pemberton argued for the plaintiff, that if there be any merger in this case, it is only for a moiety; and he said, the reason of merger by accepting of another estate, is not the admittance of the lessor's power to demise, as appears in this, that a new demise by the lessor to the same lessee, works no merger nor surrender of the first term, where there is an interposing term; but the true reason is, the coming of two estates together, which cannot stand together, and then the merger in this case extends only to a moiety, the other moiety of the new lease being to a stranger. *Secondly*, He argued, here was no merger at all, and that by the express words of stat. 27 H. 8, of Uses, which saves the right of him who is seised, to the use of another person. Weston *contra*, The true reason of merger in these cases is the admittance that the lessor hath power to demise. 5 Co. *Ive's case*. And so in this case the whole term is merged, for he has admitted a power in the lessor to demise the whole, though a moiety only to himself. And *secondly*, The statute saves the right of them who are seised, to the use of others. But here the lease is merged by accepting a lease for a year, before he became seised by the release to any other use, and so not within the statute. *Adjournatur*.

BIDDULPH *against* HARRISON.

One conusor in a fine dies before King's silver paid. S. C. 3 Keb. 393, 426, 438, 441.

Error of a fine levied by four conusors, and assigns the death of two, before the fine ingrossed, or King's silver paid. And whether the fine should be reversed *in toto*, or only *quoad* them two? was the question: and Newdigate Serjeant, argued it should be reversed *in toto*, because the writ abated, and so it is a fine without original, and cited Hill. 1662, B. R. Rot. 1179, *Roe* against *Yeatly*, to be so adjudged.

[128] TRAFFORD *against* TRAFFORD.

Suit *pro rationabili parte* may be in the Ecclesiastical Court. *Q.* 1 Vent. 259, 275. Raym. 470. *Ante* 100, 125.

Trafford sued his brother executor of his father, for his reasonable part of the goods of the father in the Spiritual Court, according to the custom of the province of York; whereupon Levinz moved for a prohibition, for this is a temporal cause, founded upon the custom, for which there is an original form in the register, and where there is a remedy at common law, the Spiritual Court is not to meddle, F. N. B. 53 H. But per Twysden, Rainsford and Wylde, absent Hale, the prohibition was denied, for in this case they said, and in the case of a pension, both Courts have jurisdiction.

THE KING *against* THE LORD LEE.

For ill usage of the wife the husband bound to his good behaviour.

Habeas corpus was granted to him the last term, to bring the body of his wife into Court, upon affidavits of ill usage, imprisonment and danger of her life, as was done before in the case of Sir Philip Howard; the Lord Lee brought his wife into Court, where the one charged the other with unkindnesses, and she made oath in Court, that she went in danger of her life by him; and notwithstanding divers affidavits were made in Court to the contrary, of his good usage, the Court offered to bind him with sureties, according to F. N. B. 80 & 239 B. But they declared they could do no more than bind him, and that they could not remove her from him.

THE KING *against* SIR ROBERT VINER LORD MAYOR OF LONDON.

Pluries hab. corp. returned *nullum talem habeo in custodia mea, nec habui die impetrationis hujus brevis*, ill.

Habeas corpus was directed to him to bring in the body of Bridget Hide, daughter and heir of a great estate to Sir Thomas Hide, which daughter he had by one that

was afterwards the wife of Sir Robert Viner, and who is now dead, the daughter being of the age of thirteen, and left in the custody of Sir Robert at the death of her mother: and now it was alledged, that Sir **[129]** Robert had no right to detain her, her aunt being guardian; and that his design was to marry her to a great man, though she was already (as it was said) married by her mother to one Emerton, her kinsman. And now upon the *pluries hab. corpus* he returned, *nullam habeo talem personam in custodia mea, nec habui die impetrationis hujus brevis vel unquam postea.* Which return was adjudged ill; for it may be he had such a person *die impetrationis* of the first writ: whereupon he afterwards brought in the young lady by consent, to prevent an attachment, which the Court intended to grant, and the damsel being in Court, and asked the question, chose to stay with Sir Robert Viner, and not to go to her aunt her guardian in law, nor to Emerton her pretended husband: hereupon the Court would not remove her, but left her in the hands of Sir Robert Viner, upon his recognizance of 40000l. not to suffer her to marry while she staid in his custody; being ordered also, to let her aunt and the rest of her friends visit her, while she staid with him.

DEAKINS *against* SIR WILLIAM SCROGGS, KING'S SERJEANT, AND GILBY, IN B. R.

Serjeant and common person sued jointly, no privilege.

In battery against them; Gilby pleaded *son assault demesne*, Scroggs pleaded his privilege of serjeant to be suable only in C. B. upon which the plaintiff demurred, because he is not a sole defendant in this case, but sued jointly with another. It was argued on his behalf, that serjeants and their servants have privilege of being only suable *in Com. Banco*, 1 Cro. Serjeant Hoskins's *Man's case*. And further, as to the being joined in one action, that where the action is joint and cannot be severed, there if the defendants be sued jointly, the privilege of one is lost for want of privilege in another: but where the action is severable as in this case, the want of privilege in one defendant, ought not to toll the privilege of the other. *Curia*, A serjeant has no privilege against any Court of Westminster, and in fact they do practise in all Courts of Westminster, and are not confined to the Common Pleas. But if a serjeant be sued in any other Court than at Westminster, he may plead his privilege; whereupon a *respondeas ouster* was awarded.

[130] CITY *against* CITY.

Husband makes a voluntary assignment of a term, it shall not bar the wife's title to her customary part. 2 Jo. 204.

The father a freeman of London, being possessed of a term, by deed assigned it to his son, as a provision, and died; the mother sued in Chancery for her customary part: and now upon issue at a trial before Hale, after the term, whether the wife shall be bound by this assignment of the father, so as to be barred of her customary part? It was proved and found by the jury, that she is not barred thereby, it being voluntary, but has still a title to her customary part of the term: the same law of goods.

[131] TERMINO PASCHÆ, ANNO 27 CAR. II. IN BANCO REGIS.

OTTO *against* SELWIN.

Officer of the Admiralty justifies by warrant, without shewing the cause was within their jurisdiction. S. C. 3 Keb. 449.

Trespass and false imprisonment, the defendant justified by warrant out of the Court of Admiralty, which recites that a case was depending therein *de re maritima*, and commanded the defendant, their officer, to take the plaintiff; whereupon he took him. Upon this the plaintiff demurred: and for the plaintiff it was argued, that this plea is naught, for not averring that the cause was maritime, so as it may be tried

whether it be so or no; for if the cause was not within their conusance, their warrant will not justify their officer; and cited 10 Co. *case del Marshalsea*. *Sed per Hale & Curiam*, it would be very hard to put the officer in all causes, to shew the matter was within the jurisdiction of the Court, to which they minister, it is sufficient for him to plead the warrant, which he is bound to obey; and in this case it does not appear but that the matter of the cause was within their jurisdiction. But in the case of the Marshalsea it appeared the cause was not within their jurisdiction; whereupon they ruled judgment for the defendant. *Tamen vide* Rolle's 2 Rep. 109, *Martin* against *The Marshal*, in case of an Inferior Court, (as in a justification by the officer of the Court of Equity at York) it must be averred that the cause of action arose *infra jurisdictionem Curiæ*.

[132] JAMES *against* PEIRCE.

Prisoner escapes and comes back, and is in prison, and a new warden is made, and then escapes; the plaintiff may sue the new or old warden for escape. S. C. 1 Vent. 4, 269. 3 Keb. 453, 463.

Debt against the warden of the Fleet for an escape, and upon *nil debet* a special verdict was found before Hale Chief Justice at Guild-Hall, and the case was thus: Peirce the former warden suffered a voluntary escape by one in execution; the prisoner came back and continued in prison till a new warden was made; he was turned over to the new warden, the now defendant, who had him in prison, and afterwards suffered him to escape. And whether the prisoner was so absolutely discharged by the first escape, that he could not be in prison again? was the question: and upon the first argument, and the authority of 1 Rolle 902, the Court was of opinion, that notwithstanding the first voluntary escape, when the prisoner was in prison again, he was so far in execution, that the plaintiff hath election either to take him as now in execution, and so charge the new warden for the last escape, or to admit him out of execution, and charge the old warden; but he shall not be obliged to do so, for the old warden may be dead, or perhaps not responsible. Yet before they would give judgment, they said, they would confer with the rest of the Judges, so that this point might be settled by all the Judges, wherefore they adjourned it for a week. But in the *interim* the plaintiff got an injunction out of Chancery, and so no judgment was given in this case.

But *note*, after this the judgment was given in the case of *Lenthal* against *Lenthal*, which see reported before, pag. 109.

[133] ASTRY *against* NEVIT IN THE EXCHEQUER.

Executor *de tort*, wastes and dies, whether his goods are liable to answer. S. C. 3 Keb. 533. Lex Testam. 523.

Debt against the defendant executor of A. executor of B. The defendant pleaded, that A. was never executor of B. nor ever administered as his executor; and issue thereupon, and a special verdict, which found that A. was *executor de son tort* to B. & *si, &c.* And the sole question was, whether A. being a *tort executor*, his executor shall be charged for the goods that the *tort executor* wasted, he leaving assets in the hands of the defendant? It was argued by Duncomb for the plaintiff, and Thompson and Hoyl for the defendant. And Turner Chief Baron, held strongly that he shall be charged, for B. having the goods, the *tort* in wasting does not die with him, but charges his executor; contrary to the opinion of *Brown and Collins's case*, *antea* in B. R. *Et vide nunc stat.* 30 *Car.* 2. *Quære*, If in this case upon the plea *ne unques* executor in another, the defendant shall be charged *de bonis propriis*, as he shall when he pleads *ne unques* executor himself?

ASHTON *against* JENNINGS.

Matter of precedence, where determinable. S. C. 3 Keb. 462. *Q.* Raym. 251.

Battery by the plaintiff a doctor of divinity, and his wife, against the defendant and his wife, for a battery done by the wife of the defendant, to the wife of the plaintiff: the defendant pleaded that her husband is a justice of peace and an esquire in the town of Plymouth, where the battery was done, and that the wife of the defendant ought to have precedence of the wife of the plaintiff, and that at such a funeral in Plymouth, the plaintiff's wife took precedence of the defendant's wife, wherefore she *molliter manus imposuit* upon the plaintiff's wife to remove her; upon this the plaintiff demurred. And now Saunders argued, that the wife of an esquire, and a justice of peace, ought to have precedence, and take place before the wife **[134]** of a doctor of divinity, for though a doctor of divinity takes place of an esquire (and as Wylde said, contends with serjeants at law for precedence) yet Saunders said, that was in respect of his degree in the university, which is personal to himself only, and not communicable to his wife; no more than the dignities of a bishop to the wife of a bishop, who is no lady, nor takes place as such, though the bishop himself be a Baron of Parliament, and takes place as such. Rainsford and Wylde being only in Court, said, they would not countenance such a justification, and that they were not Judges of precedence, but the Court of Honour. And without determining the right of precedence, or any regard had to it, gave judgment for the plaintiff, for that the defendant by his plea had confessed the battery.

[135] TERM. SANCT. TRIN. ANNO 27 CAR. II. IN BANCO REGIS.

HOWARD *against* WICKLIFFE.

Plea, no clear profits, repl. there were profits to 20l. Rejoinder, no clear profits: issue thereupon, and verdict that there were clear profits as the plaintiff replied, naught. S. C. 3 Keb. 466, 469.

Debt upon an obligation, conditioned to pay all the clear profits of a coal-mine; the defendant pleaded performance according to the condition. The plaintiff replied and said, that the profits amounted to 20l. and for breach assigns the non-payment of it. Defendant rejoins, there was no clear profits, *& de hoc ponit se, &c.* and the plaintiff *similiter*. The jury found there were clear profits, *modo & forma*, as the plaintiff replied, and thereupon judgment for the plaintiff in Durham, and error brought thereon, and the judgment reversed, because the replication does not shew there were any clear profits, but profits to 20l. which might be, and yet wholly swallowed up in the charges of obtaining it: and though the verdict finds there were clear profits, yet it is not found absolutely so, but with as the plaintiff had replied, whereas he did not so reply. And this is not cured by the last or any other Statute of Jeofails.

[136] RIDLEY *against* POWNELL.

Bishops may grant offices for one, two, or three lives, if so they did before the 1 Eliz. otherwise not. S. C. 3 Keb. 472, 505, 540, 560.

Case for disturbing him in his office of register to the Bishop of Bristol: upon *non culp.* a special verdict was found, that Bristol is a new bishoprick, founded in the time of H. 8. and taken out of the Bishoprick of Salisbury; and that this office is a necessary office, and hath been granted *separalibus temporibus*, since the foundation of the bishoprick to the grantee and his assigns for three lives: and that Robert the bishop, 1 Octob. 1639, granted the same to Israel Pownell, and found the grant, which recites, that John, bishop, &c. had granted it to Heape and his assigns, and the assignees of them for a term in the grant mentioned; and that Robert, bishop, &c. granted it to Israel Pownell, and his assigns, *& idoneis assignatis suis*, which grants by the opinion of some learned in the law, were good. That the present bishop in consideration of the surrender of these grants, granted it to Israel Pownell, and his assigns, and the

assignees of them, for the lives of Nathaniel, Edward, and Israel Pownell; and that livery and seisin was made in the house belonging to the office by attorney, which grant was confirmed by the dean and chapter. And that Edward is still living, the bishop dead, and the present bishop his successor, granted the same to the plaintiff for life, and made livery as before, and the dean and chapter confirmed it. They also found stat. 1 Eliz. that all grants by bishops, of manors, lands, tenements and hereditaments, to their bishopricks appertaining, other than for twenty-one years, or three lives, whereupon the ancient rent should be reserved, are void. And if for the plaintiff, they found for the plaintiff, and if not, for the defendant. The case was argued by Weston for the plaintiff, and by Pawlett for the defendant. And Weston argued, that a lease for three lives cannot be good to bind the successor, and cited 1 Cro. *Young* against *Stowell*, *& ibidem Young* against *Fowler*, *& ibidem Lambe* against *Walker*, and *Bolton's case*, cited 10 Co. in *The Bishop of Salisbury's case*. In which cases it is said, the words *usually grant*, must be intended, granted time out of mind; which cannot be in this case, the See **[137]** itself being founded within time of memory: and though this bishoprick was taken out of the Bishoprick of Sarum, the prescription in the Bishoprick of Sarum, will not extend to this part derived out of the former, but remains in the old Bishoprick of Sarum. Farther he urged, that the verdict has not found any title or prior possession in the defendant, for though he be one of the *cestui que vies*, that gives him no title, admitting the grant were good, no assignment being found to be made to him; and there can be no occupancy of an office. Then the plaintiff being here put into possession by livery and seisin made to him, though there should be title in the assignees of Israel, yet the plaintiff in this case, (the defendant having no title nor primer possession) must recover as against a trespassor. Pawlett answered to the last matter first, and he said, the plaintiff declaring of a disturbance to him in his office, if the office be not his own, the defendant could not be guilty of a disturbance to him in his office, but shall be responsible to him that hath the right, if he himself has no title; and to the matter he argued, there was no difference between new and ancient bishopricks as to granting of offices, for they do not make grants by virtue of any prescription, but as owners, and by the power they have as being seised of the estates; and therefore before the statute, the bishops as well of ancient as new bishopricks, might alien their estates as any other person might: and if their grants of offices had been by prescription, the prescription should always have been pleaded, which is not done in *The Bishop of Salisbury's case*, nor in any other: offices of necessity are not restrained from being granted by any statute, and this is an office of necessity, neither is it any prejudice to the successor to have an officer ready in the office, of whom he is sure of by the office's being granted for three lives, and also surer of an able officer; in *Young and Fowlers case*, the grant of the register's place in reversion was held good for this reason. And March's Rep. 38, if an office was so granted before 1 Eliz. it is a badge of the necessity of such grants. And in *Lamb's case*, the reason why that grant was held void was, because it had not been so granted before the year 1609, which was long after the first of Eliz. But here it is found to be granted *separalibus temporibus* after the foundation of the bishoprick in Henry the Eighth's time. Hale Chief Justice, **[138]** Before 1 Eliz. there was no difference between the grant of offices of ancient and new bishopricks; both made their grants as owners, and not by prescription; and whether new or ancient, if they usually granted for three lives before this statute, they may grant so after. But this verdict is defective in this, that it does not find it was usually so done before 1 Eliz. but that it was so done *separalibus temporibus* since the foundation in the time of H. 8, which may be, and yet not till after 1 Eliz. to supply which defect he advised the parties to take a *venire facias de novo*. And he held, that this being taken out of the Bishoprick of Salisbury, there are the same prescriptions and appendances to this part which belong to the Bishoprick of Sarum. *Cæteri Justiciarii* inclined to the opinion of Hale, and that there was no difference between ancient and new bishopricks as to grants of offices, but that both do it as owners, and that neither ancient nor new bishopricks can grant otherwise than they did before the first of Eliz. But that they are all equally restrained by this statute; and that if it were not for the incertainty of the verdict in this point, they would give judgment for the defendant: but the defendant not agreeing to the proposal of a new *venire facias*, *adjournatur: sed postea* in Michaelmas term following the parties agreed to take a *venire facias de novo*.

BAXTER *against* DOUDSWELL.

Borough-English granted to a man and his heirs for three lives, it shall go to his customary heir, and not to the heir at common law. S. C. 3 Keb. 475, 486, 498. 2 Danv. 542, pl. 4.

Ejectment, and upon *non culp.* and special verdict the case was: one seised of land in Borough English, demised it to A. and his heirs for the life of B. A. died, leaving two sons, A. the eldest and D. the youngest. And whether the land shall go to A. as heir by the common law, or to D. as heir by the custom? was the question. Argued by Serjeant Maynard and Saunders, that it should go to the eldest son, for this is not a discent to him as heir, but a special limitation to prevent occupancy, and he takes it as a special occupant and a purchasor in this case, and therefore must be heir at common law. But it was argued **[139]** by Heneage Finch junior, that he takes in this case as heir, and so is 10 Co. Rep. *Seymain's case*, such an estate as this is taken as a discendable freehold. And then it ought to discend to him who is heir by the custom, which runs with the land, and guides the discent to the youngest son. And of this opinion was the Court, and gave judgment accordingly.

WEBB *against* BATCHELOR.

Church-lands subject to new charges by Act of Parliament. S. C. 3 Keb. 476, 507. 1 Vent. 273.

Trespass by the plaintiff a parson, for taking his beasts: the defendant justified by warrant from a justice of peace to take them for a tax for the repair of the highways. The plaintiff demurred, pretending the church-lands are not subject to such charges: but *per Hale & Curiam*, they are subject to new charges by Act of Parliament, as well as other lands, if they be not excepted; and gave judgment for the defendant.

THE KING *against* THE LORD FITZ-WATER.

Jeofails in informations, whether cured by verdict. S. C. 3 Keb. 459, 465, 485, 519, 555.

Information in nature of a *quo warranto*, for fishing in the river Thames, in a place extending to B. and seven parishes, as appear by the record. After verdict for the defendant it was moved by Maynard in arrest of judgment, that the *venire* is from one parish only, where it ought to be from all, and that this is not cured by the Statute of Jeofails, being in an information, which is excepted out of the statute, 1 Cro. *Rex* v. *Talbott*, and also the new statute of 16 and 17 Car. 2, contains an exception for all appeals, indictments and informations upon penal statutes. It was answered, that this is the fault of the prosecutor himself who sued out the *venire facias*, and therefore he ought not to take advantage of his own default. And the proviso except informations, &c. upon penal laws only, which this case is not. And to the opinion in *Talbot's case* they said, it seemed unreasonable to hold, that the King was not bound by the law *quia* not named in the law, for it appears by the exception, that the **[140]** Parliament took it the King had been bound, though not expresly named, for otherwise there was no occasion for the exception; and if in these cases the King had been bound but for the exception, he shall be bound in this case which is not excepted. Twysden and Wylde held this case was not cured by the statute. Hale seemed *contra, & adjournatur*. But afterwards in Michaelmas term the verdict was set aside, upon affidavits that the jury cast lots for their verdict, and gave it as the lot fell, and so the exception was not determined.

ROE *against* WILLIAMSON.

Ejectment of a lease for five years, and the lessor had only a term for three years. S. C. 3 Keb. 490.

Ejectment, and declares upon a lease for five years, and upon *non culp.* jury found that the lessor of the plaintiff had only a lease for three years, *& si, &c.* Hale held this verdict was against the plaintiff, for the judgment must be, that the plaintiff recovered *terminum suum prædictum*, which is five years, whereas the lessor's interest is not to continue so long, and perhaps the defendant may have the reversion after the three years expired, and so by this means the lessor of the plaintiff will recover the land for two years more than he hath right to hold it. And he said, that for this reason he before caused another plaintiff to be nonsuit. Wylde agreed with Hale, but Twysden seemed of a different opinion. *Et adjournatur.*

THE KING *against* PARKER.

Coroner's inquest finds that a man *seipsum emergit & sic seipsum murdravit*, quashed. S. C. Farsl. 16. *Vide post*, 152. 1 Vent. 239, 278. *Sed* 1 Sid. 90 & 101 *contr.*

The coroner's inquest *super visum corporis*, found that Parker *felonice seipsum* threw into a river, *& in rivo præd' seipsum emergit, & sic seipsum occidit & murdravit:* and this was quashed, because *emergo* is to arise out of the water, and not to drown himself in the water; and the *felonice* threw himself into the water does not cure it, for the going into the water does not make a felony, but the drowning himself in the water, and the conclusion *& sic seipsum occidit, &c.* signifies nothing, as **[141]** being without premisses; and to say a man murdered himself without shewing how, is insufficient: but then it was moved what should be done in this case, for the party being dead and buried for two years, there could be no other view in this case. *Et per Curiam*, that may be supplied by commission of enquiry; or the justices of peace, or of assize, may enquire of it without commission. But in either of these cases the inquisition is traversable, though the inquisition of the coroner himself in such case as the law is now holden, is not traversable. But Hale said, that anciently the coroner's inquest was traversable in this case, but never *in fugam fecit.* And it was ruled in this case, that the death should be presented next Assizes at York, and the inquisition traversed and tried the same Assizes, and so the matter determined,

1913: 3 Ves: 727: HUTCHINSON *against* THOMAS.

Information for usury, the defendant pleads another information of the same term. S. C. 3 Keb. 136, 426, 491. *Post*, 176. *Ante* 13.

Information for usury was thus: *memorandum quod termino Sancti Michaelis*, and so set forth the usury. The defendant pleaded *quod ante exhibitionem hujus informationis, scilicet termino Sancti Michaelis* (the same term) another person exhibited an information also against him for the same usury, and obtained judgment against him; upon which the informer demurred, and had judgment; for both informations, as here pleaded, refer to the first instant of the same term. But if another information was exhibited before, this same term, he should have pleaded that this information was exhibited such a day of the term, and that at another day before in the same term another information was exhibited, and judgment thereupon obtained.

[142] MAYOR, &C. OF LONDON *against* GORREY.

The defendant craves oyer, the plaintiff demurs, *quia placitum in barra minus sufficiens*, and judgment against him, because his demurrer was without warrant. No repleader. S. C. 1 Vent. 298. 3 Keb. 677. *Post*, 174. *Nul repleader.*

Debt for scavage, and declares upon a patent of Edw. 4. The defendant imparles, and in a term after demanded oyer of the letters patents [which after imparlance he

ought not to have] the plaintiff demurred *quia placitum præd' in barra placitat' minus sufficiens, &c.* The defendant rejoins, *quod placitum præd. est sufficiens. Curia*, This was no plea, and therefore does not warrant the demurrer in this form, *ideo* judgment for the defendant, *& non quod replacitent*, as was desired.

MOTTRAM *against* JOLLY.

Grant of 20 of the best trees he has in his wood, to be taken by the grantee within 11 years, the grantor cannot take in the mean time. S. C. 1 Vent. 271. 1 Danv. 807, pl. 9. 2 Danv. 760, pl. 7. 3 Keb. 477. 5 Co. 25. Noy 32. Cro. El. 82. Yelv. 188.

The case was, one granted to another twenty of his best trees in his wood, to be taken at the grantee's election within eleven years: the grantor cannot take any trees in the mean time, at least not without a request to the grantee to make his election; and this is not like to *Palmer's case* in 5 Co. a grant to take twenty loads of wood out of his wood, for there all is wood, and if he leaves sufficient for the grantee to have his twenty loads it is enough: but here it is the twenty best trees, so that until he hath made his election of what he'll take for the best, the grantee cannot take any. Adjudged.

SKILLINGTON *against* NORTON.

Stat. 14 Car. 2 appoints collections for poor by townships in Lancashire, Yorkshire and Derbyshire, this extends to no other counties. S. C. 3 Keb. 422, 460, 494, 539.

Trespass, a special verdict found stat. 14 Car. 2, 12. That whereas the parishes in Lancashire, Yorkshire, Derbyshire, and other counties there particularly named, and then hath the general words *and other counties*, are so large, that distributions to poor people cannot so conveniently be by parishes a stat. 43 Eliz. appoints, and therefore this statute appoints the provision and distribution shall be by **[143]** townships, and that the parish of Kenitworth *in com. Warwick* (being none of those counties named in the statute) is a large parish, having two townships; but it does not find it so large that distribution parochial cannot be well made. And the question was, whether the county of Warwick, which is not named in the statute, shall be taken within the general words, *and divers other counties?* And Hopkins Serjeant, cited a case to be adjudged *in Com. Banc.* two or three years ago, that the statute extends not to other counties, than those there expresly named: and to this Hale inclined, but the Court desired to see that precedent before they gave judgment, for which it was adjourned. But afterwards in Michaelmas term it was adjudged, the statute extends not to any other counties, but those only which are named in the statute.

HODGSON *against* THORNBOROUGH.

Copyholder leases for 16 years, rendering rent, the lessee leases part for ten years without rent, the last lessee assigns his term to the first lessor, he shall have the whole rent, without extinguishment or apportionment. S. C. 3 Keb. 500, 505, 518, 541, 557.

Copyholder made a lease for sixteen years, rendering 20l. rent, the lessee made a lease of part for ten years, rendering no rent, the under-lessee assigned his term to the first lessor: and whether the rent of 20l. shall be suspended or apportioned? was the question. And it was adjudged, that the rent shall neither be suspended nor apportioned, but that the lessor shall have the whole rent of 20l. per annum against the lessee; and Hale said, that if the lessee had reserved 5l. rent upon his lease for ten years, and he had assigned to the lessor without reserving rent, the lessor should have 20l. from his lessee, and the lessee should have 5l. from the under-lessor, and the under-lessor nothing against the first lessor, for each one shall have according to his contract, and there shall be no apportionment against the contract and agreement of the parties: also there can be no suspension or extinguishment of the rent of 20l. for

that is always where the lessor enters wrongfully against the will of the lessee; and so Wylde said are all the pleadings, *scilicet*, that the lessor *vi & armis* entered: but in this case all is done by the agreement and contract of the parties, and therefore every one shall enjoy according to his agreement. And Twisden said, that what Coke says, that a rent-service cannot be suspended in part, and *in esse* for part, is without **[144]** reason, and without authority: and all the Court *scilicet* Hale, Twysden, Rainsford and Wylde agreed, that the lessor should have the whole rent against the lessee, and he nothing against his under-lessee, because nothing is reserved by him, nor shall the under-lessee have any thing from the first lessor for the same reason; for which they cited 17 E. 3, 16, vol. 56. Co. Litt. 148 b. 1 Rolle's 938. *Dorrell* against *Andrews*, 16 E. 3, anno 93. Brook's Extingu. 48, and the third resolution in *Rawlins's case*, which they said is not a point that judicially arises in the case, but a collateral opinion.

HILL *against* MOUNTAGUE.

Escape on mean process. Defendant pleads a rescous, but no return. *Q.* 1 Mod. 57, 244.

Case against the defendant, capital bailiff of Westminster, for an escape upon a mean process. The defendant pleaded a rescous, but not that he returned the rescous; upon which the plaintiff demurred, and judgment for the defendant, according to the case of 2 Cro. 419, and *Waldon and Lambert's case* there cited at the end thereof; for it is a good plea upon mean process, though not upon an execution; and the plea was adjudged good, though he does not shew a return of the rescous. Levinz for the defendant.

SEASON *against* GILBERT.

Issue *non assumpsit*, evidence nonage. Bull. N. P. 152.

Assumpsit, the defendant pleaded *non assumpsit*, and upon the trial before Hale in Middlesex, the defendant was permitted to give in evidence infancy at the time of the promise, whereupon the plaintiff was nonsuit. Jones Attorney General, and Levinz for the plaintiff at the trial.

[145] HORSEY *against* DANIEL.

[Referred to, *Soady* v. *Turnbull*, 1866, L. R. 1 Ch. 498.]

Debt upon obligation, counting of a *devastavit*, lies not against an executor, *aliter* upon a judgment. A *devastavit* cannot be by a *feme covert*. S. C. *post*, 261.

Debt upon an obligation against husband and wife executors, and declares upon a *devastavit* by them; and upon demurrer judgment was given against the plaintiff: for *first*, A *feme covert* cannot waste during the coverture, though the *devastavit* of the husband will charge her, if she survive, according to *Beamond and Long's case*, and 1 Cro. *Monson and Bourn's case*. *Secondly*, The Court would not carry this action farther than it has already been allowed, and that is, in debt upon a judgment, but not in debt upon an obligation; and Mich. 29, *inter East* against *Withers*, it was adjudged that debt upon an obligation, counting of a *devastavit*, lay not against an executor.

[146] TERM. SANCT. MICH. ANNO 27 CAR. II. IN BANCO REGIS.

LAVENDER *against* BLACKSTONE.

[Note on p. 147 over-ruled, *Trowell* v. *Shenton*, 1878, 8 Ch. D. 324.]

Of fraudulent conveyances. S. C. 3 Keb. 526, 826.

Ejectment upon *non culp.* was tried at Bar. Ambrose Pudsy seised in tail, being under the age of twenty-one, *scilicet* of the age of twenty years, in the year 1649,

married the daughter of Sir Thomas Davison, and had with her a portion of 2000l. Afterwards in the year 1653, Pudsy being extravagantly in debt 4000l. for which Sir Thomas Davison was bound; Sir Thomas Davison procured Pudsy to levy a fine, (wherein his wife joined not) of all his lands, to the use of Samuel Davison and Gascoign Eden, and their heirs; in trust that they with consent, and at the request of Sir Thomas Davison, should sell all or any part of the lands; the money raised thereby to be employed for payment of all debts, for which Sir Thomas Davison then was, or within fifteen years after, should be bound for Pudsy: and *secondly*, Of all such damages as Sir Thomas Davison should sustain hereby: and *thirdly*, Of all such proper debts of the said Pudsy, [not such as he was subject to as surety for others] as were then due, and should be certified by Pudsy and his creditors within a time limited; the remainder of the money, if any, to be paid to Pudsy, and the remainder of the land, if any, left to Pudsy for ninety-nine years, if he should so long live; the remainder to Samuel Davison and Eden, and their heirs, for the life of Pudsy; the remainder to the first and other sons of Pudsy in tail, the remainder to the right heirs of Pudsy. Proviso, *First*, That Pudsy may make a jointure for this or any other wife for life, not exceeding 300l. per annum. *Secondly*, That he may grant rent-charges to the younger **[147]** children. *Thirdly*, That with the consent of the said Sir Thomas and Ralph Davison, he may make leases of all or any part of the lands for any number of years, with or without any rent. A great part of the land to the value of 12,000l. was sold, and Pudsy and the trustees joined in the sale, and debts to the value of those for which Sir Thomas was bound, and that were the proper debts of Pudsy himself, were paid with the money. Afterwards he being in possession of the residue, (as by the deed was provided, so long as he paid the interest) sold 400l. per annum by himself solely, which the purchaser enjoyed many years together, without interruption or disturbance of the trustees. And in the year 1667 he mortgaged the manor of Bolton, the land now in question, having spent all the rest of his estate, to Gudgeon, who in the life-time of Pudsy, entered and assigned to Blackstone. Pudsy died, and the lessor his son and heir brought an ejectment, and recovered at York Assizes, the jury finding the settlement aforesaid to be good, and not fraudulent. Whereupon Blackstone the assignee of Gudgeon, brought a new ejectment, and the trial was now at Bar; wherein the jury by direction of the whole Court, found for the plaintiff, because the said settlement was fraudulent and void against the mortgagee for these reasons: for *first*, The continuance of possession, and the sale of 400l. per annum, by himself solely, notwithstanding the trustees joined in the sale of the other part, was a badge of fraud. *Secondly*, The proviso to make leases for any term without rent, with consent of the trustees, puts it in his power to defeat the whole settlement, and those were trustees of his own voluntary nomination. But whether this power gives him power to make leases presently, and during the fifteen years, was not resolved. *Thirdly*, The wife did not join in the fine, and therefore continues dowable: but if she had joined, it might have made the settlement to be upon good consideration, which otherwise is merely voluntary. *Et per Hale*, every conveyance *prima facie* shall be deemed fraudulent against a purchaser, but circumstances may alter the case.(1) *Fourthly*, Though it was proved that Pudsy upon the marriage promised to settle his estate when he came to age upon himself and his issue, (which it was agreed, was a sufficient consideration to avoid fraud, though an infant by law is not compellable to fulfil his promise) yet this settlement not being made till three or four years after he came of age, and not being **[148]** made directly according to the said promise, it shall not be presumed to be made in performance of the promise, without a direct proof to that purpose.

(1) Every voluntary conveyance is *prima facie* to be esteemed fraudulent against purchasers, but circumstances may alter the case. Promise by infant on his marriage to settle when of age, a settlement made accordingly, is not fraudulent.

CLERK *against* NETTLESHIP.

Promises to leave his wife 400l. if she will sell her land and let him have the money, his obligation for the 400l. not fraudulent. *Ante* 70, 146.

At Guildhall upon evidence at a trial before Hale, the case was thus: The wife having land as heiress, and the husband being a tradesman, and in debt, he promised his wife, that if she would join with him in a sale of the land, and permit him to receive the money for the use of his trade, to leave her 400l. at his death: they sold, and he had the money, and six months after being sickly and consumptive, he made an obligation to a stranger, conditioned to pay his wife 300l. after his death, and two months after died. And by the direction of Hale Chief Justice, the jury found the obligation not fraudulent *quoad* creditors, though in law a man cannot make a good promise to his wife, and though the obligation was made so long afterwards.

ST. JOHN *against* MOODY.

Case for disturbing him in his way *quod habere debuit*, without prescription or other title. S. C. 3 Keb. 529. 1 Vent. 274. *Post.* 493. 6 Mod. 116, 193, 315.

Case *quod cum* the plaintiff 27 Feb. 27 Car. 2, was seized in fee of a wood; the defendant *machinans* to disturb him of the profit thereof, *dicto* 27 *Febr. in quodam clauso vocat. Lorkdowne, viam ipsius* the plaintiff *ducent' a præd. bosco par & trans præd. clausum usque D. quam ipse* the plaintiff *adtunc & abinde hucusque pro se, servis and carriagiis suis* for the necessary use of the said wood *per totum tempus præd. de jure habuisse debuit, obstruxit & quandam fossam ex transverso viæ præd. fodit & fecit, per quod ipse* the plaintiff, *via prædicta uti vel habere non potuit:* after verdict for the plaintiff upon *non culp.* it was moved in arrest of judgment, that here is no prescription, nor any title whatsoever made to this way; and so the defendant cannot know what defence to make at the trial, and therefore the declaration is not good; it is not shewed **[149]** that ever he had possession of the way, but only *quod cum de jure habuisse debuit;* which in setting forth his title is not sufficient, as it might be in shewing the title of another person to whom he is a stranger. But Hale & *Curia* held it good, especially after verdict, and they compared it to the case of a water-course, *que currere consuevit;* and Twysden held it good upon demurrer; whereupon they gave judgment for the plaintiff. The defendant brought a writ of error *in Cam. Scaccarii*, and the judgment was affirmed. Pollexfen for the plaintiff, Levinz for the defendant in both Courts: *vide postea* such declarations held good upon demurrer.

WIGSON *against* GARRET.

Power to revoke by indenture sealed in presence of three witnesses, he by indenture covenants to levy a fine to uses, good revocation. S. C. 1 Vent. 278, 280. Raym. 239. 2 Keb. 366, 489, &c. *Ante* 127. 1 Lev. 30, & Bath & Montague, 3 Chan. Cases.

A settlement was by deed with power to revoke by indenture sealed in the presence of three witnesses. Afterwards the party without taking notice of his power, covenanted by indenture sealed in the presence of three witnesses, to levy a fine to other uses, and levied the fine accordingly. And after divers arguments it was adjudged by Hale and the whole Court, to be a good revocation; and yet the covenant of itself will not do it, because it neither passes an estate nor raises a use; and the fine itself will not do it, for that is not an indenture sealed in the presence of three witnesses; yet both together make a good conveyance and revocation of the use. This case concerned some part of the estate of the Earl of Leicester. Also it was said by Hale in this case; If there be tenant for life with power to make a lease for life, his lease for life without livery is good, and better than if livery be made: and so upon great deliberation it was resolved in the case of one Rogers. Twysden said livery in such case has been held to be a forfeiture, which Hale denied, for by the sealing of the deed the power is executed, and the livery void.

[150] SNELL *against* WEBLING.

I know what I am, I know what Snell is, I never buggered a mare; actionable by implication. S. C. 1 Vent. 276.

Action, for that the defendant *habens colloquium* of the plaintiff said, *I know what I am, and I know what Snell is, I never buggered a mare.* After verdict upon *non culp.* for the plaintiff, it was moved in arrest of judgment, that the words are not actionable, for they do not charge the plaintiff with buggery. *Curia contra*, It is by implication a charge of buggery upon the plaintiff, which the by-standers *satis intellexerunt*, and gave judgment for the plaintiff.

WAKER *against* WAKEMAN.

Settlement of lands and tithes with a power to make leases, so that 5s. per acre rent be reserved, he leases reserving 5s. per acre for the lands, but nothing for the tithes. S. C. 1 Vent. 294. 3 Keb. 544, 547.

Settlement for life with remainders over, proviso, that tenant for life may make leases of all or any part of the premisses, so as upon every lease he reserved 5s. per acre for every acre of the premisses so demised; and the settlement was of divers lands, and also of a rectory, consisting only of tithes without glebe. He made a lease of the whole, rendering rent, which amounted to more than 5s. per acre for all the lands, but nothing for the tithes. And whether this was a good lease of the rectory? was the question upon demurrer. Saunders argued that it was, because the power is affirmative to make leases, and the restraint comes under the *so that, &c.* and that cannot be extended to render rent by the acre, of that which does not consist in acres; he cited Rolle, tit. Power, 262, as so resolved. Pemberton, King's Serjeant, *contra*, The usual powers to make leases are in the affirmative, as in this case, and the restraint under a *so that, &c.* and though, as here, the ancient rent be reserved, yet it is always held, that lands never demised cannot be demised, and yet it might as well be said in these cases, that the *so that the ancient rent be reserved*, cannot be intended to render the ancient rent where no rent was before rendered. *Et adjournatur. Sed postea* in Hillary term following **[151]** judgment was given that the lease was good, only upon the authority of the case in Rolle before cited. But Hale said, *Si res esset integra*, he should be perhaps of another opinion.

THE KING *against* WATTS.

Special bailiff not within the stat. 27 Eliz. 12, of taking an oath to execute the office.

Information against him for using the office of bailiff in arresting J. S. upon a writ out of this Court, not having taken the oath appointed by stat. 27 Eliz. 12. After verdict judgment was stayed, because it is not alledged that he was a general bailiff, and a special bailiff is not within the statute, Jones Rep. 249, and here the defendant shall be taken to be a special bailiff, because the charge against him is only for one single act. The Court inclined to this opinion, and stayed the judgment for the present; *sed advisare volunt.*

ELLIS *against* RUDDLE.

Lease of a bailiwick, rendering rent, void. Offices in fee not within the stat. Edw. 6, nor grants for life or years of them, rendering rent. 4 Com. Dig. 299. 3 Bac. Abr. 730. 1 Hawk. P. C. 313.

Debt upon an obligation conditioned to perform covenants in a demise of the bailiwick of the Savoy, by which *inter alia*, he demised to the defendant the goods of felons, waifs, estrays, &c. and made the defendant his deputy baily, rendering 60l. rent per annum. And upon demurrer the Court held the indenture void within the statute of Edward 6, against emption of offices; for though *bona felonum, &c.* may

be legally demised, yet being joined with the making the defendant deputy bailiff, and a demise of the bailiwick to him, the whole is void. But because the truth of the matter was, that the King was seised in fee of the bailiwick, and demised to the plaintiff, who demised to the defendant; and offices in fee are excepted out of the statute, whereby under leases of such offices are also excepted inclusively, and for that the seisin in fee of the King does not appear upon record, the Court ordered a repleader.

[152] THE KING *against* ALDENHAM, ALDERMAN OF ROWEL.

Coroner's inquest of *felo de se* traversable, but not of *fugam fecit*. For want of the word *murdravit* quash'd, and a new inquest to be before justices of peace.

The coroner's inquest having found him *felo de se*, his executors moved they might traverse the inquisition. *Et per Hale, Twysden and Wylde, silente Rainsford*, it was granted; for the coroner's inquest finding one *felo de se* is traversable, 8 E. Bro. Traverse sans Ceo 229. But a *fugam fecit* found before the coroner is not traversable: afterwards the inquest was quashed for want of the word *murdravit*. And a new inquisition was appointed to be taken before justices of peace.

WISE *against* WISE.

Assumed to pay him the 20l. which he owed him by agreement *inter eos fact.*

Assumpsit by an executor, and declares that the defendant being indebted to the testator 20l. *quas illi solvisse debuisset secundum agreamentum inter eos habit'* promised to pay. After verdict for the plaintiff upon *non assumpsit* judgment was stayed; for this is no more than a general *idebitatus assumpsit*, because it does not appear what the agreement was, by deed or without deed, by obligation, or how.

EDLIN *against* BATTALY, IN CHANCERY.

Chancery relieves a purchaser of a term, who had been at charge in building against an old dormant title.

Bray possessed of a term for 100 years, in 1638 made his will, and Taylor, who married his daughter, executor; and devised the term to his own wife; the executor assented, she entered, &c. and after three years died. After her death the executor entered, and enjoyed the term till 1650, and then sold it to one who surrendered and took a new lease for 200 years, and laid out 250l. in building upon the premisses. Taylor died, and his wife survived him till the year 1669. Battaly, who married the daughter of Taylor, being beyond seas 20 years, and not knowing of his title, came into England in 1670, and being informed of this whole matter, and of his title in right of his wife, **[153]** took administration to the wife of Bray, and grandmother to his wife, and recovered by virtue of the term for 100 years in an ejectment. The purchaser and builder exhibited his bill to be relieved against this dormant title; and by Grimston Master of the Rolls; the possession going so long, and divers purchasers, and the last purchaser under the new term having no notice of the old, or of the dormant title to the residue of the term of 100 years: adjudged the purchaser should be relieved and hold the land till he be repaid his charges in building, discounting the profits received by the purchase; which Battaly perceiving, and that the value would not exceed 22l. per annum, and that the residue of the old term was only for 32 years, he agreed (by advice of the Master of the Rolls) to take 80l. of the purchaser, and to release his title to the old term.

FOWK *against* PINSACKE.

Indebitatus assumpsit pro præmio upon a policy, or *pro salario.*

Assumpsit, and declares the defendant was *indebitatus* 20l. *pro præmio* upon a policy of insurance upon such a ship; the defendant demurred specially, because he doth not

shew the consideration certainly, what the *præmium* was, or how it became due; *sed non allocatur;* for this is as good as an *indebitatus pro quodam salario*, which has been adjudged good.

[154] TERM. SANCT. HILL. ANNO 27 & 28 CAR. II. IN BANCO REGIS.

PIGGOT *against* THE EARL OF SALISBURY.

Feme tenant for life, remainder to J. S. in tail, remainder to the husband for life, remainder over, baron and feme per fine *sur concessit* grant *tenementa præd' pro vita* baron and feme with warranty, which descends to J. S. Whether an estate for the life of baron and feme pass by the fine, or several and distinct estates for their several lives? S. C. 2 Mod. 109. 2 Jo. 88. 3 Keb. 695, 698. 4 Bac. Abr. 296. 3 Com. Dig. 350. 1 Term Rep. 738. Cowp. 179. Style 192, 193. 1 Roll. 855.

Ejectment upon the demise of Sir Thomas Leigh *de* 32 *messuagiis in parochia Sancti Martini in comm. Midd.* upon *non culp.* trial at Bar, and a special verdict found, the case was this: William Mintern seised in right of his wife Bridget, of a reversion in fee upon a term for years; they settled the tenements in question to the use of Bridget for life; the remainder to Francis Leigh an infant under the age of twenty-one, and Elizabeth his wife, the daughter of Mintern, and wife and heirs of Francis upon Elizabeth begotten; the remainder to William Mintern for life; remainder to the right heirs of Bridget: W. Mintern, and Bridget, afterwards viz. 7 Jac. by fine *sur concessit concesserunt tenementa & totum & quicquid habent in tenementis prædictis ad terminum vitæ ipsorum Willielmi & Brigittæ & eorum diutius viventis, & illa reddiderunt al Haughton & Duncomb, tenend' sibi & hæredibus suis per totam vitam Willielmi & Bridgittæ & eorum diutius viventis* with warranty, and this was in trust for Robert Earl of Salisbury, who intended to purchase the inheritance; upon which fine lessee for years attorned. And afterwards *eodem term.* 7 *Jac.* Sir Oliffe Leigh, father of Francis, and William Mintern and Bridget levied a fine *sur conusance de droit* to the Earl of Salisbury, with warranty by Sir Oliffe, which descended upon the lessor, son and heir of Sir Francis, son and heir of Sir Oliffe; and whether Sir **[155]** Thomas the lessor be barred by this collateral warranty of Sir Oliffe, descended on him? was the question. And all depended upon the fine *sur concessit*, of what operation that is; for if that inure as a grant of the estate in possession for the lives of William and Bridget, then it displaces the remainder to Francis, and makes way for the warranty to bar; but if it pass only the estate for life of Bridget in possession, and the remainder of William for life, as a remainder, then it does not divest the estate of Francis in tail, and so that is not barred by the warranty: and it was argued at Bar for the plaintiff, that only the estate for life of Bridget, and the remainder of William, as a remainder, pass in this case, and not an estate for life of William and Mary in possession. *First*, Because the words *& totum & quicquid habent* will otherwise signify nothing in the fine; for a grant *de tenementis prædictis* for the life of William and Bridget, had been sufficient to pass an estate for their two lives in possession. But the words *& totum & quicquid habent* were added to qualify the foregoing words that the grant might only pass *totum & quicquid habent in tenementis;* and it was said to be usual in fines *sur concessit*, when the grantor hath an absolute estate in fee, to grant *tenementa prædicta:* but when he hath a particular estate, then to add *& totum & quicquid habent;* and in *Altham's case* 8 Co. particular words put after general, qualify the general; as if a feme dowable of lands in D. and S. release to him in reversion all demands *necnon dotem suam in D.* this does not release her dower in S. *Secondly*, Where words are doubtful, they ought to be taken in such a sense as no wrong be done; as if tenant in fee lease for life, and does not say for whose life, it shall be taken for the life of the lessee; but if tenant in tail or for life makes a lease for life, without expressing for whose life, it is a lease for the life of the lessor; and the law regards a lesser estate by right, more than a greater estate by wrong, 6 E. 3. 17 Co. Lit. 42 a. 182 a. b. *Thirdly*, Such construction ought to be made in this case, because the party seemed to intend so to pass the estates; for otherwise a fine by William and Bridget, and Sir Oliffe Leigh had been sufficient, and they need not have levied two fines of the same term, which cannot be

for any other purpose than to prevent a forfeiture of estate to Francis, then an infant, and no party to the fines, if they had granted the whole estate in possession; for thereby they have devested the estate of Francis, and given to **[156]** him title of entry, for by the attornment of the tenant for years, the fine *sur concessit* was executed, as was agreed *per omnes*, and the estate vested as if livery had been made. Finch *contra*, The words of the fine pass an entire estate for the lives of William and Bridget, and they ought not therefore to pass by fractions; and it is not to be considered what the parties intended to do, but what they have done; he cited 1 Co. Rep. *Bredon's case*, 1 Cro. *Baker* v. *Hacking*, Style, *Garret* v. *Blisard*. And this fine is well executed by the attornment, and therefore it devests the remainder to Francis, whereby the warranty descending upon Sir Thomas his heir, he is barred by the warranty, being collateral to his title. Hale and Wylde held clearly, the intent of the parties here was to prevent a forfeiture, and therefore not to devest the estate in remainder. But whether the operation it shall have, whether to pass an entire freehold for both their lives, or one divided estate, they would consider, & *adjournatur*. Afterwards the case being long delayed by privilege of Parliament, Sir Tho. Leigh took 2000l. of the Earl of Salisbury, and conveyed his title to him; and in truth as it seems the Earl was to purchase the estate, for he had built upon it all the houses in question: but Sir Francis being under age could not join, whereupon this conveyance was devised for the present, and Sir Francis died afterwards without joining. *Levinz pro querente*. *Note*, The parties afterwards agreed.

TERRY *against* STRADWICKE.

Trespass for entering his close, and taking a load of hay, not saying *ipsius fœnum*, naught after verdict. S. C. 1 Vent. 278. 3 Keb. 524.

Case, for that the defendant obstructed a watercourse, and turned the water into the plaintiff's land, whereby it was overflowed & *viginti carectat' fœni adtunc & ibid. existent' corrup't fuerunt*. After verdict for the plaintiff upon *non culp.* and entire damages, judgment was now staid upon the motion of Serjeant Hardress, because it is not said *fœni ipsius* the plaintiff, and so it does not appear to whom the hay belonged: *et nil capiat per billam* entered. And in another case Mich. term. *ante, inter Holland & Ellis* in trespass for entering his close, & *blada, viz. tant' carucat' de wheate adtunc & ibidem existent' cum averiis depast' fuit*, judgment was also staid for want of saying *blada ipsius* the plaintiff, and yet in both **[157]** cases the hay and corn were in the closes of the plaintiffs; whereupon it was objected they should be intended the hay and the corn of the plaintiffs: *sed per Curiam*, that is not sufficient. And Jones Attorney General, who said, he would move the case of Holland again, upon this judgment in *Terry's case*, did not move it.

COMBERFORD *against* BIRCHE.

Settlement, proviso, that if none of his brothers or their children be alive, then immediately, or after the term for 21 years, to remain to his brothers successively, two of his brothers died, the other alive, the term expired, yet it shall not remain to the brother. S. C. 3 Keb. 543, 548.

This case came out of Chancery by direction of that Court, to have the opinion of the Court here in this point; and upon demurrer in this Court the case was, William Comberford being seised of the lands in question, 3 Car. 1, settled them to the use of himself for life, remainder to John and Robert, and others his brothers successively in tail male, remainder to the lessor of the plaintiff, with power of revocation. And afterwards 16 Car. 1, he revoked and made a new settlement to the use of himself in tail, and afterwards to trustees, and of the residue to make leases for twenty-one years upon certain trusts, to make provision for the children of his brothers, and in default of them to make provision for his own sisters; and in case none of his brothers or sisters, or their children be living, then immediately, or after the term of twenty-one years expired, to the use of John, Robert, and others his brothers successively in tail male, remainder to the lessor of the plaintiff *ut ante*. William died without issue, John,

Robert, and the other brothers without issue male. But there are daughters of John and sisters of William still living. And whether any estate should rise to the lessor of the plaintiff? was the question: it was argued for the plaintiff, that the clause *if none of his brothers or sisters, or any of their children be living, that it shall remain to John and Robert*, who are his brothers, is impossible, and to be rejected rather than the whole settlement of the remainders defeated; and the intention of William, which for thirteen years together was to have such remainders, appears by both conveyances, and this part of the disjunctive, *then immediately*, depending upon the impossible clause precedent, *scilicet, if none of my brothers or sisters, or their children be living;* the conveyance may take effect well enough upon the other part of the disjunctive, *scilicet, or after the term of* 21 *years;* **[158]** and so the conveyance may well stand, and all the remainders arise upon the determination of the term of twenty-one years; and so the plaintiff hath good title. But it was answered and resolved by the Court, that all is one sentence and on condition precedent, *if none of his brothers or sisters, or any of their children be then living*, which condition is not in this case, and so all the remainders void; whereupon judgment was given for the defendant. Levinz counsel for the plaintiff, Weston for the defendant.

PLUMMER *against* WHITCHCOTT.

Warden of the Fleet in fee grants the office for life to A. who suffered escapes, and is not responsible; the warden in fee is liable. S. C. 1 Vent. 314, 515. 2 Jo. 60, 61. 2 Mod. 119 to 128. 3 Keb. 591, 56, &c.

Debt against the defendant as superior, for the escape of Holt, in execution in the Fleet, in the custody of Duckenfield, grantee for life of the office by the said Whitchott, who was seised thereof in fee: and upon a special verdict found before Hale Chief Justice at Guildhall, upon *nil debet*, the case was thus: Sir Jeremiah Whitchott the defendant, being seised in fee of the office of warden of the Fleet, granted the same to Duckenfield for three lives, at the rent of 1000l. per annum, and took security by obligation of 4000l. to save him harmless from escapes. Duckenfield was admitted by the Common Pleas, and an entry made of his admission, and that he made it appear to the Court that he was sufficient. Holt and divers other persons being in execution for great debts under Duckenfield, and he it seems being a person of desperate fortune, suffered all of them to escape, and went himself beyond sea with one of them; now he not being responsible, whether Sir Jeremiah Whitchcott should be charged with these escapes, upon the rule *respondeat superior*, was argued this and several other terms after by Saunders, Levinz, and others for the plaintiff, and by Holt junior, Finch and others for the defendant. And Hale upon the first argument was clear of opinion for the plaintiff, and that the action lies. The objections made for the defendant were, that at common law no jailor was answerable for escapes, but the remedy that is in such case is given by statute. The first statute which gives a remedy in this case was Westmin. 2, cap. 11, which extends not to this case, of an execution for debt, but only for arrearages in account, and Whitchott **[159]** is not superior to Duckenfield in this case, but Duckenfield during the three lives, is as well warden of the Fleet during that time as Whitchcott is in reversion; and the rule *respondeat superior* does not extend to these cases, but to those cases where the officer makes a deputy subject to his controul, which Duckenfield was not in respect of Whitchcott, Duckenfield himself being officer to that Court during his time, Co. 2 Inst. 382. 10 E. 2, Fitz. Debt 152, 192. Noy 69. *D. & Cha. de Paul's case*, 16 E. 3, Dam. 81. Fitz. Det. 148. 2 Inst. 381, and divers other books were cited. But for the plaintiff it was said and agreed, that debt lay not at common law for an escape, but case lay as it lies at this day for escapes upon mesne process: and the Statute Westm. 2, though it mention account only, extends to other cases by construction, notwithstanding the provision be there special, as the Statute de Circumspecte Agatis de Rebus Tangent' Episcopum Norwicensem, by construction extends to all bishopricks. And after this statute and before the statute 1 R. 2, 12, which is the first statute concerning escapes, divers actions of debt were brought for escapes in other cases besides account; as 16 E. 3, Fitz. Dam. 81. Mich. 41 E. 3, pl. 1. 41 Ass. Bro. Escape 28,

which proves that debt lay for escapes upon this statute in other cases than account. And statute 1 R. 2, 12, which gives an action against the warden of the Fleet, extends to all other prisons and their keepers. And this Statute of Westm. 2, which gives the action upon account, gives the rule also *de respondeat superior;* also statute 2 H. 6, 10, is general, that all officers of Courts put in such clerks for whom they will answer. And to the objection that Duckenfield is officer, and therefore the action lies not; it lies for this very reason, for it lies not when the gaoler makes a deputy, because the act of his deputy is his own act, and he must be charged in that case as for an escape suffered by himself. But here he is charged for an escape suffered by an officer put in by him, upon the insufficiency of that officer. And no action lies against the deputy for an escape, but against the Master; and the statute provides, that if the gaoler be not sufficient, *respondeat superior*, and a deputy is not a gaoler but a servant to the gaoler. And in *The Dean and Chapter of Paul's case*, the reason why the action lay not against the dean and chapter was, Hale said, not because the superior is not chargeable, but because the action ought not to charge **[160]** the superior generally, but specially, for insufficiency of the bailiff of the franchise they had put in, which was not alledged in that case as it is here. And for authority in point were cited 39 H. 6, 32, *The Duke of Norfolk's case*, & Rot. Parliam' 12 E. 4, Mem. 5. where an Act of Parliament was made to excuse the duke from escapes in the time of Brandon, his officer for life, of the Marshalsea; when the soldiers of H. 6 broke open the prison doors, and turned out all the prisoners in the time of the war betwixt him and Edw. 4. Co. 9 Rep. 98 a. Be the gaoler tenant for life or tenant at will, so he be but gaoler, the superior must answer for the insufficiency of the inferior, Co. 2 Inst. 182. The Mayor, &c. of London, shall answer for the insufficiency of the sheriffs, who have the gaol, and Co. 4 Inst. 114, the lord of a franchise shall answer for the insufficiency of the bailiff put in by him, which is a full answer to the case in Noy 69. And though he appeared to the Court of Common Pleas upon his admittance to be sufficient, that is not material, they might be misinformed: but Whitchcott at his peril is to put in a person sufficient to answer for all escapes, or otherwise he himself must answer. And afterwards term Pasch. 29, after all the arguments Hale being gone, and Rainsford Chief Justice, all the Court *preter* Twysden, who seemed to hesitate a little, declared that the action lay without doubt. But upon an objection started by Wylde upon the Bench, that the averment of insufficiency in Duckenfield is not well found by the jury; for it is, that he was insufficient at the time of his admittance, and when the escape happened, which though it were, yet if he became sufficient before the action commenced, the superior is not to be charged; whereupon counsel was heard again, who argued that the declaration shewing that *tempore admissionis & adhuc* he was insufficient was good, and that the finding being in a special verdict, is well also, for it shall not be intended in a special verdict, that he became sufficient after the admittance and escape, and before the action brought. But afterwards Trin. 29, a new *venire facias* was awarded by the Court for the insufficiency of the verdict, and so no judgment given in the case. And some small time afterwards Sir Jeremiah Whitchott died before a new trial could be had, whereby the action abated.

[161] HORSY *against* DANIEL.

Advantage cannot be taken of error in a judgment till it be reversed. Feme executrix survives, she is chargeable for damages recovered against the husband for his *devastavit*, but not for the costs.

Judgment against baron and feme, executors, *quod recuperent debitum de bonis* (omitting *testatoris*) and damages *de bonis propriis* of the husband: and in debt upon this judgment, declaring of a *devastavit*, it was resolved, that though the first judgment be ill, yet it is well enough to maintain this action until it be reversed; for no advantage can be taken of the error while it remains unreversed. *Secondly*, It was resolved, that this action lies not, for though the wife if she survive, is chargeable for the *devastavit* of her husband, yet she is not chargeable for the costs recovered against the husband *de bonis propriis;* and therefore upon demurrer judgment was for the defendant.

HARVY *against* GIBBONS.

Promise to a servant, that if he will release 20l. due to his master, ill.

Error of a judgment in Shrewsbury Court, where the plaintiff declared, that he being bailiff to J. S. the defendant in consideration that he would discharge him of 20l. due to J. S. promised to expend 40l. in repairing a barge of the plaintiff's: verdict and judgment for the plaintiff, upon *non assumpsit* was reversed, the consideration being illegal, for the plaintiff cannot discharge a debt due to his master.

[162] TILLY *against* COLLIER.

[See S. C. 3 Keb. 589.]

One having three daughters, devised the land to his wife till his heir come of age, paying so much to his heir, &c. and so much to the other daughters, the eldest daughter hath the fee as heir. And if Susan my heir die without issue, to the other daughter. Susan is by this tenant in tail. S. C. Lex Testament, 489, 490. 3 Keb. 589.

Ejectment, *non culp.* and a special verdict, whereupon the case was, Remnant being seised in fee of the lands in question, and having three daughters, *scilicet* Susan eldest, Anne and Elizabeth, devised to his wife all his lands till his heir come of the age of twenty-one, paying to his heir 20l. per ann. and to his other children 20s. a-piece in the mean time. *Item*, He gave to Anne and Elizabeth 140l. a-piece, and if Susan his heir die without heirs before twenty-one, so that the land fall to Anne, then Anne shall pay Elizabeth the portion she herself was to have; and if any of her younger daughters die without heir before twenty-one, her portion to be divided between his heir and the other daughter. *Et per Curiam*, upon argument: this is a devise of the inheritance to Susan, and she shall have the whole exclusive of her sisters, by reason of those words in the will, which call her his heir, and often mentioning his heir in the singular number throughout the will; but by the words, if Susan his heir die without heir before twenty-one, so that the lands fall to Anne, then Anne to pay Elizabeth the portion which she herself was to have, this is only an estate-tail, and not a fee-simple.

THE BISHOP OF CARLISLE, &C. *against* WELLS.

Spiritual Court may appoint guardians to infants, having only personal estate. *Vide post*, 217.

Debt by the bishop and his commissary, upon an obligation to them made, conditioned, that whereas the defendant is appointed guardian of an infant by the Spiritual Court, if he safely guard the infant and his estate, and render him a just account of all his goods, lands, &c. to be void. The defendant pleaded that the plaintiffs pretending a power to take such obligation, took this *extorsive colore officii*, whereas they have no such power, and so the obligation void; upon this the plaintiff demurred, and Weston argued for the plaintiff, that the Ordinary **[163]** may appoint a guardian to an infant to take care of his person and estate, and therefore great reason he should be allowed to take security for performance of the trust, both to himself who hath the care of the infant, and to his commissary who is Judge of his Court; and cited Swinburne 102, 106. 2 Rolle 205. And this is not like the case of *The Bishop of Exeter* against *Starr*, where the obligation was taken for caution upon excommunication, for that concerns the King. To which it was answered by Levinz, that if the Ordinary hath power to appoint a guardian or curator to infants that have only personal estates, yet where the infant hath lands as here, he hath not as much power. Swinb. 96, 97, 98. 2dly, If he hath power to take such obligations, yet they ought to be taken to the King, *Bradston's case* Roll. 1 Rep. as the Judges do in the King's Courts, who take all recognizances to the King. 3dly, If the bishop may take obligations they ought to be to him only, not to his commissary, for if he should

survive and afterwards die, the obligation will go to his executors. Hale, As to personal estate, the Ordinary may appoint curators, but cannot as to lands, here are both: and if the Ordinary may take an obligation to himself, it does not follow he may take it to him and his commissary; and he seemed of opinion the obligation was not good. *Sed adjournatur*, and so hung till Trin. 29, when Hale being dead it was moved again, and the Court inclined that the obligation was good.

WELBY *against* HERBERT.

Custom is never triable in the Spiritual Court, custom that all farmers of such a farm use to find cakes and ale at perambulations. S. C. 3 Keb. 606, 609. *Ante* 102, 103. *Post*, 187.

The plaintiff declared upon a prohibition to a suit in the Spiritual Court, that all customs are triable at common law, and that the defendant sued him in the Spiritual Court, libelling, that all farmers of such a farm have used to find cakes and ale at the perambulation of the parish, to the value of 8s. *aut eo circiter*, and avers there is no such custom, and that he so alledged in the Spiritual Court, but they refused the plea; the defendant pleaded that there is such a custom, upon which the plaintiff demurred: *et per Curiam*, adjudged a consultation shall not go in this case, for the custom in farmers is no more than a **[164]** prescription in occupiers, which is not good in matters of charge upon the land, 6 Co. *Gateward's case:* but as to the objection of incertainty in the libel, in saying 8s. *aut eo circiter*, that is not material, for all their proceedings are all so.

MASTERS *against* WOOD.

Traverse *absque hoc que aliter vel alio modo vel al auter lieu* issue thereupon bad.

S. C. 3 Keb. 552, 612.

Trespass for battery and false imprisonment such a day and place. The defendant justified at another day and place, by virtue of a writ and warrant from the sheriff, *absque hoc* that he is guilty *aliter vel alio modo, vel* at any other place. The plaintiff replied that he is guilty *aliter alio & modo*, and at another place. Whereupon issue was joined, and verdict for the plaintiff: but for the badness and incertainty of the issue, upon motion in arrest, judgment was stayed, and a repleader awarded.

ADDERLY *against* WISE.

Action laid in London, and issue upon a feoffment in Oxfordshire, tried at London.

Covenant, and declared, that the defendant Thomas Wise conveyed to him the manor of Steeple-Burton in com. Oxen. and covenanted against himself, William Wise his father, Eldred his mother, and all claiming under them, and says, before the defendant had any thing in the land, Wild and Darby were seised, and conveyed the same to Gerard Croker in fee, who conveyed to William and Eldred, the father and mother of the defendant, and to the heirs of the mother; and that by their death it descended to Wm. Wise, eldest brother of the defendant; and that he conveyed to Rowny and his heirs; and that afterwards William the brother conveyed to the defendant and his heirs, and so assigns for breach, that the defendant when he conveyed to the plaintiff had no title. The defendant confessed the seisin of Croker, but sayeth, that before the feoffment to his father and mother, Croker infeoffed Crook and Brampston, and after entered upon them, and infeoffed his father and mother, and that Crook and Brampston entered upon **[165]** them, and were seised *de pristino statu*, that his father died and his mother survived, entered and disseised Crook and Brampston, and died seised within five years after, and the tenements descended to his brother William, and he infeoffed Rowny, and that Crook and Brampston entered and infeoffed the defendant whereby he was seised, and being so seised, conveyed to the plaintiff, *prout, &c.* The plaintiff maintained the seisin of Croker, and so made title as he declared, *absque hoc*, that

Croker enfeoffed Crook and Brampston, and so issue joined upon the feoffment. And this action was tried in London, whereas the action was local, supposing the conveyance to the plaintiff to be made there. And after verdict this was moved in arrest of judgment to be a mistrial, for a feoffment in Oxfordshire, of lands there, is local and ought to be tried there. But per Vaughan Chief Justice & *Curiam*, resolved this is cured by the Statute of Jeofails, 17 Car. 2, by the express words thereof, being tried in the county where the action is brought, & *vide* 1 Saund. 246. Trin. 22 Car. 2, B. R. Rot. 902, *inter Croft and Boil* in case for words at London, justification at Oxford, issue upon the justification, and tried at London, where the action was brought, and adjudged to be cured by this Act.

BULL *against* PALMER.

Executor upon account with himself non-suit, shall not pay costs. S. C. 2 Jo. 47. 3 Keb. 626, 643. *Ante* 161.

Assumpsit, and declares that the defendant covenanted with him, being executor to J. S. as executor, upon which account so much was due, and he promised to pay it. Upon *non assumpsit* the plaintiff was nonsuit, and the question was: if he should pay costs? Wylde held that he should pay costs, because he does not sue as executor, nor produce the will, but founds the action upon an account with himself. Rainsford Chief Justice, Twysden and Jones Justices *contra*: for the action is in the right of his executorship, and the money recovered will be the assets; and they gave judgment accordingly.

[166] COPLEY *against* DORKMINCQUE.

Statute of Limitations is no plea to debt by assignee of commissioners of bankrupt. Plaintiff discontinues after argument. S. C. 3 Keb. 625, 645. *Q.* 3 Lev. *Vide post*, 209.

Assumpsit as assignee of the commissioners of bankrupts, for a debt due by contract to the bankrupt. The defendant pleaded *non assumpsit infra sex annos*, and the plaintiff demurred. And Weston argued, that the Statute of Limitations extends not to this case, the debt being assigned by virtue of an Act of Parliament, and said it was so adjudged in 1653, whereupon a day was given to shew that record. But after for a default in the declaration, the plaintiff had leave of the Court to discontinue.

STRANGE *against* GREENHIL.

Debt *sur* obligation of 50l. and the obligation was *quantoginto libris*. S. C. 2 Jo. 48. 3 Keb. 644.

Debt and counts upon an obligation of 50l. The defendant demands oyer of the obligation, which was *noverint, &c. me teneri in quantoginta libris*, and then demurs, and judgment was given for the defendant, for this variance and insensibility of the word *quantoginta*.

[167] TERM. SANCT. TRIN. ANNO 28 CAR. II. IN BANCO REGIS.

ATTORNEY GENERAL *against* MATTHEWS IN CHANCERY.

General charities are not within the power of the commissioners but of the King himself, and to be settled on information in Chancery by the King.

Upon a decree made by the Commissioners of Charitable Uses, being brought hither, and exceptions taken thereunto, the case was: Henry Frier seised in fee 7 Car. 1 infeoffed several persons in trust, and by his will appointed they should pay 100l. per annum to three parishes in London, *scilicet* A. B. and C. for the poor of those parishes; and likewise appointed some other charities now determined, and of the residue he

declared they should stand seised to the use of the poor in general for ever: after the death of Henry Frier, Dr. Frier his son and heir whom he disinherited upon some displeasure, contested this settlement and will in the Court of Wards, 8 Car. 1, and at last the matter was referred to the King: who by the advice of the Archbishop of Canterbury, and the Lord Keeper Coventry awarded, that the hundred pounds per annum should be distributed to the three parishes, *scil.* 20l. to A. and 40l. apiece to B. and C. and that 80l. per annum for ever, should go to the rebuilding and repair of the church of St. Paul's London: the residue to Dr. Frier and his heirs; this award was confirmed by several orders in the Court of Wards, but no formal decree was made, neither there nor in the Court of Chancery, where the King in his award ordered it should be settled by decree also. And the trustees were to convey the lands subject to these uses to Dr. Frier, and the land **[168]** having ever since been enjoyed by him, and the trust performed, accordingly the Commissioners of Charitable Uses upon complaint to them, made a decree, whereby they settled the whole estate to charitable uses, without regard to former proceedings, the King's award, or the former orders of the Court: and this decree of the commissioners was now quash'd by the Lord Keeper Finch, because this being a general charity, and for the poor in general, the commissioners have nothing to do with it, but it is to be determined by the King himself in this Court, upon an information by the Attorney General in behalf of the King, which accordingly he directed to be brought. And now upon the information the Lord Keeper said, this general charity belongs to the King himself to dispose, but yet to the poor. And therefore the disposal of 80l. per annum to Paul's, was out of the trust, and void; and the distribution to the three parishes good, and to be confirmed. But as to the poor kindred of Frier, who prayed to be considered, no consideration he said could be had of them, for the disposition must be such as may endure for ever, and they cannot live poor for ever. But before he would dispose of the residue, he said he would acquaint the King with the case, and the value of the estate, which appeared to be 400l. per annum at least, to have his directions how the disposition of this general charity should be, and that to be confirmed by the decree of this Court. And afterwards the King directed it should go to the maintenance of the mathematical scholars in Christ's Hospital, whom the King had lately appointed to be brought up there in order to be instructed in the art of navigation; which, *ut audivi*, was accordingly confirmed by the decree of this Court. Levinz for the defendant.

[169] BROWNE *against* WAYTE.

What words in Acts of Parliament extend to make a forfeiture of estates-tail.
S. C. 2 Jo. 57. 2 Mod. 130. Poll. 181.

Ejectment upon a lease of the manor of Daventry, upon the demise of John Danvers, son and heir of Sir John Danvers: and upon *non culp.* a special verdict, wherein the case was: Sir John Danvers upon a settlement made before the 25th of April 1646 was seised in tail the remainder to his right heirs. He after the year 1646, levied a fine to the same uses without alteration, except only a power to make leases to raise money for payment of debts and portions; and 5 April 1655 died; and being one of those persons who gave judgment of death against King Charles I. By the general Act of Pardon 12 Car. 2 it is provided, *That nothing in this Act shall extend to discharge the lands, goods or chattels of Sir John Danvers*, and others therein named *from being forfeit.* And after by another Act of the same Parliament it is enacted, *That all the manors, messuages, lands, tenements, possessions and reversions, remainders, rights, interests, hereditaments, leases, chattels real*, and other things of what *nature soever*, that Sir John Danvers, or any other to his use, or in trust for him, had 25 March 1646, or at any time after, shall be forfeited to the King. Whereupon two points were started. *First*, Whether by this latter statute this estate-tail was forfeited to the King? Against which it was argued, that estates-tail were never forfeitable for treason before 26 H. 8, c. 13, and not then neither by the general words of *lands, tenements and hereditaments;* but by the particular words of *any estate of inheritance whatsoever*, which included tail-estates. But this statute extends to cases of attainder only, and therefore will not reach this case: for Sir John was never attainted; which shews also that

the Parliament intended not to be so severe in the case of Sir John Danvers, as it had been against other persons guilty of the same crime, whom the Parliament attainted, though dead. And that lands intailed were never forfeited by Acts of Parliament, which gave the forfeiture of lands, tenements and hereditaments by general words, **[170]** were cited statute 25 E. 3 de Treason, which declares all lands and tenements to be forfeited to the King by treason; 27 E. 3, 5, makes all lands forfeited for drawing men to foreign pleas; 15 R. 2, 5, makes all lands and tenements forfeit for bringing into this realm excommunications from Rome; 13 R. 2 for accepting benefices out of the realm; and the Statute of Præmunire makes a forfeiture of all lands, tenements and hereditaments; and yet none of these extend to lands intailed, Co. Litt. 130. 11 Co. 63 b. *Trudgeon's case*, & Co. Litt. 393 b. Intailed lands were never forfeited by any thing till statute 26 H. 8 in cases of attainder of treason, and that not by the general words *all lands, tenements and hereditaments*, but these there following, or *any estate whatsoever*. 2d Point, Whether by the fine levied after the treason committed (though it be to the old uses in tail) and the seisin in fee which he gained at the instant of levying the fine, this forfeiture shall take place as a charge upon the land precedent to the new intail? Against which it was argued for the plaintiff, that this instantaneous seisin was not forfeitable nor chargeable: for it is *revera*, no more than a fictitious seisin, not regarded in law, Co. Litt. 31. A wife is not endowable thereof, 2 Cro. 615. Tenant in special tail took a second wife, and made a feoffment, she is not endowable. But for the defendant it was argued, that an estate-tail is here forfeited by the words of the statute, *all interests*, which are as comprehensive, *as any estate whatsoever*, in stat. 26 H. 8. And the intent of the Parliament could not be other than to give estates-tail as forfeited, that the penalty might be answerable to the crime of the King's murder. And in stat. 12 Car. 2, where some of the regicides are attainted, the same words of forfeiture, as here, are used; and all the difference intended by them was only to spare corruption of blood in the one case, and not in the other; but to make both liable as to the same forfeitures: and it may be for any thing appears to the contrary, Sir John Danvers had no lands but what were entailed; and then there is no penalty at all upon him, neither by corruption of blood or forfeiture of estate. To this opinion some of the Judges seemed inclinable. But as to the other point they held, that the forfeiture could not attach upon the *instantaneous* seisin gained by the fine. *Et adjournatur.* And **[171]** afterwards in Michaelmas term, the judgment of the Court was delivered by Rainsford Chief Justice, that the plaintiff ought to be barred upon the first point. Upon which judgment a writ of error was afterwards brought in 1690, in the Exchequer Chamber, and the judgment affirmed: and afterwards 1691, error thereupon was brought in the House of Lords, and there again affirmed by a majority of two or three voices. Levinz for the plaintiff, and Sir John King for the defendant in the first argument *in Banco Regis.*

Nota, This judgment was afterwards 1 W. & M. affirmed in Parliament by one voice only.

ATTORNEY GENERAL *against* SIR EDWARD FARMEN, IN THE EXCHEQUER CHAMBER.

King granted derelict lands, and all lands *contigue adjacen'* which hereafter at any time should be recovered from the sea: *non obstante non nominando valorem, quantitatem, sive qualitatem;* lands derelict after shall not pass. Raym. 241, 242. 2 Mod. 106.

Information by English bill, for lands derelict upon the sea-coast, wherein the case as drawn by consent of the parties was: King James I. granted to J. S. certain particular *marsh* lands bordering upon the sea. *Et ex uberiori gratia* granted, *omne solum, fundum, terram, arenam, terram mariscal' contigue adjacen' præmissis, quæ modo inundat' vel aqua maris cooperta existunt, & quæ ad aliquod tempus imposterum recuperat forent per relictionem maris, vel aliter alio quocunque modo, non obstante non nominando valorem, quantitatem sive qualitatem.* After this 100 acres became derelict by the sea adjoining to the marshes before particularly granted, and whether it belonged to the King or the patentee? was the question. It was argued that the King should have it. *First,* Because the King had not these 100 acres since become derelict, and could

not grant that which was not in him to grant. *Secondly*, This is to pass a parcel of lands which the King has by his prerogative, which cannot pass by general words. *Thirdly*, If any thing shall pass it must be only so much as a line borders upon the parcels before granted; otherwise should the sea by recession leave ten or twenty miles of sand, what must be the boundary? Surely the patentee is not to have all this extent of soil. To this it was answered, that the King may grant that which is not actually in him at the time of the grant, as it is in Dyer 108 **[172]** a. 252 b. the marriage of a ward *quando acciderit*, and yet the King too hath the ward in right of prerogative. 2. Here is as much certainty as the fact was capable of; no number of acres or description of the soil, *quia non constat* what it would be, and to say that in that respect the grant is not good, is to argue against the prerogative, and to make the King in a worse condition than the subject, *scil.* that he hath lands, but cannot grant or dispose of them. 3dly, The *non obstante* will make it good, if not good without it; for it is *non obstante non nominando valorem, qualitatem sive quantitatem*, which implies all the objections which are or can be against the grant, 4 Co. 4 b. particular *non obstante* in letters patents, cure all defaults for want of information in the King; and here is a particular of all things whereof the King ought to be informed, but cannot by reason of the nature of the thing. 4thly, The words *contigue adjacen'* include all which in any part adjoins, if not unknown; as one close is said *contigue adjacens* to another, and yet in fact it is not the whole close, but the skirts of it that is *contigue adjacens* in a line. *Sed postea*, Montague Chief Baron & *Curia*, with the advice of the Chief Justices Rainsford and North, held, that nothing passed by these general words; but the patent as to the 100 acres which became derelict after the patent, was void. Sawyer *pro Rege*, Levinz for the patentee.

MICHAEL *against* ALESTREE, &c.

Case against the master and servant, for that the servant brought a coach into Lincoln's-Inn-Fields, with two ungovernable horses, to train them, which run over the plaintiff, &c. S. C. 1 Vent. 295. 4 Keb. 650.

Case, for that the defendants in Lincoln's-Inn-Fields, a place where people are always going to and fro about their business, brought a coach with two ungovernable horses, *& eux improvide incaute & absque debita consideratione ineptitudinis loci* there drove them to make them tractable and fit them for a coach; and the horses because of their ferocity, being not to be managed, ran upon the plaintiff, and hurt and grievously wounded him: the master was absent, yet the action was brought against him as well as his servant, and both found guilty. And now it was moved in arrest of judgment, that no *sciens* is here laid of the horses being unruly, nor any negligence alledged, but *e contra*, that the horses were ungovernable: yet judgment was given for the plaintiff, for it is alledged that it was *improvide & absque debita* **[173]** *consideratione ineptitudinis loci;* and it shall be intended the master sent the servant to train the horses there.

TRACY *against* SMITH.

Distribution equal between the whole and half blood. S. C. 1 Vent. 307, 316, 323. 2 Jo. 93. 2 Vent. 317. 3 Keb. 669, 730, 776, 831.

Prohibition. One died, having brothers A. B. and C. of the whole blood, and D. E. and F. of the half blood. Administration was committed to A. and the Ordinary would bind him to distribute equally between those of the whole, and those of the half blood: this was argued at Bar several terms, and for the prohibition 'twas urged, that the Judges of the Common Law are to judge of Acts of Parliament, and half blood is not regarded at common law; the one cannot be heir to the other, nor can the testator or intestate be presumed to have the same affection for the half blood, that he had for the whole; and therefore unreasonable the Ordinary should give them equally a like share of the estate. Farther, the statute is silent as to the point, whether half blood be of kin; it only appoints division shall be made between the kindred of equal degree; and therefore the common law is to determine who is of kin,

and what are the equal degrees of kindred; but which were cited Fitz. Devise 9. 2 Roll. 303. For the consultation 'twas argued, that the statute being only for a distribution of things *testamentary*, it must be construed according to their law. And a brother of the half blood is a brother, as well as a brother of the whole blood; and our law takes notice of this, and therefore allows that a brother of the half blood may be a guardian, as Owen & 3 Cro. *Swan* against *Gateland*. And this statute is, that they ought to distribute according to the law in force, and our law makes no mention of distribution; therefore the law in force must be intended the canon law. And they cited also 2 Roll. 303, and Style 74, 75. And Trin. term. 29 Car. 2, 'twas said at Bar, that the Spiritual Court gave the half blood half shares, which Rainsford and Wylde held reasonable, & *postea* Mich. 29, a consultation was granted: *quære tamen* whether generally or with an *ita quod* they gave but half shares to the half blood: for ever since their constant course is to divide equally between the whole and the half blood; and that has been approved since in the Courts of Westminster.

[174] MAYOR, &C. OF LONDON *against* GORRY.

Assumpsit for scavage without express promise. S. C. 1 Vent. 298. 3 Keb. 480, 491, 677. *Ante* 142. 1 Danv. 27, 7. 1 Show. 35.

Assumpsit for money due by custom for scavage: upon *non assumpsit* the jury found the duty to be due, but that no promise was expressly made: and whether *assumpsit* lies for this money thus due by custom, without express promise? was the question: resolved it does, and judgment for the plaintiff.

ALLEN *against* RESCOUS.

Assumpsit to beat one, naught. *Vide* 1 Cro. 113, 195, 245, 246. 11 Co. 53, 54. 2 Jo. 24.

Assumpsit, in consideration that the plaintiff would give him 20s. to give the plaintiff 40s. if he did not beat J. S. out of such a close; and that he gave the defendant the 20s. but he did not beat J. S. out of the close. Verdict for the plaintiff, but judgment was stayed, for the consideration and the whole contract is illegal and void.

GOLD *against* CUTLER.

Justifies the imprisonment *per breve return'* 15 *Martini:* plaintiff replies, and shews a writ *return' octabis Martini*, and traverses 15 *Martini*.

Debt upon an obligation to the sheriff, conditioned to appear *octabis Martini ad respondend', &c.* Defendant pleaded the stat. 23 H. 6, and that he was taken and imprisoned *virtute brevis return. quinden' Martini*, and that the obligation was taken for ease and favour. The plaintiff replied, *auter briefe return. octabis Martini*, and that he was taken and imprisoned upon that, *absque hoc* that he was in prison *virtute brevis return' quindena Martini*. The defendant demurred generally. And now Saunders argued the traverse was ill and immaterial; for it matters not, whether any writ was returnable *quindena Martini* or not: but he should have concluded *et hoc paratus est verificare;* and left the defendant to traverse the writ returnable *octabis Martini;* and **[175]** upon this traverse no good issue can be taken, for it is not material, whether any writ was returnable *quindena Martini* or not; the only material thing to maintain the goodness of the obligation is this, that the writ was returnable *octabis Martini. Sed per Curiam*, If the traverse be immaterial, the defendant waiving that, should have traversed the writ being returnable *octabis Martini*. But they held the traverse was well enough in this case, it being taken to be the most material thing pleaded in bar to avoid the obligation; and they gave judgment for the plaintiff. *Vide Bennet and Filkin's case*, Mich. 18 Car. 2, B. R. *Sed intrat.* Trin. 18, Rot. 1172.

[176] TERM. SANCT. MICH. ANNO 28 CAR II. IN BANCO REGIS.

DOBSON *against* BELL.

Trover laid the first day of Easter term, and the declaration was of the same term. S. C. 2 Jo. 87. 3 Keb. 693. For declarations in trover.

Trover for goods supposed by the declaration to be converted 20 April; and the declaration was generally *de termino Paschæ*, and Easter term this year began 20 April. Whereupon after verdict *pro quer'*, this matter was moved in arrest of judgment: but on making it appear that the bill was filed, and the declaration also delivered, both after the 20th of April, the judgment was entered for the plaintiff, without any amendment; for though the declaration being general, relates to the first day of the term, yet the bill being filed at a day after, all relates to the filing of the bill by the course of the Court; of which course if error be brought, the Court where the error is brought, will take notice, as the custom of this Court. And a precedent was produced, where it was so done. *Vide* Trin. 27. *Ante, Hutchinson* against *Thomas;* & Trin. 23, *Castle vel Tatlow* against *Bateman.*

HICKS *against* PENDARVIS.

Trover de ampullis, but say not how many & *de parcella lintea.*

Trover inter alia de ampullis Anglice bottles, without shewing what number, & *de quadam parcella lintea:* after verdict and intire damages, judgment was stayed for the incertainty.

[177] MORE *against* FINCH.

Sheriff's bond to appear *coram Majestate Sua apud Wesmonasteriam;* and to answer a bill of 100l. not saying whose bill. *Vid. post.* 180. *Ante*, 123. 2 Show, pl. 38.

Debt upon obligation, conditioned to appear *before His Majesty at Westminster, Wednesday next after three weeks of Easter, to answer Sarah Asly of a plea of trespass, and also of a bill to be exhibited against him for* 100*l.* The defendant pleaded the statute of H. 6. and shewed that the writ was to appear *coram domino Rege apud Westmonasterium ad respondend' Sarah Asly de placito transgressionis, ac etiam billæ versus ipsum exhibend' pro centum libris.* The plaintiff demurred, and upon argument the Court was of opinion against him: 1. For that the condition of the obligation was to appear *coram Majestate Sua apud Westmonasterium*, whereas it ought to be *coram domino Rege.* 2. Because it is not expressed in the condition at *whose bill* he is to answer, and it ought to be a bill *ipsius Sarœ exhibend';* as it is, it does not appear to whose bill of 100l. he is to answer.

DUNWELL AND WIFE *against* BULLOCK.

Trover de ferramento, Anglice a range, naught. 1 Vent. 304. *Vide* pag. precedent.

Trover inter alia de uno ferramento, Anglice, an iron range. Verdict for the plaintiff and intire damages, and it was moved in arrest of judgment, that *ferramentum* is a word too general; for it signifies *any iron tool whatsoever.* Sty. 313, 327. *Trover de quodam instrumento ferreo, vocat' a pair of fetters*, or a *horse-lock*, or a *brand-iron*, naught. And there is a proper term in Latin for a *range;* for if so be he means the *grate, cratis* is Latin for it; if the *broach* or *rock* upon which the spit turns, *crateuta* or *crateutorium* is Latin for it; and judgment was staid.

[178] HORE *against* THE EARL OF DORSET.

Issue in two counties tried in one.

Debt against him as heir to his father upon an obligation. He pleaded *riens per discent prœter* the reversion of certain lands in Herefordshire and Worcestershire,

expectant upon the life of A. and judgment thereupon against him upon his confession of assets. A. died, and now in a *scire facias* against him upon this judgment, he pleaded, that B. was seised of those lands, until C. disseised him and infeoffed his father, who demised to A. for life: after whose death B. entered and ousted him; and issue being that *B. did not enter*, it was tried by a jury of Herefordshire, and verdict for the plaintiff. Upon which it was moved in arrest of judgment that this was a mis-trial, for it should have been tried by both counties by several *venire's;* for which judgment was staid at present.

Note 1. This seems cured by stat. 21 Jac. which says *where the venue is of one place where it ought to be of more;* and does not restrain it to one county, so that it may well extend where the places are in several counties, according to the opinion of Hale in *Jennings and Hawkins's case, ante* 26 & 27 Car. 2. 2. This is in debt against the *heir*, wherein damages, which are *several*, are not to be recovered, but the debt itself, which is *intire;* and if his plea be falsified in any part, the whole debt must be recovered; and his plea is falsified here by a jury of Herefordshire, where part of the lands lie, who are proper jurors as to that part. *Quære.*

UNDERWOOD *against* SAUNDERS.

Prescription for him & *quibusd' aliis tenentibus de manerio Irtlingborough.* 1. *Quibusd'* incertain. 2. *Ne nom. le manor.*

Case, and declares that he was seised of such lands, and that he and all those whose estate he had, *simul cum quibusdam aliis tenentibus tent' per copiam curiæ de manerio in Irtlingborough*, time out of mind, &c. have had *solam pasturam* in such a close, from such a time until such a time; and the defendant disturbed him. The defendant demurred generally upon the declaration, and took these exceptions. 1. That *cum quibusdam aliis tenentibus* is uncertain, both as to what kind, and what number of tenants. 2. *De manerio in* **[179]** *Irtlingborough* is also uncertain what manor: for several manors may be in one vill, and every manor hath a particular name: for which reasons the Court held the declaration ill, and gave judgment for the defendant. Levinz counsel for the defendant.

THE KING *against* MOORE.

Information in B. R. upon the Statute of Ph. & Mar. for taking a woman out of the custody of her guardian. S. C. 3 Keb. 708, 715.

Information for that the defendant and others, *existentes* above the age of 14 *ceperunt*, one A. then being a virgin unmarried, possessed *de bonis movilibus*, and seised of lands of great value, out of the custody of her mother, *contra formam statuti.* After verdict for the King it was moved in arrest of judgment; 1. That it is said the defendants were above the age of 14, at the time of the caption; for *existens* or *being* refers to the time of the information, not of the caption, as in the cases of *forcible entry, existens liberum tenementum* refers to the time of the indictment, not to the time of the entry. *Sed non allocatur:* in these cases the *existent'* follows the verb *ipsum disseisivit* of such and such land *existent' liberum tenementum;* and so may be his freehold after the disseisin: but here the *existens* precedes the verb *ceperunt*, and so it is tied up, and must relate to the time of the caption. 2. The information is possessed *de rebus movilibus*, and it ought to be *mobilibus*, for there is no such word as *movilibus: sed non allocatur:* the seisin of the lands is sufficient without the goods. 3. This information lies not in this Court; for the Statute of Philip and Mary directs the punishment to be in the Star-Chamber, or before Justices of Assize by fine and imprisonment; therefore it lies not in this Court upon the statute; and it cannot be maintained as an offence at common law, because of the conclusion *contra formam statuti: sed non allocatur:* for though the statute appoints the examination in the Star-Chamber, &c. yet there are no *negative words*, and therefore this Court is not excluded. Hereupon they gave judgment for the King, and fined the defendant 500l. and committed him till he paid it: and thus the doubt in *Mary Smith's case* 1 Cro. resolved.

[180] KIRBRIDE *against* DYKE.

Writ is to appear *coram dom' Rege at Westminster;* condition of the sheriff's bond to appear before His Majesty's Justices of the King's Bench at Westminster, good. *Vide ante*, 123, 177. 2 Show. pl. 38.

Debt upon an obligation of 2000l. to the Sheriff of Cumberland, conditioned to appear before His Majesty's Justices of the King's Bench at Westminster *die Mercurii post tres septimanas Sancti Michael' ad respondend' Annæ Curwen viduæ in placito transgressionis, ac etiam billæ ipsius Annæ* against the defendant *pro mille libris.* The defendant pleaded the statute of H. 6, and shewed the writ was to appear *domino Rege apud Westmonasterium, &c.* and that the obligation was given for ease and favour. The plaintiff demurred, and now it was argued for the defendant, that the obligation was void; not being made according to the *writ*, which is to appear *coram domino Rege*, whereas the obligation is to appear *coram Justiciariis domino Regis de Banco Regis.* To which it was answered, that the statute was made only to prevent extortion and oppression by the sheriff, and not to tie the sheriff up to strictness of forms, so long as the thing be satisfied in substance; and that words in *deeds* or *obligations* are to be taken according to common parlance, as in Cro. a submission to an award, so that it be made before the first day of the term, and the award was made after the *essoin*, but before the *quarto die post*, and good; for in vulgar acceptance the *quarto die post* is the first day of the term: so here, *coram dom' Reg' apud Westmon'* is in common parlance before *His Majesty's Justices of the King's Bench at Westminster;* and all one. And if the party had pleaded *comparuit ad diem coram domino Rege apud Westmon' secund' exigen' brevis*, it had been sufficient. And 2 Cro. 286, *Villiers Sheriff of Leicester* against *Hastings*, niceties are not to be favoured in sheriffs bonds so long as they contain such certainty that the defendant may know where to appear: upon the view of which case of Cro. the Court was of opinion and gave judgment for the plaintiff: but the matter being formerly moved in Hale's time, and he then doubting, the defendant brought a writ of error in the Exchequer-Chamber, where Hill. 28 and 29 it was argued again, **[181]** and most part of the Judges were for affirming the judgment. But North Chief Justice *de Com. Banc.* being strongly against it, the case was thereupon adjourned till *Pasch. prox.* Levinz for the plaintiff in the action.

BULL *against* KNIGHT.

Smith's forge to pay chimney-money, not a blowing-house.

Trespass for taking his goods, and upon *non culp.* the jury found a special verdict, and therein the Statute of Chimney-money, which does enact, that for every *fire-hearth* shall be paid 2s. per annum, proviso, that the Act shall not extend to any *blowing-house, stamp* or *kiln.* And that the plaintiff had a *smith's forge*, which cannot be used without bellows to blow the fire; and because the plaintiff would not pay 2s. for it, the defendant collector of the *chimney-money*, took the goods as a distress for the 2s. *& si, &c.* And upon argument by the King's Counsel for the defendant, no one appearing for the plaintiff, judgment was given for the defendant, for a *blowing-house* is a house where iron, lead, or tin is cast or melted, to which the proviso extends, but not to a smith's forge.

[182] TERM. SANCT. HILL. ANNO 28 & 29 CAR. II. IN BANCO REGIS.

ABRAM *against* CUNNINGHAM.

[Considered, *M'Dougal* v. *O'Shaughnessy*, 1868, Ir. R. 2 C. L. 162. Distinguished, *Boxall* v. *Boxall*, 1884, 27 Ch. D. 220. Explained and not applied, *Fitzpatrick* v. *M'Glone* [1897], 2 Ir. R. 545. Explained and applied, *Ellis* v. *Ellis* [1905], 1 Ch. 613.]

Ordinary grants administration where there is a will and executors, but concealed. it is void, and not made good by the executor's renunciation afterwards. S. C. 1 Vent. 303.

Ejectment; wherein upon *non culp.* and a special verdict, the case was: David Cunningham being possessed of an *interesse termini* for 30 years to commence in 1671,

made his will; and made another David Cunningham his executor, and died in 1659. David the executor, 8 October, 1661, made his will, and Ninian Cunningham and Andrew Hays his executors, and 15 September, 1665, died, having proved the will of the first David. The Ordinary not having notice of the *last* will 14 Feb. 1665 granted administration *de bonis non* of the first David, *non administratis* by the second David to Bradborne a creditor of the first David, no probat being made of the will of the second David. 21 Octob. 1671 Hays the surviving executor renounced the will of the second David before the Ordinary, whereby the first David died intestate. 1 March, 1672, Bradborne for 1000l. assigned the term to Lovelace. 11 Feb. 1673, Bradborne was sued by citation to repeal the administration committed to him, and the 13th of February, 1673, the administration was repealed and committed to Cunningham the defendant, who entered; upon whom Lovelace re-entered, and made the lease to the plaintiff, whereupon the action is brought. And whether the plaintiff or defendant hath the better title? was the question, which was argued by Saunders for the plaintiff; and two things were admitted by him; 1. That where an executor is *in* **[183]** *esse*, who after proves the will, administration granted in the mean time, without notice of the will, and all mean acts done by such an administrator are void, according to *Greysbrook and Fox's case*, Plowd. Com. 2. Where administration is granted to one who disposes of goods, and his administration is repealed afterwards by citation, as here; all mean acts done by him are good, as *Packman's case*, 6 Co. But thirdly, he said this is a *middle case*, for here is an executor *in esse* and a will at the time of administration granted. But the executor renouncing afterwards, especially before the grant to Lovelace, hath made that good *ab initio*, and consequently the sale of the term also; although the administration be afterwards repealed upon the citation. Levinz answered, that the grant of administration, there being an executor *in esse*, was utterly void, and not voidable, and so could not be made good by the renunciation, and this for two causes: 1. Where there is a will and executor *in esse*, the Ordinary hath no power to commit administration, but as he is enabled by the statutes of the realm, 9 Co. *Hensloe's case*. Now the statute of the 31 Ed. 3, 11, is, that where a man dies intestate, the Ordinary shall commit administration to his next friends. The Ordinary then hath no power by this statute till the party dies intestate, which was not in this case till the executor had refused. And the statute of 21 H. 8, 5, is more plain; for that is *in case any person die intestate, or the executors refuse, then the Ordinary shall commit administration.* When then shall he commit? When the executor refuses. By the death of the testator the executor hath immediately the property of the goods in him, and may either grant or release before *probate*, though he cannot maintain an action, 5 Co. *Middleton's case*. How then can the Ordinary vest the property in another by granting him administration? For there cannot be two several properties in several persons in the same thing. Suppose the executor sell to one, and the administrator to another, and afterwards the executor refuse, which of the two vendees should have the goods sold? Doubtless the vendee of the executor. 3dly. If the administration was void *ab initio*, no subsequent matter could make it good; for things voidable may be made good by matters subsequent, but things void cannot; Co. Litt. 215 a. 3 Co. 64 b. Dyer, 339, 240. 1 Co. 62. Bishop makes a lease for four **[184]** lives, one of which determines in the life of the bishop, yet the lease is not made good as to the successor. The Court were strongly of opinion for the defendant, that the administration was void at first, and was not made good by the renunciation of the executor; and therefore the sale by the administrator, though made after the renunciation was void, and gave rule for judgment for the defendant, *nisi causa* before the end of this term. But after upon the importunity of Pemberton to be heard to this point the next term they gave him leave accordingly. But he not arguing it next term, the rule was made absolute, and judgment given for the defendant.

HIPPSLY *against* TUCKE.

Judge of an Inferior Court has not taken the oath, &c. according to stat. 25 Car. 2, &c. yet his judgment is not void, and cannot be assigned for error. S. C. 2 Jon. 81. 3 Keb. 606, 665, 682, 721. 3 Blac. Abr. 471. *Post.* 242.

Error of a judgment in Newberry Court; and it was assigned, that the mayor who was Judge there had not taken the oath and sacrament according to stat. 25 Car. 2, for which his office was void before the judgment given, and so the matter *coram non Judice*. To which it was answered, that this is not matter assignable, being contrary to the record, whereby he is taken and admitted to be Judge, 2 Cro. 359. 3 Cro. 320. Also though the statute make the office void, yet that is only *quoad* himself, to subject him to a fine for meddling in the office; not *quoad* strangers, who may not know whether he had taken the oaths or not, to make his judgments void to their prejudice: farther it was said, that he is *de facto* a Judge, which is sufficient; as if a steward *de facto* admits a copyholder, the admission is good, though he was not *de jure* steward. But to this it was replied, that the statute in making the office *void* makes it *void* to all purposes touching the jurisdiction, and then this matter is assignable, though contrary to the record. 2 Roll. 761. Of which opinion was the Court now, and reversed the judgment. But afterward Hill. 30 & 31 Car. 2, *inter Denning and Jennings*, which is entered Pasch. 30 Car. 2, B. R. Rot. 391, it was adjudged *contra*.

[185] ASTRY *against* BALLARD.

By a lease of land and mines, wherein some are open and some not, those open pass only. S. C. 2 Jon. 71. 3 Keb. 709, 723, 761, 765, &c. *Vide* Plowd. case of *Mines*.

Trover, upon *non culp.* and a special verdict, the case was, one seised of land wherein were some mines open, and some not open, by indenture demised the *lands* and *mines* therein to the defendant, who opened a new *coal mine*, not open before, and there dug the coals for which the action is brought; and whether in this case by the demise *lands and mines* he could open new *mines*, or not? was the question. For the plaintiff it was said, that he could not, and Co. Lit. 54 b. cited: a lease of *lands* and *mines*, some open, and some not; those only which are open pass, being sufficient to satisfy the words, and the lessee cannot open *new mines:* so if a man demise land and *timber*, the lessee is not impowered to sell timber. 11 Co. *Liford's case*. By such general words lessees shall not have power to commit waste; where it is intended to invest him with such power, there ought to be express words in the grant to that purpose, as in this case, *mines open or not open:* for the defendant it was answered and agreed, that Co. Lit. 54 b. is, as was cited; but to warrant his opinion he cites *Saunders's case*, 5 Co. which does not warrant it; for there it is expressly said, that by a lease of land *mines open* will pass, not that by a lease of *land and mines*, *mines not open* will not pass; and if by a lease of land only *mines open* pass, and by a lease of *land* and *mines*, *mines not open* do not pass, the word *mines* will signify nothing in the case; for by a lease of *land and mines* nothing but the land *mines open* pass, and so they would by a lease of the lands only: this then is only the opinion of Coke in his comment upon Littleton, not warranted by *Saunders's case*, nor any other; for all the former books say, that by a lease of *land* and *mines* the *mines* pass, not making any distinction, whether open or not open. But the Court held, that by the words *land* and *mines*, there being *mines open* at the time of the demise, no *mines* pass but those open, and gave judgment for the plaintiff. Simpson and Pemberton for the plaintiff; Levinz for the defendant.

[186] WIFE *against* CREEKE.

Repair of the parish chapel sufficient to exempt from repair of the parish church. 3 Keb. 727, 791, 809. *Ante* 102, 163.

A prohibition was prayed this term to stay a suit in the Spiritual Court by the *churchwardens* of Adderbury *in com. Oxon.* against the inhabitants of Bodecut, a village

within the parish of Adderbury, for repair of the parish church ; *suggesting*, that they have a chapel parochial and rights parochial, and *ratione inde* have time out of mind been discharged from repairing the parish-church. The Court granted a *prohibition*, but ordered the plaintiff to declare thereupon, that the matter might come judicially in debate, whether such custom be good or not? Accordingly the plaintiff declared, that time out of mind they have had in Bodecut a chapel parochial, or church of Bodecut *infra parochiam de Adderbury ;* in which time out of mind there has been a body of a church, a chancel, *campana & omnia alia parochialia trophæa*, and divine service and sacraments, and a distinct perambulation for Bodecut, separate from that of Adderbury, and that the inhabitants of Bodecut never go to the church of Adderbury, nor have seats there, and that the inhabitants of Bodecut have distinct church-wardens, and make no other use of the church or church-yard of Adderbury, *nisi tantum pro sepultura ;* and that time out of mind they have repaired their parochial chapel or church of Bodecut, and the inhabitants of Adderbury have been freed and exempt from this charge, and *ratione inde* time out of mind they have been freed and discharged from repairing the church of Adderbury, and yet the defendants libel against them to repair the church of Adderbury. Upon this the defendant demurred, and for the plaintiff it was said, that a general prescription without cause to exempt from repair of the parish church is not good, for every parishioner is liable thereto of common right. 2. The cause here ; *scil.* the repair of their own parochial chapel is not a sufficient cause of discharge ; for it is for their own ease, and therefore cannot discharge them from a duty to which they are liable of common right : but if they had prescribed to be discharged upon paying so much towards the repair of the parish church, or the walls of the church-yard, that might be good, as 2 Rolle, 290. Hob. 166. Thirdly, This custom, if there be such a custom, might have been pleaded **[187]** in the Spiritual Court, and there tried, being matter ecclesiastical, and triable there by the express words of the Statute de Circumspecte Agatis, *scil. de ecclesia discooperta vel cemiterio non clauso non jacet prohibitio :* but for the defendant it was answered ; First, 'Tis true a general prescription to be discharged from the repair of the parish church is not good without some reasonable cause, no more than a general prescription of discharge from repair of the highway, *quia bonum publicum*. But 2. Here is a good cause of discharge for want of seats in the parochial church and not going there *nisi ad sepeliend'*, and this might have a reasonable commencement : for instance, the mother-church might become too small for the people, and the people too numerous for the mother-church by the increase of new buildings and inhabitants in the village ; and it might be agreed, that the inhabitants of the village should build them a chapel, and no longer overthrow the mother-church ; but should repair and find seats, bells, &c. in their own proper chapel : and this hath been allowed a good consideration of being exempt from the repair of the mother-church ; as in 2 Rolle 219, the same case before cited on the other side, and Hob. 67, where it appears the consultation in the case of Chapel-Bromwich was not granted because the custom was void, but because the suggestion was false ; and Hob. himself in the end of the case says, if such a custom had been alledged, a prohibition had lain, and so it was resolved in this Court *inter Palfrey & Brown*, Pasch. 26 Car. 2, B. R. To the third objection ; it is true, the repair of churches is expressly within the Statute de Circumspecte Agatis ; but when a custom comes in dispute, the custom is temporal, and must be tried in the Temporal Courts, because their law and the common law differ in the very essence of customs. So tithes and a *modus decimandi* are within the words of the same statute ; *scil. decimis, sive consuetis*, where *decimis consuetis est modus decimandi ;* Co. 2 Inst. 490. And for this reason a *modus decimandi* is suable there ; but yet if the *modus* be denied, or another *modus* there pleaded, a prohibition lies ; 2 Roll. 293. Het. 138. 3 Bulst. 241, and of this opinion was the Court ; Mich. 26, when this case was argued upon the prohibition, *scil.* that a prohibition lay, and advised the defendant's councel to take issue upon the custom ; to which purpose they gave him time to talk with his client. Holt jun. for the plaintiff, Levinz for the defendant.

[188] HALL *against* HUFFAM.

Surviving joint-merchant brings action as survivor; naught. 3 Keb. 737, 798. *Ante*, 111. *Post*, 228.

Assumpsit for 100l. for wares sold by the plaintiff, and one Witty whom the plaintiff survived. The defendant pleaded in abatement, that the plaintiff and Witty were joint-merchants, and that *per legem mercatoriam* there is no survivorship *inter mercatores*, and that Witty made such a one his executor, who administered, and is still alive, not party to the suit. The plaintiff demurred, and upon consideration of Co. Lit. 172, 182. F. N. B. 172 e. it was resolved by the whole Court, that the action should abate.

[189] TERMINO PASCHÆ, ANNO 29 CAR. II. IN BANCO REGIS.

NORDEN *against* LEVIT.

[Disapproved, *Farr* v. *Newman*, 1792, 4 T. R. 631.]

Executor having an action of trover in right of the testator compounds it by articles for payment of so much at a future day, this is a conversion and assets in his hands before payment. 3 Keb. 597, 615, 691, 706, &c. *Vid.* 1 Danv. 241, pl. 20. *Vide* 6 Mod. 94. *Vide ante* 40, 110, 133. 1 Lev. 147, 245, 255, &c. *ib.* 2 Show. 55, 56. 1 Saund. 307. 2 Saund. 403.

Scire facias upon a judgment against the defendant is alledged, that he had wasted the goods and disposed and converted them to his own use; and upon issue *non devastavit, vendidit seu in usum proprium convertit*, a special verdict was found, that A. was liable to an action of trover to the defendant for goods of the intestate; and that after an action brought the defendant and A. came to an agreement by articles, that the defendant should discharge A. and that A. should pay him such a sum at a future day not yet come, *& si &c.* And it was argued by Eyre for the plaintiff, that the issue is found for the plaintiff; for the defendant by accepting a new security for payment of the money to himself hath extinguished the old right; as if he had taken an obligation for a debt due by contract, and therefore he hath made himself liable *ad valorem*, though he hath not received the money; for the new security is *quasi* a payment to him, Yelv. 10. It was answered by Pollexfen, that this cannot be a *devastavit*, for here is no hurt done by him; he hath only taken the best means that could be to secure the estate; and this is not like the case of an obligation taken for a sum due by simple contract; for there is a debt certain, but here only damages were to be recovered, according to the discretion of the jury, which are now ascertained by the articles, but are not assets in his hands until the money received. *Curia*, This is not a **[190]** *devastavit*. But by Sir Thomas Jones Justice, This it a disposal and a conversion to his own use, by reason of the new security, whereby he had discharged the antient right to the goods, and so it is *quasi* a sale of them, and they are assets presently, though by his own act the money is not payable until a future day. Some of the other justices seemed to incline to this, *& adjournatur*; but afterwards next term all the Judges agreed that it was a disposition, and judgment was given for the plaintiff by the whole Court.

GRANWELL *against* SIBLY.

Executor sued imparles, and then pleads in bar that he is administrator, and not executor; this is only in abatement, and therefore naught after general imparlance. Lex Testam. 407, 408.

Debt against the defendant as *executrix* of her husband; the defendant *imparled*, and then pleads *actio non*, because her husband died intestate, and administration was committed to her *absque hoc* that she is executrix, or ever administered as *executrix*; upon which the plaintiff demurred. And it was said for the plaintiff, that his plea is no more than *misnomer*, which goes only in abatement, and therefore cannot be pleaded

after general imparlance, and it is not like the plea *ne unques executor*, which wholly estranges the testator; for here she admits herself liable to the action, but in another manner, *scil.* as administratrix. To which it was answered for the defendant, that though this plea does not go to the *right of the action*, yet it goes to the *action of the writ*, as *Robison's case*, 5 Co. and this will bar the plaintiff ever to charge the defendant as *executrix*, and so it is more than a plea in abatement, though it be no bar to the right itself, when the plaintiff charges the defendant as *administratrix*. But *per Curiam*, this plea is only in *abatement*, and therefore cannot, as it is in this case, be pleaded after general imparlance; upon which they gave judgment for the plaintiff. *Simili casus & simile judicium eodem tempore inter Howly & Sibly.* Martin Stanhope Attorney, and Levinz counsel for the plaintiff, Saunders counsel for the defendant.

[191] PAGET *against* VOSCIUS.

Devise to a man during his exile. S. C. Show. M. S. 1 Vent. 325. 2 Mod. 223. 1 Jon. 73. 3 Keb. 638, 749.

Ejectment upon *non culp.* was tried at Bar, and upon a special verdict the case was, Brown being seised of lands devised them to Voscius during his exile. *And if it shall please God to restore him to his country, or if he die, then he devised them to the lessor of the plaintiff.* Voscius was a Dutchman and had a pension from the States, but upon some displeasure the States deprived him of his employment and of his pension, and gave them to another, whereupon he voluntarily left the country, and came and lived here with Brown, who had been his acquaintance beyond sea. After his coming hither a war happened between the Dutch and the English, and afterwards a peace was concluded between the two nations, yet Voscius still continued here. And whether the estate of Voscius be determined, or continues? was the question. Argued this term and Trin. *prox.* by Holt jun. and Maynard King's Serjeant for the defendant; and by Jones Attorney General and Pemberton King's Serjeant for the plaintiff. And for the plaintiff it was said, 1. That exile is either by *restraint*, as when the States of the country forbid or make it penal for the party to return, which is not in this case: or 2. *Voluntary*, where the party leaves his country upon disgust, but may return again at his pleasure. Now this second cannot be the exile Brown meant, because of these words, *if it shall please God Voscius be restored;* and therefore the exile Brown intended was not such as depended upon the pleasure of Voscius; but he meant, that when he could return to his country with safety, which could not be done (during the war) his estate should determine; and though the war was not the cause why he left his country, yet it was the cause why he could not return; and now when he may return, and does not return, *equum est* as if he had returned; so is the 15 H. 7, 1. Annuity granted until he be promoted, offer of promotion and refusal shall determine the annuity. On the other side, those for the defendant agreed the distinction of *exile voluntary*, or *coercive;* Calvin's Dictionary, *verbo exilium.* Plutarch in the Life of Marius **[192]** says, that he went into voluntary exile. One who abandons his country upon its displeasure at him is in exile: here Voscius's pension and office were taken from him by the States, and given to another; and in our law it is exile *in hominibus* to impoverish the tenants; here Voscius is impoverished by taking away his pension. 2. The war does not concern him: he came here before the war, and he might have returned before the war. 3. If there be no exile in the case, then is the estate of Voscius an absolute estate for life, for the exile is not a condition precedent, but subsequent; which was denied by Jones Attorney General, for the estate is devised to him during his exile, and if he be not in exile *omnino*, he hath no estate *omnino;* for this is not like the case of a feoffment and condition subsequent; there the estate passes before, here it is by a devise during his exile, so that exile is in the devise itself, and if no exile no devise. Twysden Justice, If a voluntary exile will serve the turn, then hath Voscius an estate for life if he pleases, which does not seem to be the devisor's intent. Jones Justice, These words, *if it please God to restore him*, seem to signify and refer to something else than only the will of Voscius. Rainsford Chief Justice, Brown takes notice of the difference and of the war between the Dutch and English, and of the displeasure of the States to Voscius, and their taking away his pension; and these seem

to be the exile intended by him: *adjournatur;* and after Hill. 29, 30, judgment was briefly delivered by Rainsford in the name of the whole Court for the defendant. He said they were all agreed, that the exile intended by Brown was the leaving of his country because of the States displeasure to him; and the withdrawing of his pension upon that displeasure; nothing of which is altered since the making of the will, and therefore the estate devised does continue.

[193] MORS *against* THACKER.

Case for some words, *cumq; etiam* other words, is good; otherwise in trespass. 1st Count lays the words *in auditu quamplurimorum;* the last does not, yet good. 2 Jo. 197. 2 Sho. Case 17, 413 & 294. 1 Com. Dig. 193, 195. Ld. Raym. 959. Cowp. 276. 1 Lev. 338.

Case for words, and declares; that whereas the plaintiff was of good fame, the defendant *in præsentia quamplurimorum* spoke such and such words (which were actionable) *cumque etiam* the defendant *postea tali die ex ulteriori malitia* spoke other words (which were also actionable). After verdict for the plaintiff and entire damages, it was twice moved in arrest of judgment by Pemberton and Tremail, and two exceptions taken; 1. That the last count is not affirmative that he spoke the words, but under a *cumque etiam*, which in trespass hath been several times ruled naught; and then the damages being intire, the plaintiff cannot have judgment for any part. *Sed non allocat'.* This is well enough in an action upon the case as this is, though in trespass it has been ruled ill. *Nota, similis casus & simile judicium inter Cotterell & Matthew; Mich.* 4 *W. & M. in Com. Ban. sed intrat. Trin.* 4, *Rot.* 837. 2. The last words are not said to be spoken *in præsentia & auditu quamplurimorum. Sed non allocatur;* the first *audita quamplurimorum* goes to all. And judgment was given for the plaintiff.

MERCHANT *against* WHITEPANE.

Prescription for a seat belonging to his messuage, without saying time out of mind they had the seat. 3 Keb. 754. *Ante* 148. 1 Vent. 274.

Case; for that he is seised in fee of a messuage, and he, and all those whose estate he hath in the messuage, have had a seat in the church, and *toties quoties necesse fuit* have repaired it, and the defendant disturbed him of his seat. After verdict for the plaintiff upon *non culp.* it was moved in arrest of judgment by Saunders, that the plaintiff hath not prescribed by a time out of mind, &c. *Curia.* It is said that he was seised in fee, and that he, and all those whose estate he hath, have had this seat, and the fee hath been time out of mind, &c. by consequence therefore he, and all those whose estate he hath, have time out of mind had this seat. But especially it is good in this action, which is founded **[194]** upon his possession and the disturbance thereunto done, according to *St. John and Mowdy's case* lately resolved in this Court.

GREGORY *against* MAIOR.

In covenant concerning the possession, eviction may be pleaded without shewing title. 3 Keb. 744, 755.

Assumpsit in consideration the plaintiff promised to pay the defendant so much yearly for five years for such a thing, the defendant assumed to save him harmless in the possession of it; and that such a one had evicted him, and the defendant had not saved him harmless. After verdict for the plaintiff upon *non assumpsit*, it was moved in arrest of judgment, that it is not shewn that he was evicted by title, and all covenants of this nature extend only against legal title and eviction. *Curia*, This agreement is only *quoad* the possession, not *quoad* title; and gave judgment for the plaintiff.

JEPSON *against* JACKSON.

Trespass against baron and feme. Baron pleads a licence to enter with his wife and servants. Plaintiff replies, *non dedit licentiam* to the baron and feme, naught. 3 Keb. 755, 761.

Trespass against baron and feme for entering his house, and continuing possession for three years; the defendant pleaded *non culp. quoad* two years; and *quoad* the third, a licence to the husband to enter with his wife and servants, and inhabit there; and the issue was, *non dedit licentiam* to the baron and feme *modo & forma prout, &c.* and both issues found for the plaintiff, and entire damages; and this being in *Com. Banc.* a writ of error was brought, and it was assigned for error, that the second issue is impertinent and void; for when the defendant pleads a licence to him to enter with his wife, &c. the replication *quod non dedit licentiam* to the husband and wife is foreign, and does not *meet* the plea; for he may give licence to the husband to enter with his wife, and in such case the licence is given to the husband only, and not to the husband and wife; and this is a material difference, for the licence amounts to a lease, and if it be made to the husband and wife, she, as survivor, shall have it; but if it be made to the husband only, the wife shall not have it, as survivor; and so, upon two several debates twice this term, held the Court, and reversed the judgment. Levinz for the plaintiff, Holt jun. for the defendant in error.

[195] ASTRY *against* BALLARD.

Plaintiff took one of the defendants in execution; whether the bail be discharged as to the rest. S. C. 1 Vent. 315. 1 Sid. 107. 2 Jon. 75. 2 Mod. 312. 3 Keb. 709, 723, 761, 765, &c.

Scire facias against the defendant as bail for A. B. C. and D. The defendant pleaded that before the return of the second *scire facias* the plaintiff took A. in execution upon a *capias*, and still detains him. The plaintiff demurred, and Saunders and Levinz argued that the plaintiff having taken one of the principals in execution had thereby disabled the bail to render him, and therefore discharged him *quoad* all the rest: *Curia cont'*, The bail having undertaken to bring in all the four principals, and therefore though the plaintiff hath taken one, this does not discharge the bail as to the other three; for they ought, as they took upon them, to bring in all the four; and gave rule for judgment for the plaintiff, *nisi, &c.* by such a day; when Jones Attorney General came and pressed to be farther heard in the case; for he said, that the plaintiff by taking one of the principals had determined his election to have the principals in execution, and thereby had discharged the bail; and cited 1 Roll. 897, let. G.

WADE *against* HATCHER.

Trespass for taking a parcel of yarn.

Trespass for entering his house, and taking divers goods, and *inter alia unam parcellam pensarum laniarum, Anglice, a quantity of woollen yarn.* After verdict for the plaintiff and entire damages, judgment was staid *ex motione Levinz*, for the incertainty *de una parcella*, and what quantity is meant by it.

[196] TERM. SANCT. TRIN. ANNO 29 CAR. II. IN BANCO REGIS.

VIRTUE *against* BIRDE.

Case for not appointing a place to unload his cart whereby his horses took cold. S. C. 1 Ven. 310. 3 Keb. 766. 2 Cro. 386. 1 Roll. Ab. 101. Yelv. 20. 1 Sid. 146. Carth. 90. Salk. 102. 3 Term Rep. 31.

Case that whereas the defendant had hired him to carry a load of timber from Woodbridge to Ipswich to be laid there at any place the defendant should appoint,

and that he gave notice to the defendant that he would carry it such a day, and requested the defendant at Woodbridge to appoint where it should be laid, and that accordingly he carried it to Ipswich, and the defendant appointed no place where it should be laid, but made the horses of the plaintiff being hot stay so long in the *cart*, that they took cold, whereby some of them died, and the rest were spoiled; and after verdict for the plaintiff, upon *non culp.* judgment was staid, because the action lies not; for, first, he might have taken his horses out of his *cart*, and have walked them up and down, or put them into the stable. 2. As soon as he came there, and found no place appointed by the defendant, he might have unladen the timber in any convenient place, and returned; and therefore the injury which the horses received is owing to himself, and through his own default.

[197] HARKER *against* MORELAND.

Upon oyer of administration craved after imparlance, the defendant pleads in abatement, that it is tested since the action brought, and the action abated *per Curiam ex officio.* 3 Keb. 768. *Ante* 190. 3 Lev. 55. 6 Mod. 80, &c. 1 Stra. 22. 2 Stra. 806. 1 Wils. 180. Cowp. 454, 671. Doug. 62.

Scire facias tested 12th Feb. the last day of Hillary term, was brought by the plaintiff as administrator against the defendant as tertenant, who imparled generally, and after craved oyer of the letters of administration, which were dated the 26th of March following in the vacation between Hillary and Easter term: whereupon the defendant pleaded this in abatement. The plaintiff demurred, because he cannot plead in abatement after general imparlance; but *per Curiam*, it appearing now upon record, that the plaintiff hath brought his action, the Court ought *ex officio* to abate the writ; and so they did: and yet the party could not have a *scire facias* tested after 12 Febr. in this Court, until term Pasch. and it might *in rei veritate* have been sued during the vacation, after the grant of administration. *Aliter*, where the suit is by obligation out of the Chancery, for there the Court is always open; *tamen quære* of this judgment; for it does not appear rightfully upon record when the administration bears date, it being upon an oyer after general imparlance; *quære tamen*, for an oyer may be after imparlance.

GAMLY *against* BECHINOR.

Assumpsit on consideration that he should not sue *quidam* . . . *Allison.* 3 Keb. 769.

Assumpsit; whereas *quidam* . . . *Allison* was indebted to the plaintiff, who intended to sue the said . . . Allison, the defendant, in consideration the plaintiff would forbear the said . . . Allison, promised him to pay the debt. After judgment upon verdict for the plaintiff in C. B. in *non assumpsit*, error was brought in B. R. and it was assigned that it does not appear what Allison was intended in the case; for it is *quidam Allison* without Christian name, and so it may be any Allison in the world; and Rainsford Chief Justice, and Twysden held this an error. But Wylde and Jones *contra;* be it what Allison it will, the defendant hath promised, and that is so **[198]** found, and this judgment may be pleaded in bar to any other action brought in consideration of forbearance of any Allison without Christian name, with an averment that he is the same person; and rather than reverse it for this cause, they would intend *quidam* was his Christian name. *Quare adjournat'.*

TRIPPS *against* RAND.

Assumpsit in consideration the plaintiff at the defendant's request would procure himself to be made a knight, and saith that he procured himself to be made a knight, but does not say at the defendant's request. 3 Keb. 769, 800.

Assumpsit in consideration the plaintiff at the defendant's request would procure himself to be made a knight at his own proper charges, so that his wife, the defendant's daughter, might be a lady, to pay him 2000l. and says, that he procured

himself to be knighted at his own charges, whereby his wife became a lady; yet the defendant had not paid him. After verdict and judgment upon *non assumpsit in Com. Banc.* it was now assigned for error in B. R. that it is not said the plaintiff procured himself to be knighted at the request of the defendant: it might be he did it of his own head, and the request here is part of the consideration, executory and traversable, and by omitting it the plaintiff hath lost his traverse of the request; and upon *non assumpsit* he was not obliged here to prove a request upon evidence, as are the cases in Hob. 88, 106, and for authority in point, 2 Leon. 53. 3 Leon. 91. *Curia contra*, The request shall be intended here to be made at the time of the promise; *scil.* that he then requested him to be made a knight, and promised to give him 2000l. and it shall not be intended that he promised to give him the 2000l. if he would procure himself to be made a knight when he should afterwards request him, and so the request is not executory, but executed at the time of the promise made: and they gave rule to affirm the judgment; but at the earnest motion of Jones Attorney-General, to be farther heard for the plaintiff in error, it was adjourned until next term, when the judgment was affirmed by the whole Court. *Vide* 1 Cro. *Poynter* v. *Poynter*, accordingly.

[199] ROBINSON *against* WOOLLEY.

Archbishop, as guardian of the spiritualties *sede vacante Glocestriense*, institutes and sends his mandate to the archdeacon to induct, but induction is not made till after bishop consecrated; it is void. S. C. 1 Vent. 309, 319. 2 Jon. 78. 3 Keb. 747, 773, 821.

Ejectment, and upon *non culp.* and a special verdict the case was; The Bishoprick of Glocester being void, and the Archbishop of Canterbury *gardianus spiritualium*, a church became void, and the patron presented to the archbishop, who admitted and instituted the presentee, and granted a mandate to the archdeacon for his induction, who according to usage appointed certain ministers to do it, who for three or four months neglecting to induct him, a new Bishop of Glocester was made and consecrated in the mean time: afterward the induction was made by the ministers, and whether this were a good induction or not? was the question; which this term and the next was argued by Weston and Holt jun. for the plaintiff, and by Saunders for the defendant: for the plaintiff it was urged, that the suffragan authority is derived out of the authority of the metropolitan, Hob. 185. 11 H. 7, 9, and therefore the acts of the metropolitan concerning any thing which belongs to the diocesan are not void, but voidable. 2. He that hath a power of instituting hath also the power of inducting, Lyndew. 141, (the new edition). In this case the institution is by the archbishop, and therefore so ought the induction; for authority well commenced shall be perfected by the same person; 2 Cro. 73, 83. 1 Cro. *Smith* vers. *Executors of Pandrell.* And the institution here is the judicial act, the induction no more than a ministerial act, thereupon. 3dly, Induction belongs to the archdeacon *jure officii*, and the mandate from the archbishop for induction is not authoritative, but only directive to certify what person he hath instituted, and when the induction is done, it is by virtue of a power inherent in the office of archdeacon, and not by the mandate from the bishop: 11 H. 4, 9 b. Plowd. Com. 529. Hob. 15. Afterwards towards the end of Mich. term judgment was given by the whole Court that the induction was void, for though it belongs to the office of archdeacon to induct, yet he does it only by mandate and authority from the bishop; and they said the case is no more in effect than if a man makes a letter of attorney to make livery, and dies, and the attorney makes livery after his death.

[200] THE KING *against* MERCHANT-TAYLORS OF LONDON.

Custom of London to commit for not accepting the livery. S. C. 1 Vent. 327 2 Danv. 422. 3 Keb. 714, 764, 784, 799, 811. *Vid.* Sty. 78. Mar. 179. 1 Stra. 560. 5 Com. Dig. 197. 1 Ba. Abr. 681.

Upon a *certiorari* was returned a custom for the Company of *Merchant-Taylors* to choose livery-men, and for refusing to accept of the office to commit the refusers; and

that Smartford was elected, and without reasonable cause refused, for which he was committed; to which return these exceptions were taken by Holt jun. 1. This custom to commit is not good, for it does not concern the government of the city, but only the state of the company. 2. It does not appear that he was *habilis & idoneus*, and therefore not eligible, 2 Leon. 29. March 103. *Sed non allocatur;* for first, all their customs are confirmed by statute. 2. A refusal without reasonable cause implies him *habilis & idoneus.*

THE KING *against* THE CITY OF LONDON.

Custom of London to disfranchise freemen upon information before the mayor and aldermen for speaking disgraceful words of an alderman. S. C. 1 Vent. 302, 327. 2 Show. 3 Keb. 764, 109, 811. 3 Keb. 714. 2 Salk. 426.

Upon a *habeas corpus* and *certiorari* they returned the custom of London, that if any freeman of the city speak disgraceful words of an alderman, that for such speaking the *common serjeant* hath usually exhibited an information before the *mayor and aldermen*, wherein if the offender be convicted by *verdict* or *confession*, the use is to punish him by *fine* or *disfranchisement*, and that Clark spoke scandalous words of Alderman Lawrence, as he was surveying the measures of coals; *scil. that he would undo the city, and that he was a knave, &c.* for which the common serjeant exhibited an information, whereupon he was taken and imprisoned. To which return these exceptions were taken; 1. This custom to try a man for words spoken of an alderman in the Court of Aldermen is unreasonable; it is to make them Judges and parties. 2. It does not appear by the return that Clark was a freeman. In the information indeed, which is returned *in hæc verba*, he is said to be a freeman, but that is not sufficient; the return itself must set forth in fact, that he was a freeman; for upon this return, as it is here, he cannot have an action upon the case for the **[201]** falsity of the return, if he be not a freeman. 3dly, This custom to disfranchise for words is void, 11 Co. *Bagg's case.* To which it was answered, that their customs being confirmed by the statute of R. 2. as it appears by the record, the custom thereby is made good; and for that omission in the return, in not saying he was a *freeman*, they said they had a multitude of precedents after that form, and proceedings upon them; which the Court desired to see, but none were produced, and the parties agreed in the mean time; upon which the Court was afterwards moved by the city counsel for a *procedendo*, but the Court would not grant it without farther argument, saying it might be dangerous to put it in the power of the aldermen to disfranchise a freeman for speaking words of an alderman; and though the words were here spoken to him in the exercise of his office of alderman and justice of peace, yet they said it would be more reasonable to punish him by fine and imprisonment, which might be by information in this Court, but this Court cannot disfranchise him.

BUTTS *against* PENNY.

[Disapproved, *Forbes* v. *Cochrane*, 1823, 3 Dowl. & Ry. 721; 2 B. & C. 448.]

Trover for negroes. S. C. 3 Keb. 785. *Vid.* 3 Lev. 336, 337. *Vid.* 2 Salk. 666, 667, *contra.* See 5 Mod. 182, 186, 187. Raym. 16. 3 Lev. 336, 337. Cro. Jac. 262, 463. Cro. Car. 19, 391, 545. Mar. 12. Cro. El. 126. Hob. 283. 1 Com. Dig. 219. 1 Salk. 556. 1 Raym. 250. 5 Mod. 375. 5 Com. Dig. 352. 5 Bac. Ab. 264.

Trover for 100 *negroes*, and upon *non culp.* it was found by special verdict, that the *negroes* were infidels, and the *subjects of an infidel prince*, and are usually bought and sold in America as merchandise, by the custom of merchants, and that the plaintiff bought these, and was in possession of them until the defendant took them. And Thompson argued, there could be no property in the person of a man sufficient to maintain trover, and cited Co. Lit. 116. That no property could be in villains but by compact or conquest. But the Court held, that *negroes* being usually bought and sold among merchants, as merchandise, and also being infidels, there might be a property in them sufficient to maintain trover, and gave judgment for the plaintiff, *nisi causa*, this term; and at the end of the term, upon the prayer of the Attorney-General to be heard as to this matter, day was given until next term.

[202] SMITHE *against* ABELL.

Tenant for life levies a fine to him in remainder for life; it is a forfeiture of both estates. S. C. 2 Jon. 65. 3 Keb. 787, 733. *Vid.* Ow. 156. Cro. El. 757. 11 H. 4, 10.

Ejectment, and upon *non culp.* and a special verdict, the case was; Tenant for life, remainder for life, tenant for life levied a fine to him in remainder for life and his heirs, *sur conusans de droit;* and *per Curiam*, without argument, both their estates are hereby forfeited, the one by the gift, the other by the acceptance of such estate.

FORTESCUE *against* ABBOTT.

Devise to his 3 sons severally of several parts, and if any one die, his part to go to the others, the reversion descends to the eldest; this will destroy the contingent remainders to the other. But it is good by way of executory devise. S. C. 2 Jon. 79, 80. 2 Danv. 519, pl. 14. 3 Keb. 788, 824. *Vid.* 1 Lev. 135. 2 Jon. 452. Ray. 162. 1 Sid. 153. Vaug. 259. 2 Saund. 386. 1 Bulst. 61. 2 Cro. 260, 655. *Ante* 39. *Vid.* 2 Cro. 590, 655, 695. Cro. El. 833, 204, 225. Godb. 282. Pal. 131. Dy. 33, 124. Bridgman 1. Mo. 422. 2 Leon. 11. 3 Leon. 64. 1 Rol. Abridg. 611, 839, 835, 836 b. 2 Rol. Rep. 196, 281. 3 Com. Dig. 226. 4 Bac. Abr. 332. Fearne. C. Rem. 264. Pow. on Dev. 418. Doug. 502.

Ejectment, and upon *non culp.* and a special verdict, the case was; One having three sons, A. the first, B. the second, C. the third, devised a part to each without any limitation of estate, and if any of them die, that his part shall remain to the rest. John died, and whether his part should remain? was the question: and it was argued by Saunders, that it should not remain, but the remainders are contingent, and the descent of the fee upon John destroyed the particular estate devised to him, and consequently the remainder to the others. Pollexfen answered, that it might be good by way of executory devise, according to the opinion of Fleming in *Wood and Ingersole's case*, 2 Cro. 260, contrary to the judgment of that case; & *adjournatur* till Pasch. 30, *postea*, when, *ut audivi*, the Court adjudged it to be a good executory devise to the younger sons, according to the opinion of Fleming, and contrary to the judgment of *Wood and Ingersole's case.*

[203] TAYLOR *against* BEKON.

Payment to a gaoler, or to the sheriff upon a *ca. sa.* is no plea in debt upon a judgment, but payment to the sheriff upon a *fi. fa.* is. S. C. 2 Jon. 97, 98. 3 Keb. 748, 788. *Q.* 1 Lev. 260. *Vide* 3 Co. *Ridgeway's case.* 8 Co. *Dr. Drury's case.* 1 Leon. 141. Cro. El. 390. Cro. Car. 328. 1 Crom. Prac. 364. 4 Bac. Abr. 76. Cowp. 728. 2 Term Rep. 45.

Debt upon a judgment: the defendant pleads, that he was taken upon a *capias*, and committed to the marshal of this Court, and that he had paid the money to him in satisfaction of the judgment; upon demurrer adjudged no plea, for the marshal is not to receive the debt, but only to detain the defendant in prison until he hath paid it to the plaintiff. But payment to the sheriff upon a *fieri facias* is a good plea, for he hath thereby an authority to levy the debt; but payment to the sheriff upon a *capias ad satisfaciend'* is perhaps no plea for the reason aforesaid.

[204] TERM SANCT. MICH. ANNO 29 CAR. II. IN BANCO REGIS.

SIR JOHN LAWRENCE *against* BLITHE.

Upon removal from an Inferior Court an heir shall not be held to bail, as he was below. S. C. 2 Jon. 82. 3 Keb. 803.

Debt in London against the defendant, as *heir*, being removed hither, the question was, if the heir should find bail here, as he did in the Inferior Court of London, where

they compel all defendants, heirs or executors, to find bail? And there are precedents wherein executors, being held to bail there, were here also upon removal forced to find bail: but no precedent being shewed of bail found by an heir in such case, the Court denied to hold the defendant to special bail in this case: and it was said, that Kelynge and Hale had denied it upon removals in the case of executors.

CLAPPE *against* EDGECOMBE.

Debt upon the 5 Eliz. ought to be laid in the proper county. S. C. 3 Keb. 804. 1 Lev. 249, 250.

Debt was brought in B. R. upon stat. 5 Eliz. for using a trade in Devonshire, which was sent by Nisi Prius, and tried in Devonshire for the plaintiff; and now it was moved in arrest of judgment, that the action should have been brought as well as tried in Devonshire. To which it was answered, that in *Hughes and Barnes's case* it was resolved, that debt lay in this Court: but it was replied, that after that case *inter Nicholls and Cochinell*, in the time of **[205]** Hale Chief Justice, it was adjudged that the action ought to be brought in the proper county, upon which the Court ordered the case to be put in the paper.

FOSTER *against* HAWDEN.

Jury cast lots for their verdict. *Ante* 140. 2 Jon. 82. 3 Bac. Abr. 282. Buller. N. P. 308. 2 Hale's P. C. 296. 2 Hawk. P. C. 221.

Trespass tried by Nisi Prius in Northumberland: the jury not agreeing cast lots for their verdict, and gave it according to lot; for which, upon the motion of Levinz, the verdict was set aside; and ordered the jury to attend here next term to be fined.

Nota, In Hale's time, in a case between *The King and the Lord Fitzwater*, a verdict was set aside for the same cause.

RICHARD FROUDE *against* FROUDE.

He would have A. rob the house of B. and he (*innuendo A.*) did rob him; actionable. S. C. 2 Jon. 84. 1 Vent. 323. 3 Keb. 805, 812, 841. 1 Com. Dig. 176. 4 Bac. Abr. 508. 1 Str. 194. Hob. 140.

Case for these words; *Richard Froude went to Dean's house, and would have had him to rob Bolton's house, and he (præd. Richard Froude innuendo, did rob him)*. After verdict for the plaintiff upon *non culp.* judgment was staid, because it does not appear but by the *innuendo* who it was that robbed Bolton's house, and the *innuendo* does not sufficiently shew it; for it is but the plaintiff's inference, or construction upon the words that the words were spoken of him. But afterwards upon argument by Maynard for the plaintiff, citing 3 Cro. 291, 308, 349, 618, 710, 747, 787. Mo. 63, 409, 410, that the first words are actionable of themselves, and the others for aggravation: and by Pollexfen for the defendant, citing 2 Bul. 206. 3 Cro. 167. Co. 4, 15 b. 18 b. Lane 98. Yelv. 90, *contra*, judgment was given by the whole Court, *scil.* Rainsford, Twysden, and Jones for the plaintiff, that the first words of themselves were actionable, and made worse by the second, whether the robbery be intended done by the plaintiff himself, or by any other at his procurement.

[206] THE KING *against* PLYM.

Costermonger, if a trade within the 5 El. S. C. 1 Vent. 326, 346. 3 Keb. 816, 843. 5 Eliz. 1 Rol. Rep. 10. A *barber* is. 5 Eliz. *Vid.* 1 Lev. 87.

Indictment upon stat. 5 Eliz. for using the trade of a *costermonger*, or *fruiterer*. The defendant demurred to the indictment, and Pollexfen argued for the defendan

that the *fruiterer* is not a trade within the statute, 2 Bulst. 188. Dolbyn Recorder of London *contra*, a *barber* hath been adjudged a trade within the statute, which was agreed, but Twysden and Jones held strongly a *fruiterer* was no trade within the statute; Rainsford doubting, Wylde absent, it was adjourned.

WETTENHALL *against* SHERWIN.

Battery *per quod cum, &c. Vide* 2 Jon. 197. 2 Show. case 17, 180, 294, & 2 Salk. 636, &c. *ib. Certiorari* to Chester upon error in a record fully certified. *Quære*, if it lies.

Error of a judgment in battery in Chester, assigned by Levinz, that the declaration is by way of recital, *quod cum* he was beaten, &c. upon which the judgment was reversed, *nisi, &c.* when Saunders came and prayed a new *certiorari*, for the record is right there, but badly certified. To which it was answered, that diminution cannot be alledged of a thing which is fully certified, but in something that is wanting, as want of original, warrant of attorney, &c. Of which the Court would hear farther next term; *quære adjournatur*.

HARPER *against* BURGH.

Lessor grants his reversion, and after assignment releases covenants to the lessee, but before breach. S. C. 2 Jon. 102.

Covenant, and declares, that lessee for forty years demised to the defendant for twenty years, rendering 16l. per annum rent: and that the defendant covenanted to pay it, and that afterwards he in reversion upon the new lease for 40 years assigned his term to the plaintiff; to which the defendant attourned, and assigns for breach non-payment **[207]** of 16l. for a year's rent due at Lady-Day, 29 Car. 2. The defendant pleaded, that before the rent became due, the lessor released all covenants to him; upon which the plaintiff demurred; and now by Rainsford and Jones, they two being only in Court, this release of the lessor to the lessee is a good bar of this action, being before breach though after the assignment, according to *Middlemore and Goodale's case*, 1 Cro. *Sed postea* term Pasch. being moved again, and the Court full, judgment was given for the plaintiff, for they would intend the action to be grounded upon the *reddendum*, which is a covenant in law, which ran with the reversion at common law, before the statute of H. 8, and passed by the grant of the reversion, so that the lessor could not release it after his assignment; and *Middlemore's case* is upon a collateral covenant.

PHILIP BICKERSTAFFE AND WIFE *against* PERCY.

Quidam J. S. intended a stranger. 3 Keb. 810.

Debt upon judgment, and declared, that Clarke recovered 90l. and made the plaintiff Anne executrix, and died, and that she took for husband *quendam Philippum Bickerstaffe*. The defendant pleaded, that the plaintiffs were never married; the plaintiff demurred; upon which the declaration was adjudged ill, or *quendam Philippum Bickerstaffe* shall not be intended the now plaintiff Philip, according to Dy. 70 b.

SMARTLE *against* SCHOLAR.

S. C. 2 Jo. 28, 265, 266, 267. Vaugh. 262, 264. 1 Mod. 189. 1 Vent. 323, & *vide ibid.* 376, and 1 Sid. 191.

Ejectment, and in a special verdict upon *non culp.* the case was: one seised in fee devised to a stranger and his heirs after the death of the devisor and his wife; the devisor died, and whether the stranger should take presently, or not until after the death of the wife? And whether she should have it for her life by implication?

was the question: and Tremaine argued, that the stranger shall have it presently, and the wife nothing: otherwise, he said, if the devise had been to the heir after the **[208]** death of the wife, for then there is no one else to take in the mean time, Mo. Pasch. 7, 123. 2 Cra. 75, *Horton* v. *Horton*. *Conqia Courtney* v. *Pet.* Bro. 107. A devise to a stranger after the death of the wife is an estate for life to the wife by implication. But then, *ut videtur*, the stranger is not to have the estate until after the death of the wife, as well as the husband; and the heir takes it in the mean time; *& adjournatur*. But afterwards it was so adjudged.

THE KING *against* THOMPSON.

Indictment, *quod scienter recepit* divers robbers, and does not say *felonice*, nor *sciens* them to be robbers. 3 Keb. 674, 375, 760, 782, 817. *Vide* 6 Mod. 311. 3 Inst. 213. Hob. 138. 2 Hawk. P. C. 323.

Error of a judgment on an indictment, which was, that the defendant did *scienter receive and harbour* divers robbers, to the jury unknown, who had stolen several goods, and committed divers burglaries. The 1st exception was, that this is too general, no more in effect than *communis receptor felonum* and cited Co. 3 Inst. 12, 13. Indictment for using *diversas diabolicas artes*; and Rolle Indictment 79. *Communis oppressor vicinorum*, naught; but *communis barrectator* is good; for it is a term well known. 2. *Scienter recepit* is not good, but it ought to be that he knowing them to be robbers received them; for he might know the men, and not know them to be robbers, 1 Cro. *Bolton* v. *Banks*, *& ib. Kirmion* v. *Wells*. 3. It ought to be *felonice recepit*; for the receipt and harbour of robbers, knowing them, is felony. *Sed non allocatur*; for *per Curiam*, 1. Perhaps the felons, no more than the felonies and burglaries, could not be known particularly; and a house that harbours felons is a common nusance as a common bawdy-house is; and to the second, Jones said, that *scienter* had been lately ruled good in one *Sally's case*: and to the 3d; the King, if he please, may pass by the felony, and make the indictment for trespass; whereupon the judgment was affirmed.

[209] ENT *against* WITHENS.

Debt counting of a *devastavit* upon obligation lies not against executors. S. C. 1 Vent. 315, 321. 3 Keb. 798, 825. *Ante* 40, 133, 145, 189.

Debt upon an obligation against the defendant as executor; and declares upon a *devastavit*. Defendant pleads several judgments and *nul assets ultra* 5*l*. liable to the judgments, which is not sufficient to satisfy them. The plaintiff demurred, and upon argument judgment for the defendant; for an action upon an obligation counting of a *devastavit* against an executor will not lie; *aliter*, in an action upon a judgment; for there the plaintiff may count of a *devastavit*. Upon which the plaintiff prayed leave to discontinue, and had leave.

BASTARD *against* STUKELY.

No survivorship by the ecclesiastical law. S. C. 2 Sho. pa. 50. 2 Jon. 130. *Vid.* 2 Jon. 162. 1 Lev. 164. 2 Sho. 50. Prohibition.

One devised goods to A. and B. the executor assented to the legacy, and afterward A. died; and now the executor of A. sued in the Spiritual Court for A.'s share, there being no survivorship in such case by the laws ecclesiastical; whereupon B. sued a prohibition, and declared, and upon demurrer and argument it was adjudged the prohibition should stand; for by the assent of the executor the interest was vested in the legatees, and became a chattel in them governable by the rules of the common law.

BEVERSHAM *against* OSBORNE.

Debt for rent, pleads, *paratus fuit solvere* without *obtulit*. S. C. 1 Vent. 322. 3 Keb. 800, 810, 828.

Debt for rent. The defendant pleaded *actio non, &c. quia dicit, &c.* when it became due, *paratus fuit, & adhuc paratus existit solvere, & profert hic in Cur'* the money. The plaintiff demurred, and the plea was adjudged ill; 1. Because he does not plead an *obtulit*. 2. The plea is not to the action, but only in excuse of damages.

Quære of the first reason, for rent is demandable; otherwise of a sum in gross which is payable without demand.

[210] INGRAM *against* BRAY.

Release of all demands does not release the rent due upon a lease. 1 Vent. 314. 2 Mod. 281. 3 Keb. 785, 829.

Replevin; defendant made conusance for rent and Heriot, as bailiff to J. S. The defendant pleads in bar as to the rent a release of all demands; and as to the heriot, that A. and B. as bailiffs to the said J. S. *auter fois* made conusance in Com. Banc. and pleads the record at large, *prout patet, &c.* The defendant demurred, and Pollexfen argued, that the bar was naught as to both points; for 1. The rent is incident to the reversion in this case, and is not barred by release of all demands, for the release does not bar the reversion, 2 Cro. *Hancock and Field's case;* and *Fenn and Hanson's case* in this Court, Pasch. 15 Car. 2. But such a release will bar a rent-service in fee according to Litt. to which the Court inclined. 2. This is not good as to the heriot, because it is not said, that the conusance in the Common Pleas was made by the assent of J. S. for it might be by a stranger without his privity. Also there wants an averment of a life, as it appears by the record here set forth; and then the judgment there being founded upon the manner of the plea, and not upon the matter, it is no bar here, where the continuance of the life is averred; to which the Court inclined likewise. But it was adjourned.

DUTTON AND WIFE *against* POOLE.

[Questioned, *Tweddle* v. *Atkinson*, 1861, 1 B. & S. 399.]

Son promised his father to pay 1000l. to his sister: the sister may bring the action. S. C. 1 Vent. 317, 318, 332. 2 Jon. 102. Ray. 302. 3 Lev. 139. 3 Keb. 786, 814, &c. 4 Burr. 2237. Cowp. 294, 365.

Assumpsit, and declares, that the father of the plaintiff's wife being seised of a wood which he intended to sell to raise portions for younger children, the defendant being his heir, in consideration the father would forbear to sell it at his request, promised the father to pay his daughter, now the plaintiff's wife, 1000l. and avers, that the father at his request forbore, but the defendant had not paid the 1000l. After verdict for the plaintiff upon *non assumpsit*, it was moved in **[211]** arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her: also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise, and divers cases were cited for the defendant, as Yelv. *Rippon* v. *Norton*, *Hawes* v. *Leader*, *Starky* v. *Milner*, 1 Roll. 31, 32, Sty. 296, and a case lately resolved *in Com. Banc. inter Norris & Pine, intrat.* Hill. 22 & 23 Car. 2, 1538, where the case was; *If you will marry me, I will pay your children so much;* and the action being brought by the children, adjudged it lay not. On the other side it was said, if a man deliver goods or money to H. to deliver or

pay to B. B. may have an action, because he is to have the benefit of the bailment; so here the daughter is to have the benefit of the promise: so if a man should say, Give me a horse, I will give your son 10l. the son may bring the action, because the gift was upon consideration of a profit to the son; and the father is obliged by natural affection to provide for his children; for which cause affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration, and in the promise; and the son had a benefit by this agreement, for by this means he hath the wood, and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father, and for authorities of this side were cited, Roll. 1 Ab. 31, *Oldman* v. *Bateman*, and *ibid.* 32, *Starky* v. *Meade*. Upon the first argument Wylde and Jones Justices seemed to think, that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise, nor consideration. Twysden and Rainsford seemed *contra;* and afterwards two new Judges being made, *scil.* Scroggs Chief Justice in lieu of Rainsford, and Dolbin in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs Ch. Just. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, **[212]** that the consideration and promise to the father may well extend to the children: and he and Jones remembered the case of *Norris & Pine;* and that it was adjudged as aforesaid. But Scroggs said, he was then and still is of opinion contrary to that judgment. Dolben, Justice, concurred with him that the daughter might bring the action; Jones and Wylde *hæsitabant.* But next day they also agreed to the opinion of the Chief Justice and Dolben; and so judgment was given for the plaintiff, for the son hath the benefit by having of the wood, and the daughter hath lost her portion by this means. And now Jones said, he must confess he was never well satisfied with the judgment in *Norris & Pine's case;* but being it was resolved, he was loth to give his opinion so suddenly against it. And *nota*, upon this judgment error was immediately brought; and Trin. 31 Car. 2, it was affirmed in the Exchequer-Chamber.

HOLMES *against* THE MANUCAPTORS OF BROWNE.

Bail cannot plead lessor sum paid by the principal to the plaintiff in satisfaction of the judgment. *Vide* 2 Jon. 75, 188. 1 Mod. 24. 1 Bac. Abr. 218. 2 Term Rep. 576.

Scire facias upon a judgment had against the principal for 35l. 6s. 8d. Defendant being bail pleaded, that the principal after the judgment paid the plaintiff 34l. in satisfaction of the debt due upon the judgment, which he accepted. The plaintiff demurred, and had judgment; for though the bail may plead payment to the plaintiff by reason of the condition of his recognizance, which is to pay the condemnation or to render the body, which the defendant himself cannot plead; yet the bail cannot plead payment of a less sum in satisfaction of a greater after the money was become due. *Pennel's case* 5 Co. and here the money was due immediately by the judgment.

[213] WALKER *against* HALL. IN THE EXCHEQUER.

Feoffment with letter of attorney but no livery nor name of attorney in the deed, shall operate as a covenant to stand seised. *Vid.* N. Lut. 243. *Post*, 225. 2 Jon. 105, 106. 3 Lev. 370.

Ejectment of lands in Durham by *quo minus* was sent and tried at Durham, and upon a special verdict the case was, Maddison being seised in consideration of marriage, gave, granted and confirmed to Margaret, his intended wife, *habend' to her, her heirs and assigns*, with a letter of attorney in the deed, but a blank for the attorney's name. And the deed was indorsed, memorandum, that livery and seisin was made *per* Attorney, leaving a blank for his name; but no witnesses of the livery indorsed, but to the sealing and delivery of the deed names of witnesses were

indorsed. And whether this should inure as a covenant to stand seised to the use of the wife? was the question. Argued by Shaftoe, serjeant for the plaintiff, and by Levinz for the defendant; and for the plaintiff were cited *Sanders and Savil's case*, Com. Banc. Hill. 1655, Rot. 1578. Adjudged, that the grant of a rent and attornment by one who in fact was not tenant, and so no attornment, should inure as a covenant to stand seised: and in *Crossing and Scudamore's case*, lately in B. R. there was a blank letter of attorney. To which it was answered for the defendant, that Crossing and Scudamore was a bargain and sale to the son, and no money paid, and that deed inrolled, which it was held, might operate as a *covenant* rather than the conveyance should be void. But there the intent of the party was only to pass a use, and since a use could not pass by bargain and sale for want of consideration, it passed as a use in another manner as it could. But when the parties intent is to pass an estate as at common law, and not by way of use, as it apparently was in this case by the letter of attorney, and the indorsement; though the deed be void as to this purpose, it shall not operate by way of use. Co. Lit. 49 a. 2 Roll. 787, pl. 1, 5. *Tibb & Poplethwait's case*, where the same point was adjudged that was afterwards in *Crossing and Scudamore's case*. If a letter of attorney had been in the deed, it could not have passed by way of use, for the alteration of the warranty. Here the blank letter of attorney is sufficient to shew the parties intent was to pass the estate as by conveyance at common law, and not by way of use. And *Pitfield and Prince's case*, 2 Rol. 789, *nu.* 2, father grants **[214]** to the son without letter of attorney; yet that shall not amount to a covenant to stand seised. And *Foster & Foster's case, nuper in B. R.* where the mother by articles doth grant and demise to the son in the present tense; yet that shall not operate as a covenant to stand seised, *& adjournatur*. But afterwards, as I heard, judgment was given by all the Barons, that this should operate as a covenant to stand seised: I did not hear their arguments, but I was informed they principally relied upon the case of *Crossing and Scudamore*.

COCKAINE *against* HOPKINS. IN THE EXCHEQUER.

Runnagate rogue, and if he had his deserts he would be hanged, said of one who used the trade of buying and selling, not actionable. *Vide post.* 233.

Case, that whereas the plaintiff for 7 years last past, *artem vendendi barganizandi & emendi legitime usus fuit*, and thereby had gained great profit for the support of himself and his family, the defendant *injuriose falso & malitiose* said of him, *He is a runnagate rogue, and worse than a rogue, and if he had his deserts he had been hanged*, whereby he lost his custom, but does not alledge any special damage. After verdict for the plaintiff, and divers books cited *pro & cont.* Judgment was staid, and the words adjudged not actionable; for *per Cur'*, *runnagate* is not of the same sense with bankrupt; and the plaintiff does not shew what was the trade he used, it might be a *tinker* or a *pedlar*, who travel up and down the country, and are rogues by the stat. of El. And what follows, *and deservest to be hanged*, are not actionable. *Sed quære* by reason of the words, *deservest to be hanged*.

MORRIS *against* WILFORD.

General release reciting the particular purposes and for what it was made. S. C. 2 Show. pl. 32. 5 Keb. 814, 840. *Ante*, 210. 3 Lev. 273, 274. 1 Lev. 99, 110, 272. 1 Sid. 141. 2 Show. 90. 1 Mod. 99. 1 Vent. 314. 3 Mod. 281.

Covenant against the defendant, as executor of Sir Samuel Starling, upon an indenture made between the plaintiff of the one part, and Sir Samuel Starling, and Mary his wife, on the other part, reciting, whereas Richard Garford, father of Mary, had devised to the plaintiff divers lands and goods in trust for the said Mary, and that her husband **[215]** should not intermedle with them, and that suits and differences having been touching the estate so devised, it was agreed, that Sir Samuel Starling, the husband, should have 2000l. out of the estate, and that he should release all his title to the residue, and covenant that he would not, *plus sectare turbare vel molestare*

the plaintiff, *pro vel concernen' stat. præd' Garford vel receptione vel retentione inde;* and assigns for breach, that Sir Samuel afterwards sued the plaintiff by English bill in the Exchequer to have an account of the estate of Garford, and thereby put him to the charge of 300l. The defendant pleads, that by indenture after the death of Sir Samuel made between the Lord Grandison, the husband and of the said Mary, and the plaintiff, of the one part, and the defendant of the other part, the Lord Grandison, and the said Mary, and the plaintiff, release to the defendant *totu' eorum jus titulum clameum & demand'* to the brew-house, of Sir Samuel, and to all the brewing vessels, and all claim and demand to the brewing vessels, and all their claim and demand to the personal estate of Sir Samuel, *virtute consuetudinit Civitatis London vel aliter quocunque modo.* Upon which the plaintiff demurred; and now it was argued for the plaintiff, that this release cannot bar the plaintiff, 1. Because the release was made for a particular purpose, *scil.* to release the wife's customary part, and the general words, *vel aliter quocunque modo,* do not extend to foreign matter; *scil.* damage to be recovered for breach of covenant with the plaintiff, though he be the executor of Sir Samuel. 2. Release of all demands to the personal estate of Sir Samuel will not bar Morris, the plaintiff, because at the time of the release he had no right to demand any part of the estate, but only to bring his action against the person, like the 25 Ass. 7, tit. Execution, 330. Co. Litt. 265 b. If the conusee release to the conusor of a statute all his right in the land, yet he may still sue execution of the land; for he had no right nor demand to the land at the time of the release, but only to have an action against the party, and the land is not bound but in respect of the person. To which it was answered for the defendant, that this case is not like that of the statute; for there the person is bound, and he hath nothing to do with the land but in respect of the person; but here he hath nothing to do with the person but in respect of the assets, for without assets, the party being an executor, is not chargeable. Jones, **[216]** Wylde and Twysden Justices upon the first argument were of opinion, that the release is no bar, notwithstanding the general words; for the release being made for particular purposes the general words are to be guided by the particular purposes. Rainsford Chief Just. *contra.* And after the case had been argued at Bar several times in Hill. 30 and 31, judgment was given for the plaintiff *per totam Curiam.* Levinz and others for the plaintiff: Saunders and others for the defendant.

[217] TERM. SANCT. HILL. ANNO 29 & 30 CAR. II. IN BANCO REGIS.

LOURY *against* REYNES.

Where an infant hath only goods, the Ecclesiastical Court may appoint him a guardian.

Prohibition was prayed to the Ecclesiastical Court of York to stay a suit there by a curator, which that Court had appointed to an infant who had only personal estate, against another who detained the person of the infant from him; and the suit was to have the person of the infant delivered to him. *Curia.* The Spiritual Court may appoint a *curator* for an infant that hath only personal estate, but whether such *curator* can maintain an action there for the custody of the person? they seemed to doubt. But they granted a prohibition, and ordered the plaintiff to declare that the matter might come judicially before the Court; accordingly it was done, and in Hillary term 30 & 31, the case came to be argued. The declaration was, that the title to *guardianship* is determinable at common law; nevertheless, that the defendant had libell'd against him in the Spiritual Court, that by the *canons* and *ecclesiastical constitutions* any person having the tuition of an infant under age committed to him by the will of the father, or *per judicem competentem,* ought to have the custody of such infant and of his portion, and that if any person detain such infant or his portion, he is punishable, and compellable by ecclesiastical censures to deliver up the person and portion of such infant to his *tutor* or *guardian,* and that the custody of James Reynes, **[218]** an infant under the age of 14, and of Anne Reynes under the age of 12, both of them having legacies left them by their father, was upon the probate of the will committed by the Ecclesiastical Court to the now defendant, plaintiff there,

grandmother of the said infants, 'till the son should attain the age of 14 and the daughter the age of 12, and that the defendant there detained them. The defendant pleaded *non prosecut' fuit contra prohibitionem*; and *pro consultatione habend'* he pleaded, that by the common law used and approv'd in England, if any person by his will bequeath goods to his infant children, the Ordinary, before whom the will is prov'd, hath us'd to commit the custody of sons and their portions 'till they come to the age of 14, and of daughters and their portions 'till they attain the age of 12, except where such children are in custody of any other by reason of *tenure*, or by the appointment of their father. And if any person detain such infants or their portions, to compel them by ecclesiastical censures to deliver them; and that the father of these infants devised goods to them, but appointed no *guardian*, and that they were not in the custody of any other *ratione tenuræ*, for which the Ordinary upon probate of the will committed them to the custody of the plaintiff there, defendant here; and that the defendant there, plaintiff here, detain'd them. The plaintiff replied, that the father of these infants being sick of a distemper whereof he soon after died, during his sickness constituted the now plaintiff and his wife, their grandmother, (now dead) their *guardians*, upon which he sued the defendant there for detaining them. The defendant demurr'd, and now, *scil.* Hil. 30 & 31, it was argued for the defendant, that where infants have only goods, the Spiritual Court may appoint them *curators* or *guardians* Swynb. 175, 176, and then as the appointment of a *guardian* belongs to them, so ought the suit for detainer from such *guardian*. 2. The republication of a commitment by the father is not material, 1st. Because it is not shewed to be by deed, testament, or *quo modo*. 2dly. One of the guardians being dead, the authority (for this is no more) is determined, Dy. *The Lord Bray's case*. To which, 'twas answer'd for the plaintiff, that supposing the Ecclesiastical Court hath authority in some cases to commit the custody of infants that have only personal estate, yet as the libel is here, the *prohibition* must stand, and they ought not to be suffer'd to proceed upon such libel, and the *prohibition* is founded upon the libel; now the libel is, that by the laws ecclesiastical every **[219]** person having the tuition of any infant under age committed to him by the will of his father, *vel per judicem competentem*, ought to have the custody of such infant, and suit in the Ecclesiastical Court for detainer of them. And this include commitments by the father upon stat. 12 Car. 2, which appoints a remedy in other Courts: and also comprehends all guardianships at common law, of which the Spiritual Court hath no power; and though the declaration abridges the matter by an exception (*scil.* excepting where they are in custody of any other *ratione tenuræ*, or by the appointment of the father) yet this will not amend the libel. And so held the whole Court, and that they ought not to be suffered to proceed upon such libel. 2. It was answered, that the commitment to the father is well pleaded, without shewing how; for it might be by parol, or by delivery of the infant; and the 26 E. 3, 65 is the case in point admitted. To which Scroggs, Chief Justice, agreed. 3. It was said, that the custody of an infant is an interest, and may survive, 2 Cro. *Shopland* v. *Rider*. He may make a lease in his own name; it is grantable over, F. N. B. 142 P. Latch. 157. Mich. 8 Ed. 4, pl. 2. But as to this point the Court said nothing. 4. It was said, that admitting the Ecclesiastical Court may appoint such *guardian*, yet it does not follow that the guardian must sue there for detainer. F. N. B. 142 G. the mayor, &c. may commit orphans, and yet the suit for detainer must be in other Courts. To this likewise the Court said nothing. But for this fault in the libel it was unanimously resolved, the prohibition should stand. Levinz for the plaintiff, Holt, junior, for the defendant in the prohibition.

[220] TERMINO PASCHÆ, ANNO 30 CAR. II. IN BANCO REGIS.

SEATON *against* HENSON.

Three jointly and severally bound, if the seal of one be torn off, the obligation is void *in facto*. S. C. 2 Show. 28. 1 Salk. 52, 53. 2 Salk. 574. Bull. N. P. 268. 5 Com. Dig. 232. Cowp. 600.

Debt upon an obligation made to A. B. and C. wherein they were jointly and severally bound, and the action now brought against A. only. The defendant upon

oyer of the obligation pleaded that the seal of B. *fuit divulsus*, and therefore the obligation cancelled and made void as to all. The plaintiff demurred; and now Pollexfen for the plaintiff argued, that the obligation being joint and several, it is still good as to the rest. 5 Co. *Mathewson's case.* To which it was answered, that the obligation being at first joint and several as to all three, by this cancelling of it as to one, it ceases to be so, and therefore the obligation is wholly void: for it is not now an obligation of the same nature as it was when it was first executed. March. Rep. *Watford's case.* The Court at first doubted; but afterwards upon sight of *Watford's case*, and another case which Wylde remembered to be so adjudged, *inter Bloom and Tracy*, the whole Court gave judgment for the defendant.

[221] THE KING *against* MARIOT.

Indictment of forgery wanting *vi & armis*, S. C. 2 Show. pl. 2. Forgery *super caput suum proprium. Vide* 1 Jo. 325. 1 Lev. 138. 3 Mod. 66. Raym. 81. *Ante* 21.

Error of a judgment upon an indictment for forgery assigned, 1. Because the indictment wants *vi & armis*, and this indictment is not for a *non-feasanze* but a *male-feazance.* 2. The indictment is, that he forged it *super caput suum proprium* instead of *ex imaginatione sua propria*, or *ex capite suo proprio;* for as it is it must be intended that the writing was writ *upon his head*, and that might be by another. 3. The jury find him guilty *de transgressione contempt. & forgeria prædict'*, and there is no such Latin word as *forgeria:* but the Latin word is *fabricator.* And then the defendant is not found guilty of the forgery, and yet judgment is given against him for the whole; and as to the word *transgressio*, there are other trespasses laid in the indictment to answer that. As to the first Jones, Justice, answered, It is cured by the express words of statute 37 H. 8, and *Hart's case*, 2 Cro. is so resolved. But Twysden and Wylde *totis viribus contra;* for multitudes of indictments have been quashed for this cause, and without *vi & armis* no *capiatur* can be awarded, nor fine to the King; and to this Rainsford, Chief Justice inclined, whereupon *Curia advisare vult.* But as to the second, it is but a literal translation of the words of the statute, and therefore the whole Court held it well enough, though they be not so elegantly translated as they might be 3. *Transgress. prædict.* includes the forgery, and all other trespasses. *Postea Trin. prox.* upon reading the stat. 37 H. 8, and several perusals of it, it was agreed by the whole Court that the want of *vi & armis* is cured. *Similis casus ante Trin. 2 Car. int. Regem & Newton.*

[222] TERM. SANCT. TRIN. ANNO 30 CAR. II. IN BANCO REGIS.

CORY *against* PEPPER.

Suit in the Spiritual Court for keeping of a school without license from the Ordinary. Nels. Lutw. 341.

A *prohibition* was prayed and granted *nisi causa* upon a suit in the Spiritual Court, for teaching a school without licence, in contempt of the canons, and now upon hearing counsel of both sides a consultation was granted; for though the Statute of Uniformity in the 13 Car. 2 gives a penalty of 5l. in such case, for which the suit must be at common law; yet that does not take away the jurisdiction of the Spiritual Court, when they proceed upon the canons, and not upon the statute for the penalty. And the canons made ann. 1571 in the reign of Queen Eliz. and in 21 Jac. being confirmed by Q. Eliz. and K. James are good and valid per stat. 25 H. 8, so long as they neither impugn the common law, nor the King's prerogative. Before the stat. 25 H. 8, the clergy made canons without the King; but now they are restrained by that statute cap. 19, yet still notwithstanding that statute the clergy may make canons with the King's consent, provided they be not contrary to the laws of the land, nor derogatory to the King's prerogative; which cannot be said on these canons requiring a school-master should be licensed by the bishop of the diocess, to the end school-masters may be fit to instruct their scholars in the true principles of religion. Williams for the plaintiff, Levinz for the defendant in the **[223]** prohibition.

THE KING *against* LEAVER.

Certiorari to the County Palatine, how it should be directed.

Error of a judgment upon an indictment of barretry in London, an exception was taken to the writ. *First*, Because it is directed to the Judge of Assise, where it ought to be to the Chancellor, and he to command the Judge of Assise; and precedents were ordered to be searched, and two found; one 7 Car. 1, directed to the Chancellor and proceedings thereupon, and judgment affirmed: the other 19 Car. 2, directed to the Judge, but no proceedings thereupon appearing in the record, the Court had little regard to it: but in truth there were proceedings thereupon, for I myself was a counsel in the cause, and assigned error *ore tenus*, which being over-ruled by Hale then Chief Justice, the plaintiff in error being this same Leaver, in a conviction of barretry as this is, agreed with the prosecutor, and obtained a pardon, by which means it happened, that none of the proceedings were entered upon record. But in that case no exception was taken to the writ. A second exception to the writ was, that in the style of the King, *Carolus Secundus, &c. Scotiæ* was omitted; and for this cause the writ was quashed, and Leaver brought a new writ of error directed to the Chancellor, and no writ *quod coram vobis residet*, for it was held the record was not removed by the first writ.

LISLE *against* [illegible].

Covenant to stand seised to A. for life; remainder to his 2d, 3d, and 4th sons in tail male, and to all and every the heirs males of the body of A. Whether A. has an estate for life, or in tail? S. C. Raym. 278, 302, 315. 2 Sho. pl. 3. 2 Jon. 114. *Vid. ante* 9, 76. *Post* 226.

Ejectment of lands in Northumberland; and in a special verdict upon *non culp.* the case was: one seised of the lands in question covenanted to stand seised to the use of himself for life, the remainder to Edward his first son for life, the remainder to the first son of Edward in tail male, the remainder to the second, third, and fourth sons of Edward in tail male, *and so to all and every other the heirs males of the body of Edward respectively and successively, and to the heirs males of their bodies, according to their seniority of birth, the remainder to the lessor of the plaintiff for life,* **[224]** *the remainder to his first son in tail male, and so to the 1st, 2d, 3d and 4th son in tail male, and so to all and every other the heirs male of the body of the lessor severally and respectively, according to their seniority of birth.* The covenantor died; Edward suffered a common recovery, and dies without issue male; and if the lessor was barred by the recovery? was the question; which rests entirely upon the words of the limitation after the limitations to the four sons of Edward, viz. and *so to all and every the heirs male of the body of Edward;* whether by these words Edward took an estate tail for default of the issue of his four sons? or, whether he was only tenant for life, and the words, and *so to all and every the heirs male of the body of Edward* shall be taken as if it had been *to all and every other sons of Edward?* And 'twas argued for the plaintiff, that Edward took only an estate for life. First; by the words, *and so to the heirs male of the bodies of those heirs,* it appears, that the heirs male are to take by purchase; for otherwise these words and *to the heirs male of their bodies* need not have been added; for if they take by purchase and *successively,* then have the words the same sense as *all and every son and sons.* 2. *And so to all and every other the heirs males, &c.* (How must that be?) *So as the heirs male, scil. the sons,* took before. 3. Translate the word *so* in Latin, *eodem modo as the four first sons took;* as was done in *Beresford's case,* to serve the intent of the parties, and to make the conveyance coherent. 4. Not only the precedent, but also the subsequent limitations shew, his intent was to settle it to the lessor and his four sons in tail male, *and so to all and every the heirs male of the sons, &c.* which would be in vain, if Edward shall have such an estate as will enable him by common recovery to defeat all the rest. 5. Here is a proviso, that if Edward die without heirs male of his body, he may charge the estate with portions for his daughters, which were needless if Edward hath an estate tail, for then he may do it without such proviso. But 'tis proper to add it to an estate for life, which shews also

his intent, that Edward should have but an estate for life. On the other side it was said, that in all cases when the ancestor takes an estate of freehold, a limitation afterwards to his heirs, or the heirs male of his body, vests the inheritance in himself, Co. [225] Litt. 22 b. and 1 Co. *Shellie's case*. *Curia*, Edward hath only an estate for life by the manifest intent of the conveyance, which ought to be pursued where by any means it can; and therefore they, as was done in *Beresford's case*, would translate the word *so*, *eodem modo*, as in *Beresford's case* they translated the words *to the heirs male of Aden*, in this manner, *sc. hæredibus masculis de Aden* or *ex Aden:* to supply the words *de corpore*, and to make good the intent of the donor in that conveyance; and so they gave judgment for the plaintiff; upon which a writ of error was brought, and upon the first argument the Court of Exchequer-Chamber inclined to affirm the judgment: but before it was affirmed or reversed, the suit abated *per mortem*. And afterwards a new ejectment was brought, *sed quid inde venit nescio*. Levinz for the plaintiff, Lisborn for the defendant.

COLTMAN *against* SENHOUSE.

In an indenture of mutual covenants between mother and son, he covenants that if he dies without issue, he gives and grants the land to her, &c. this raises a use to the mother. S. C. 2 Show. pl. 7. 2 Jon. 105. Nels. Lutw. 243. *Vide prox.* pag. 3 Lev. 370, *& ante*, 213.

Ejectment of lands in Cumberland, and upon *non culp.* and special verdict, the case was; Dalton seised in fee, died seised, leaving Henry his son and heir and one daughter, to whom he gave 100l. for a portion, the wife of Dalton entered, and paid the portion during the minority of the daughter, and after married the defendant, and after Henry came of age; and then by indenture between Senhouse and his wife on the one part, and Henry on the other part, reciting this whole matter, Senhouse and his wife for the advancement of Henry, and for the love his mother had for him and for settling the lands to him quit of all claims for jointure, dower or otherwise, Senhouse and his wife covenanted, granted and aliened the lands to Henry, from the day of date, and that Henry should enjoy the lands during the life of his mother. Also he covenanted that his mother should enjoy there cattlegates for ten oxen or cows. And that he should pay all taxes, and 13l. per annum to his mother during her life, and divers other covenants and agreements were betwixt them. And then towards the end of the deed came this covenant upon which the action is brought, *sc.* Henry covenants that if he die without [226] issue, *he does give and grant the lands in question to her and her heirs*, and after he died without issue, and his sister being his heir brought the ejectment; and whether this last covenant and grant shall amount to a covenant to stand seised, and shall convey the estate to the mother? was the question. For the plaintiff it was argued that it should not, 1. Because the consideration is for the advancement of the son, and the affection of his mother to him, and there is no appearance of any intention to raise a use to the mother. 2. The scope of the deed seems to be an agreement to compose matters between the son and his mother, who entered and took the profits of his estate, and paid a portion to the sister. And *Foster & Foster's case* was cited, wherein was such an agreement as this is by articles, and yet no use arises, tho' it contained the same words, *does give, grant, &c.* and *Pitfield and Piers's case*, 2 Roll. 789. 3. The mother entered, and it might be by disseisin; for it does not appear how she entered, neither does it appear that the son re-entered, and then his covenant cannot raise a use out of an estate whereof he was not in possession. 4. The indenture seems to be only mutual covenants and agreements betwixt them; and by the covenant that Henry should enjoy for the life of the wife, no use can arise to Henry, because it is her covenant, and she was a *feme-covert*, and all on her part rests only in the covenant to bind the husband, and so on the part of Henry, his covenant rests only in covenant that his mother shall have the estate if he die without issue. For the defendant it was said, that where the intent appears to pass an estate, but the conveyance is defective, it shall be supplied and made good by way of use to fulfil that intent; and that here was a manifest intent that his mother should have the estate if he died without issue, 2 Roll. 789, *Tibb and Poplethwayt's*

case, and *Crossing and Scudamore's case*, *ante* in this Court, *sc.* Pasch. 23 Car. 2, Rot. 871, and *Pybus and Mitford's case*, Trin. 24 Car. 2, B. R. Rot. 318. *Curia.* We have gone as far already as is convenient for us to do in making good barbarous conveyances, it is not fit for us to go farther than we have done already; and inclined against the defendant, *sed adjournatur*. *Postea* Mich. 30, it was argued again, and the Court took time to deliver their opinions, and did not, but adjourned it till Pasc. 31, and then the Court upon consideration, being agreed, gave judgment for the defendant, **[227]** that a use was well raised to the wife by this covenant being the intent of the parties. And they said that Wylde Justice, now dead, was of the same opinion. Levinz counsellor for the plaintiff, Saunders for the defendant.

GILMORE *against* SHUTER.

Promise of a marriage-portion without writing made before the Statute of Frauds and sued after. S. C. 1 Vent. 330. 2 Ton. 108. 2 Show. pl. 9.

Assumpsit upon a promise for payment of a marriage-portion made before the late Statute of Frauds and Perjuries, and a special verdict was found before Rainsford Chief Justice, at Guild-hall: and it was resolved by the whole Court, that whereas the statute is, *that after the 24th of June*, 1677, *no action shall be brought upon any promise in consideration of marriage without a writing testifying the same*; and this action is brought after the 24 June 1677, yet being grounded upon a promise made before the 24 of June 1677, it is good without any writing thereof; and that the statute extends only to promises made after the 24 of June 1677, for which actions are brought after the 24 of June 1677, and no other; for it was not the intent of the Parliament to defeat all promises made before the Act.

CHAPMAN *against* FOTHERGILL.

Consideration that he would consent, and not hinder a marriage, and does not say where he consented and did not hinder.

Assumpsit in consideration the plaintiff would consent, and would not hinder the defendant to marry such a woman, in whom the plaintiff had some power of persuasion, the defendant promised to pay him 20l. and says that he consented and hindered not the marriage, and that the defendant married the said woman, and had not paid the 20l. Upon general demurrer, judgment was given for the defendant, because it is not shewed in the declaration where, or in what place the defendant did consent, and this is not a mere negative, *not to hinder*, as was objected by the plaintiff, but affirmative also; to consent, and not to hinder.

[228] HALL, &c. *against* HUFFAM.

Surviving joint-merchant, and the executor of his companion, join in an action. *Ante* 110, 111, 188. 3 Keb. 737, 798.

Assumpsit by Hall and George Wood, and his wife executrix of John Whitley, and declares, that by the law of merchants there is no survivorship; and that Holt and Wood joint merchants were possessed of 40 ounces of musk, and sold it to the defendant at so much per ounce, as they should sell the rest of their musk and that they sold the rest at such a price, and that the defendant had not paid; and declares also of another promise made to the plaintiff after the death of the testator. Upon *non assumpsit*, and verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiffs ought not to join, but should sever for their moieties; for the action brought by the executor ought to be in the *detinet tantum*, and by the survivor in the *debet & detinet*. 2dly, The executor himself ought not to join two promises in one action, the one made to the testator, the other to himself. *Sed non allocatur*; for the judgment for an executor is all one as for any other plaintiff, and whatever is recovered in such case will be assets in the hands of the executor: but a man cannot

sue an executor and another jointly; for the one is to be charged *de bonis testatoris*, the other *de bonis propriis;* and judgment was given for the plaintiff.

[229] TERM. SANCT. MICH. ANNO 30 CAR. II. IN BANCO REGIS.

DOUGHTY *against* MILLS.

Justification 10 October for taking one by virtue of a warrant of the sessions the 9 October, not averring the sessions then continued, is naught. Yelv. 53. 1 Term Rep. 645. 2 Burr. 899.

Trespass and false imprisonment; the defendant justified that a General Quarter-Sessions of the Peace was held 9 October 27 Car. 2, and that the justices made a warrant to him to bring the defendant to the sessions, and that he the 10 October, *virtute warranti præd'* took the defendant to bring him to the sessions, and detained him for a quarter of an hour, and then the defendant rescued himself. The plaintiff demurred and had judgment; for the bar is ill in not averring that the sessions continued the 10 of October, for otherwise it shall not be intended; and his saying that he took him *virtute warranti præd'* will not supply it, as in *Bayton's case*, 3 C. 44 b. *virtute warranti præd'* supplies, that it was in writing, and that it was betwixt the *testa* and return of the writ. *Tamen quære.*

[230] STRODE *against* HUNT.

No value of the soil taken in the *continuande.*

Trespass *quare* 1 *Maii anno* 29 *Car* 2, *clausum fregit & intravit & fodit terram & asportavit vigint' carectat' terr' & soli valor' quadraginta solidor', continuando transgressionem præd' quoad fossionem caption & asportationem terr' & soli' præd' a præd'* 1 *die Maii usque* 1 *diem Junii tunc prox' sequent' ad Dam'* 30*l.* judgment for the plaintiff upon demurrer, and a writ of enquiry of damages, and intire damages, and adjudged ill, because there is no value alledged for the *soil* carried during the time of the *continuando*, according to the judgment *Pasch. prox' præterit', inter Howell and Lagden.* And yet in *Howell's case* it was not said *ostrea prædict'* being for taking 100 bushels of oysters, *continuando transgressionem prædict' quoad* the taking of the oysters, but does not say *ostrea prædict'. Et hic est soli prædict'.*

JACKSON *against* NELE.

No prohibition to Inferior Courts after judgment. *Vide* 1 Lev. 50, 69, 96, 104, 137, 153, 208, 289, *ante*, 887. *Ante*, 87.

Assumpsit in Windsor-Court for meat, drink, &c. *apud Maidenhead infra jurisdictionem Curiæ;* and upon *non assumpsit* the evidence there given was of *meat, drink and a promise apud Henly*, which is *extra jurisdictionem;* for which the defendant offered to demur upon the evidence, but the steward would not admit thereof, whereupon verdict and judgment for the plaintiff; and now upon the whole matter a prohibition was prayed, but denied; for it is not grantable after judgment there. *Quære* in this case, for the party hath no other remedy, he hath done all that he could to prevent judgment; and at this rate they may give judgment in Inferior Courts after verdict before the defendant can be heard time enough to have a prohibition, and so tortiously enlarge their jurisdiction.

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[231] GAMON *against* VERNON.

Debt by the lessee against an assignee of a moiety, for the moiety of the rent. S. C. 2 Jon. 164. *Vide* 2 Sand. 181, 182, 303. 1 Lev. 308. 1 Sid. 401. 3 Lev. 296. Ray 162. Pop. 220. 3 Co. 22, 24. 2 Danv. 484, 485. 2 Bac. Abr. 18, 22, 443. 2 Com. Dig. 642. 5 Com. Dig. 201.

Debt for rent; the case upon the declaration after verdict was, lessee assigned the moiety of the land for the whole term, the lessor brought debt against the assignee

for the moiety of the rent: and it was moved in arrest of judgment, that both the privity of estate and contract, in this case, remain entirely in the lessee, and by consequence the moiety of the assignee not chargeable. But *per totam Curiam*, the assignee having the entire estate in one moiety of the land, he hath the privity of estate sufficient to be charged by the lessor for the moiety of the rent if he will; and judgment was given for the plaintiff.

THE KING *against* MAYOR, CITIZENS, AND COMMON COUNCIL OF LONDON.

Information in nature of *quo warranto* for taking ½d. per chaldron for all sea-coals brought to London, the defendants prescribe for the duty, and issue was taken upon the prescription, and tried at Bar. The defendants produce several citizens, freemen of London, to prove the prescription; and it was objected they ought not to be witnesses, *quia in proprio casu. Sed per Curiam*, it appearing that the mayor and sheriffs have the whole profit of this toll, tho' they have it for the benefit of the whole corporation, of which all the citizens and freemen are members; yet these having no particular profit to themselves, were sworn as witnesses; for it cannot be presumed that for an advantage so small and so remote, they would be partial and perjure themselves; and the jury found for the defendants. And Scroggs, Chief Justice, said that it ought not to be a general rule, that members of corporations shall be admitted or denied to be witnesses in actions for or against their corporations: but every case stands upon its own particular circumstances; viz. whether the interest be so considerable as by presumption to produce partiality or not.

[232] JAMES *against* RICHARDSON.

Devise to the heir of Robert Durdant now living, who then had a son George, a good devise to George. S. C. 2 Jon. 99, 100. Ray. 330, 331. 2 Vent. 311. 1 Vent. 334, 335. 3 Keb. 832. 2 Show. 2. Dan. 515, 516. *Vide* Hob. 29, 33. Ato. 860. 2 Leon. 70. Raym. 82. 2 Jo. 112. 2 Mod. 291. 1 Heb. 567, 752, 800. 3 Keb. 111, 145, 296, &c. 1 Lev. 59, 60.

Ejectment, and upon *non culp.* and special verdict, the case was, Weekes seised in fee, devised the lands to Higden and his heirs, for the life of Robert Durdant in trust for Robert Durdant, and after the death of Robert Durdant, to the heirs males of Robert Durdant now living, and such heirs males or females as he afterwards shall have of his body. Robert at the time of the devise had a son called George; and whether this was a remainder executed in George by the name of *heir male* of his father? was the question; for it was objected, *nemo est hæres viventis*, and Robert being then living, George could not take during his life by the name of *heir:* but after divers arguments it was adjudged, that the remainder was vested and executed in George, and not a contingent remainder, and so destroyed by the fine of Higden in the life of Robert; for the testator takes notice that Robert was alive, and then devising to heirs now living, George is the person he intended by the word *heir*, he is heir apparent in law, and in common parlance is called heir, and *now living*, refers to all; *sc.* heirs males now living, although Robert Durdant are the words precedent; for he took notice before that he was living, and therefore a tautology to refer them to him, but proper to refer them to George, who was named before, and perhaps his name not remembered by the devisor, and therefore added these words *now living*, to demonstrate what person he intended; and yet he shall take in fee-simple, and not an estate for life only, as was objected, it must be if the words were only added to denote the person; for by *heirs* is included all heirs of heirs, as a remainder limited to the right heirs of J. S. includes all heirs of heirs, without saying to the right heirs of J. S. and their heirs: whereupon a writ of error was brought in the Exchequer-Chamber, and there this judgment was reversed upon the point in law; and upon that another writ of error was brought in the House of Lords: and the judgment in the Exchequer-Chamber was reversed, and the judgment in the King's Bench affirmed. And afterwards a new ejectment was brought upon

the death of George against [233] his heir to try this point again, whether George took only an estate for life, or in fee? and the matter was found specially again, and judgment given in B. R. for the heir upon a new hearing of this matter; and upon this a writ of error was also brought, and the judgment in B. R. affirmed, whereupon another writ of error was brought in the House of Lords, and the judgment affirmed.

NEWTON AND HIS WIFE *against* MASTERS.

She is a strumpet and a bawd, and kept a bawdy-house. *Vid. ante* 274.

Case by baron and feme for saying of the wife, *She is a strumpet and a bawd, and kept a bawdy-house:* after verdict for the plaintiff, it was moved in arrest of judgment, that none of these words are actionable save the last, *scil. she kept a bawdy-house*, and they are spoke in the preter-tense, and so it may be intended, that she kept a *bawdy-house* before the general pardon. But *per Curiam;* The scandal remains, and it shall not be intended of keeping a *bawdy-house* before the pardon, unless it fully appears it was the meaning of the party, and that he so intended.

WETHERHEAD *against* ARMITAGE.

Of a school-mistress; *She is as much a man as I, she got a woman with child, she is an hermaphrodite*, not actionable without special damage. S. C. 2 Show. pl. 11. *Vid.* 1 Sal. 16.

Case by the plaintiff, a woman, and declares, that she *per diversos annos* (not saying *ultimos elapsos*) was *skilled in dancing, and taught* young women to dance, whereby she gained a livelihood; and the defendant to injure her said, *She is as much a man as I am, she got J. S. with child, she is an hermaphrodite;* by which she lost divers scholars but does not mention any in particular. Verdict for the plaintiff; but after divers motions *pro & con.* judgment staid; for *hermaphrodite* is not actionable, nor is it any scandal to her profession; for young women are taught to dance more frequently by men than women; and no special damages are laid. And therefore the Court held the words not actionable in themselves, without regard to the exception of its being *diversos annos* (omitting *ultimos elapsos*). Holt jun. for the plaintiff; Levinz for the defendant.

[234] KNIGHT *against* HOOPER.

Avows for rent by grant of the reversion, and shews no attornment. Cured by verdict upon issue *riens arrere* for the avowant. *Vide* 6 Mod. 113. Hob. 54.

Replevin, and avows for rent upon a lease rendering rent, and a grant of the reversion by the lessor to the avowant; but pleads no attornment upon the grant of the reversion. Issue, *riens arrere*, and verdict for the avowant; and it was moved in arrest of judgment, that the avowant hath shewn no title for want of attornment: *sed per Cur'. riens arrere* hath admitted a title in the avowant; at least it is cured by verdict, for the jury could not find any rent arrear to him, if he had no title. *Quære* of the first reason, for *riens arrere* is the general issue.

ASSER *against* FINCH.

Trespass, and justifies for a way; issue *extra viam:* full costs. S. C. Sho. pl. 19. *Ante* 124. 5 Mod. 74.

Trespass for entering his close, and spoiling his grass, the defendant justifies for a way there; the plaintiff replies *extra viam*, and issue thereupon, and verdict for the plaintiff, and whether the plaintiff should have full costs, or no more costs than damages upon the new statute? was the question: for it was said, no title came in question upon the trial, for the way is admitted, and the issue is now only, whether he was guilty *extra viam? Sed per Cur'.* The plaintiff shall have full costs; for

1st, There was a title to the way in question upon record, and so the case is out of the intent of the statute. 2dly, Upon this issue *extra viam*, a title to the way is in question; *scil.* of what extent the way is? Whether 10 or 20 feet in breadth, &c.? All which came in question upon the trial. Otherwise perhaps, if the extent and place where the way lies had been agreed in the pleadings. But as it is, the plaintiff had judgment and full costs by the rule and direction of the Court.

[235] ADAMS *against* STATHAM.

Award that one should pay the other so much for sums received out of the estate of W. a mere stranger. S. C. 1 Danv. 485. 2 Show. pl. 47.

Assumpsit, whereas differences had been between the plaintiff and defendant (but does not say touching what matter they were in difference) they submitted to the award of J. S. who did award *de & super præmissis*, that the defendant should pay the plaintiff 30l. in satisfaction of all sums due to him out of the estate of one Woolly. After verdict for the plaintiff, judgment was staid; but at last after divers motions this and other terms was entered for the defendant, because it does not appear that the defendant is executor, administrator or trustee for Woolly; it does not appear he had any thing of Woolly's, or that he submitted on behalf of him, and so no consideration why he should be charged for the estate of Woolly.

[236] TERM. SANCT. HILL. ANNO 30 & 31 CAR. II. IN BANCO REGIS.

ENFIELD *against* HILLS.

Freemen admitted to be witnesses for the corporation. See p. 231. S. C. 2 Jon. 115.

Case, whereas the plaintiff was an alderman of Canterbury, and put out of his place, and sued a *mandamus* to be restored; the defendant *falso, &c.* procured a return to be made in the name of the Mayor, Aldermen and Commonalty of Canterbury, and set forth the whole return *in haec verba*, and the falsity of it, by which he lost his place. Upon *non culp.* pleaded, and a trial at Bar, the defendant produced seven freemen of Canterbury, as witnesses for him to prove the truth of the return; to whom it was objected, that they being freemen of Canterbury ought not to be received as witnesses; producing a by-law there made, by which their return was ordered to be made, and that the charges insuing should be borne by the corporation. To which the counsel for the defendant answered, and shewed a release from the defendant to the mayor, aldermen and commonalty, and all others, the freemen of Canterbury, of all advantages, contributions and demands which he might have against them by virtue of this by-law, or any other order, *aut alio modo quocunque.* And yet by the opinion of Rainsford and Twysden, *contra* Jones, these three Judges being only then in Court, the seven witnesses were not allowed to give evidence, and the jury gave their verdict for the plaintiff, and 300l. damages. Hereupon the defendant's counsel prayed the Court to sign a bill of **[237]** exceptions for not admitting the witnesses, which they agreed to do accordingly, *and before judgment it was drawn, signed and sealed by them.* And now it was moved in arrest of judgment, *upon the bill of exceptions, and divers points shewed and argued.* And for the defendant 'twas said, 1st. That a bill of exceptions lies upon a trial at Bar as well as a trial by Nisi Prius, and that upon Stat. of Westmin. 2, 31, and for authorities were cited 27 H. 8, 24, 25, upon a trial by Nisi Prius, 2 E. 4, 66, upon a trial at Bar *in Com. Banc.* and also 21 E. 4, upon a trial at Bar in C. B. And Co. 2 Inst. 427, upon the words of the stat. *Et si dominus Rex venire faciat coram illo*, who says it is to be intended of a writ of error, which does not lie *in Banco Regis* upon a judgment in the same Court, therefore he supposes that a bill of exceptions would not lie upon a trial by Nisi Prius out of this Court, for there the judgment and record is in this very Court, which would render the statute of little or no effect; for by the same reason it will not extend to trials in the Exchequer, for error lies not in B. R. upon their

judgments. But these words *si venire faciat* are to be understood that the record is brought here by writ of error; not to exclude cases where the record is already there; nor where it can never come there, but goes before other justices by writ of error. 2dly, It was said for the defendant, that of this bill of exceptions advantage may be taken as well in arrest of judgment, as upon a writ of error; and in the 27 H. 8, 24, 25, 'twas so done. 3 H. 4, 14 b. *it is as well to prevent judgment as to reverse it.* 3dly, Here needs no *scire facias ad cognoscendum sigill'*, because the Judges are of the same Court where the bill was signed, either to confess or deny their seals; and though it happens that two of the three Judges are removed, *sc.* Rainsford and Twysden, yet it is sufficient that Jones continues; for by the words of the statute one Judge is enough to seal the bill, *& si forte unus justiciarior' non vult apponere sigillum apponat alter.* And if one be sufficient to seal, one is sufficient to acknowledge. 4thly, The refusal of the witnesses was error; for be it as it will in other respects by the release of the defendant, all the advantage he can have against the citizens for his charges upon the by-law is discharged. And the whole Court now held that these witnesses should have been admitted. **[238]** 5thly, The declaration itself is naught; for it does not shew what was done upon the *return*, perhaps it may yet be adjudged ill, and then the plaintiff shall be restored, and yet shall have 300l. for the loss of his place; he ought to have stayed till judgment had been entered upon the return, and thereupon have declared; otherwise it is like an action upon the case for indicting a man of felony, which lies not without shewing he was acquitted, or that the grand jury found the bill *ignoramus.* And of this opinion was Scroggs, Ch. Just. to which the rest inclined. For the defendant 'twas answered, that a bill of exceptions lies not upon a trial in this Court, whether it be at the Bar here, or by Nisi Prius out of this Court, and that upon the words of the stat. *si venire faciat dominus Rex recordum coram illo*, Co. 2 Inst. 427. But the Court seemed to incline that a bill of exceptions lay as well upon trials in this as in any other Court. *Et nota* afterwards, in or about the year 1693, upon a trial at Bar between the Duke of Grafton, and the Lord Chief Justice Holt, for the *office de Chief Prothonotary de Banco Regis*, the Court agreed to sign a bill of exceptions. But afterwards, for apparent falsities there inserted, they refused to seal it, which was complained of to the House of Lords, where the falsities were examined. To the 2d point it was argued for the plaintiff, that a bill of exceptions is not to be used in arrest of judgment, but only in a writ of error, and they produced and cited many precedents where it had been used upon a writ of error, which the Court said were good proofs that it might be used upon a writ of error: but they did not prove that it could not be made use of by motion in arrest of judgment; *however they gave no positive opinion as to this point.* 2dly. It was said for the plaintiff, that no use could be made of the bill here, because it is not entered upon the record, but only brought into Court under the seals of the justices. But to this the Court answered, it appears by the stat. that it is not always entered upon record, for the stat. says, *si non inveniat in rotulis, &c.* then a *scire facias* shall issue. Also it may be entered now if that be necessary: but the bill not being entered, the plaintiff's counsel did not speak to the refusal of the witnesses. But the whole Court declared, that the witnesses should have been admitted, and the refusal is an injury to the defendant, which will be a sufficient reason for the Court to grant a new trial, come what will of the other matters. And as to the exception to the declaration, **[239]** it was said by the plaintiff's counsel, it is not usual in the Crown Office to enter up judgment in these cases, unless where restitution is awarded. And the plaintiff hath concluded his declaration, *scil. whereby he lost his place*, which is a sufficient averment in such case, that the return was adjudged sufficient, so that he was not restored. But the whole Court held the contrary; and though the clerks *ex officio* do not enter up judgment upon the return but where they make farther benefit by issuing out writs of restitution; yet if judgment was given upon the sufficiency, the plaintiff should have procured it to be entered up to enable him to bring his action: and the Court strongly inclined that the declaration was naught for this cause; but they gave no judgment at present, but gave the plaintiff's counsel farther time to advise with his client; for be the law one way or other, here is at least sufficient grounds for a new trial. Afterwards the parties agreed, as I suppose, for I heard no more of the case. Holt, jun. for the plaintiff; Levinz for the defendant in the motion in arrest of judgment.

COLBORNE *against* WRIGHT.

Co-executor and administrator during the minority. S. C. 2 Jon. 119. *Vid.* 3 Leon. 143, 209. 4 Leon. 56, 212. Yelv. 130. 1 Brownl. 101. 5 Co. 27. 1 And. 117. 1 Mod. 47, 297. 1 Saund. 212. 2 Lev. 181, 299.

Debt for arrears of rent as executor, and also as administrator *durante minore ætate* of his co-executor, and declares, that the testator made the plaintiff and others his executors, and that J. D. seised of a rent of 20l. per annum, devised it to three persons in equal parts in common, and that all the three devisees levied a fine of one moiety thereof to the wife of the testator in fee, and of the other moiety to the use of a stranger in fee, and that the stranger granted his moiety to the wife of the testator in fee, that the testator had issue by her, and after the wife died, whereby the testator became seised of the whole by *curtesy of England*, and that the rent grew due to the testator, who made him and the other co-executors, and that he solely proved the will, and administration was granted to him during the minority of the co-executor, who is still under age. To this declaration the defendant demurred, and two things were now insisted on for the defendant: 1. That this being a rent-charge which is against common right, it cannot be divided only to make tertenant subject **[240]** to several distresses without his consent, and there is no attornment, Co. Lit. 148 a. *aliter* of a rent service or such things as are of common right, Hob. 25. Grantee of a rent gives part thereof by fine, the tenant is not bound to attorn, therefore the devise and the fine to uses thus divided is not good. He agreed, that to a devise or a fine to uses there needs no attornment; but the devise or fine in such case of things not dividable can't be divided, but the devise and the fine itself are void. 2. Both the executors ought to join in the action, though only one of them prove the will, and an executor and administrator to the same person are inconsistent; for where there is an executor, the Ordinary hath no power to grant administration. 9 Co. *Hensloe's case.* Yelv. 130, *Smith* v. *Smith*, and *Cunningham's case* lately adjudged in this Court. To which it was answered by the counsel of the plaintiff, and resolved by the Court; 1. That by these conveyances of devise and fine to uses, the rent may be divided without the assent or attornment of the party, because his assent or attornment is not necessary to the perfection of these conveyances. 2. Where one of the executors is an infant and cannot prove the will, administration *durante sua minoritate* may be granted to the other, who must sue solely, and it is not inconsistent to have administration in such case, for it is not granted in this case, as it is upon a dying intestate; for here the will is proved but only to enable him to sue solely, because the other is not capable of proving the will, nor to join with him, and he cannot sue solely; and cited *Hatton and Mascall's case* entered in this Court, Mich. 15 Car. 2, B. R. Rot. 703, the roll whereof was brought into Court, and appeared to be so adjudged. But where both executors are of full age, though the will be proved by one only, the action must be brought in both their names: so judgment was given for the plaintiff; Holt junior for the plaintiff, Levinz for the defendant.

[241] GREATERCHY *against* BEARDSLY.

Church-wardens prescribe to dispose the seats of the church, *ratione edificat' & reparations. Ante* 102, 186. *Vid.* 1 Sid. 88, 89, & 101. 1 Lev. 71. Noy. 104. 2 Jon. 3, 4, 202, 203. Raym. 52. Bridg. 4. Mo. 878. Hob. 69.

Prohibition was prayed, upon a suggestion, that time out of mind the parishioners at their own charge have built and repaired all the seats of the church, and *ratione inde* the seats have time out of mind been disposed of by the churchwardens, and that now the bishop took upon him to dispose of them. Bigland for the plaintiff argued, that though generally the Ordinary hath the disposal of the seats of the church, yet it might be otherwise by custom, and cited 2 Roll. Abr. 288, *Tredenham's case.* Jones Justice; Of common right the Ordinary hath the disposal of all seats in the church, and of common right the parishioners ought to repair them; Co. 2 Inst. 489. Then what have the parishioners done here to oust the Ordinary of his jurisdiction? They

have only said that they have repaired the seats at the parish charge, which is no more than their duty, for which they have the easement of sitting in them, according to the disposal of the Ordinary; whereupon a prohibition was denied by the whole Court, as it was before done *in Com. Banc.* in this very case, where it was first moved.

College of Manchester *against* Trafford.

A lease reciting a lease which is not, and demises for 21 years, and so from 21 to 21 years, &c. till 99 years are ended, though no number of 21 can center in 99, yet it shall be a lease for 99 years from the end of the first 21 years.

Error of a judgment at Lancaster; where upon a special verdict the case was; the college in the reign of Queen Elizabeth, reciting a lease made by them in the time of Edw. 6, demised to one Trafford for 21 years, rendering rent 21l. 16s. 4d. and *habendum* from the end of the said term made in the time of Edw. 6, and then follows a condition of re-entry for non payment of the rent, and after that a covenant and grant, that after the said 21 years ended he should have the land for other 21 years, and so from 21 years to 21 years, till 99 years past thence next ensuing shall be compleat and ended. And it was found there was no lease made in the time of Edward 6, and since the date of the lease made in the time of Queen Elizabeth more than 99 years are expired, **[242]** but that 99 years, computing from the end of the term for 21 years, are not expired. And so the question was, whether the lessee shall have 99 years only, reckoning as from the date of his lease made in the time of Elizabeth, or 99 years over and above the first 21 years; for it was agreed, that although the number of 21 years can never center in 99, yet this term shall endure for 99 years, which is a term certain, and the odd years shall be rejected according to *Baldwin's case*, 2 Co. Rep. But the point in question was, when the 99 years should commence? And at Lancaster it was adjudged, that the lessee should have 99 years over and above the 21 years, and the first 21 should not be reckoned part of the 99, and that by reason of the word *thence;* for if it must be reckoned from the making of the lease in the time of Queen Elizabeth, it ought to be *hence*. But *thence* is a word that does not denote a present time, but another time, and then *thence* must refer to the end of the first 21 years, because there is no other time to which it can refer; for the jury have found, that there was no lease in the time of Ed. 6, whereunto the defendant would have referred it, and so the term not expired; and of this opinion was the whole Court, and affirmed the judgment, and so was the Court of Exchequer about the year 1687, where the term being then expired, the plaintiff recovered for the term. Levinz for the plaintiff in both Courts.

[243] Denning *against* Norris.

Judgment in an Inferior Court not void *quia* the Judge did not take the oaths.
S. C. 2 Jon. 137. *Vid. ante* 184 *contra.*

Error of a judgment in Norwich Court, assigned, that the Sheriff by whom the judgment was given had not taken the *oaths*, and subscribed the *declaration*, according to 13 Car. 2, cap. 1. The defendant pleaded, that the oaths and declaration were not tendered to the sheriff. The plaintiff demurred. And resolved, this is not assignable contrary to the record and admittance of the parties; for this is in effect to say that he was not sheriff, because the statute says upon default &c. shall be void, contrary to *Hipsly and Tuck's case*, Pasch. 27 Car. 2, B. R. Rot. 1620, *quod vide ante.* 2. The Court held clearly, that the tender is traversable; for though the proviso for avoidance be *per se & absolute*, yet it shall relate to the precedent and first part of the statute which appoints them to be tendered.

STRODE *against* BERAGER.

Devise to Robert my son; Robert the son dies in the life of the testator, and having a grandson Robert, he republishes, saying, Robert my grandson shall have, &c. S. C. 1 Vent 314. 1 Mod. 267. 3 Mod. 313. 2 Jo. 135. Raym. 408. 2 Danv. 534, 10. 2 Show. pl. 49.

Error of a judgment upon an *ejectment in Communi Banco*, wherein upon a special verdict the case was: Robert Berager had issue his first son William, who had issue the wife of the lessor, and a second son Robert, which second son Robert had also a son Robert, grandson to the first Robert. Robert the grandfather devised the lands in question in these words, *I give my lands in Tilling to my son Robert and his heirs, and I give to my grandson Robert* 50*l*. *Also I give to my great grandaughter* 100*l*. Robert the second son died in the life of his father, afterwards Robert the devisor made a codicil whereby he devised part of those lands which he had devised to his son Robert, to his daughter Judith, and afterwards he made a republication of his will by parol, without writing, and said, *Robert my grandson shall have and take by my will as Robert my son should have done*, and afterwards died; and the question was, whether Robert the grandson, defendant in the ejectment, and likewise here, should have the land by virtue of this will and republication, or to the wife, lessor of the plaintiff, daughter and heir of William the first son? And it was adjudged *in Communi Banco*, by the opinion of North, Chief Justice, Atkyns and Wyndham, contrary to the opinion of Scroggs, that the grandson should have it; and now it was argued that this judgment was erroneous, 1st, Because grandson and son are different names of appellation, and denote different persons. 2ly, Land cannot pass by will unless the will be in writing. 3dly, The devisor takes notice in the will of the difference betwixt *son*, *grandson*, and *great grandson*, and makes devises to several persons by these several names. 4thly, The republication by parol will not supply the defect of this will, which, being of lands, ought to be in writing. 5thly, The republication itself takes notice of the difference of these appellations, *scil. my grandson* **[244]** *Robert shall have, &c. as my son Robert should have had.* It was agreed that republication might aid a will, if there be words in the will capable of being aided, as *The Lord Cheney's case*, a devise to William, there are two Williams, it may be averred what William was meant, because the word William was in the will; and 3 Cro. 493, *Buckford and Parnecote*, a devise of all his lands in Aldworth, and after the will he purchases other lands, and then republishes the will, all the lands shall pass, for the words in the will are sufficient for that purpose. But here the word *grandson* is wanting in the written will. And this case is all one with the case of *Brett and Rigden*. Plowd. Com. and *Hartrop's case*. 3 Cro. 243. And the opinion of Popham and Fenner in *Fuller and Fuller's case*, 3 Cro. 422, 423, is denied by the other Judges, *scil.* Gawdy and Clench, and the case there was adjudged upon another point. For the defendant in error, it was said, that here was a good foundation in the words of the will, and the intention of them may be supplied by matter *dehors*. That grand is but an addition to son to distinguish the son from the grandson, who were both alive at the time the will was made; but when the son was dead, as he actually was at the time of the republication, the *grandson* might well enough be meant and understood by the name *son*: and if a man hath no sons but a *grandson* called Robert, and devise lands to his son Robert, the *grandson* shall take according to the opinion of Walmsly, Owen 88. And here, though at the time the will was made the devisor had a son Robert and a grandson Robert, yet at the republication, which is a new making of a will, he had only a grandson Robert, and therefore he shall take by the name *son*, so as the name of baptism is rightly expressed, and there is no one else to take it. Scroggs, Chief Justice, continued his former opinion, saying, he was never satisfied with the first judgment, and that the judgment ought to be reversed. Dolbin, Justice, seemed *contra*, *cæteri nil dixerunt. Et adjournatur*; but after I was informed the judgment was reversed. But *quære* here of, for I was not then present.

[245] HOWARD *against* WOOD.

Assumpsit for money received in an office, to which the defendant claimed title. S. C. 2 Jo. 126, 127. 2 Mod. 260, 261. 1 Danv. 27. 2 Show. pl. 14.

Assumpsit for money received for his use and upon *non assumpsit*, and special verdict, the case was, The Queen having granted to the plaintiff Sir Robert Howard the stewardship of the honor of Pomfret for years, *habend'* from the end of a former term, in which stewardship were comprised several courts-leet as well as courts-baron, the first term being ended, the defendant by a grant subsequent to that grant made to the plaintiff, held the court, and received the money, for which the plaintiff brought his action for the fees. And upon arguments at Bar, the Court was of opinion that the grant to the plaintiff in reversion for years was void as to courts-leet, as being a judicial office, but was good as to courts-baron. And as to the objection, that this action will not lie for the money received by the defendant as money received for the paintiff's use, because the defendant claimed title by another grant made to himself, and therefore received it to his own use; and that the plaintiff should have brought an action of trover for the money, or case, for disturbing him in his office; the Court answered, that it might be hard perhaps to maintain it, if this were a new case, and the first of this nature; but they said two or three actions of this kind had been held before, and cited a case between *Bradshaw and Porter*, of Grays Inn, for money received as Judge of the Sheriff's Court of London to be so resolved; and therefore it would be hard now to adjudge the contrary. But at the importunity of Jones, Attorney General, to be farther heard in this case, it was adjourned.

[246] STABLES *against* MELLON.

Case by a burgess for common in the mayor, and burgesses as in gross without appendancy. 2 Jon. 115. 1 Mod. 6, 7, 74. 1 Saund. 343. 2 Saund. 4, 5. 1 Lev. 196. 2 Lev. 2. 2 Show. pl. 30. 1 Sid. 213. 1 Vent. 163, 383. *Post.* 253. *Vide* Hard. 118. 3 Mod. 290. Co. Lit. 122 a. March. 83.

Case for disturbance of his common, and prescribes that the mayor and burgesses have time out of mind had common for themselves, *& quolibet eorum*, and brings the action as burgess; the prescription was traversed, and verdict for the plaintiff. And Weston moved in arrest of judgment, that the prescription was not good, 1st. Because it is not laid to be appurtenant to any land. 2dly, The prohibition ought not to be in the name of the *mayor and burgesses*, but he ought to have prescribed in every burgess, *quod quilibet burgensium, &c.* and that it ought to be alledged in the corporation by way of custom, Rolle Common, 403, *Green and Stain's case.* 5 E. 4, 29, 32. *Curia contra.* This might be a common in gross, and not appurtenant to any land, 9 H. 6, 36. 1 Co. Rep. 87. As if a man grant common to the mayor and burgesses for all their cattle in such a place, it is good as a common in gross, and not appurtenant; and so judgment was given for the plaintiff.

[247] TERM. PASCHÆ, ANNO 31 CAR. II. IN BANCO REGIS.

FARMER QUI TAM, &C. *against* BROWN.

Answering upon oath in Ecclesiastical Courts. S. C. 2 Jon. 122. 3 Keb. 802, 819, 829. 1 Vent. 339. 2 Show.

Prohibition to the Spiritual Court, for that they compelled the defendant to answer upon oath there in a suit for not repairing of the church; suggesting, that the Ecclesiastical Court ought not to require answer upon oath *nisi tantum in rebus testamentariis & matrimonialibus;* and this being a point of great consideration, the plaintiff was ordered to declare, that the case might be judicially determined upon demurrer. And for the defendant in the *prohibition* 'twas argued, that the Spiritual Court might in such cases take answers upon oath, and that the *writ* mentioned in

Rast. Abridg. Prohibition 5, and in the register, are things antiquated, originally devised for the prevention of two things practised antiently among the clergy, but now disused; they had a custom of citing men before them *pro lesione fidei* in not performing their agreements, and forcing them to swear performance. Those were the mischiefs intended to be reformed by the institution of these writs. Cosin's Apology, part 1, cap. 11, fol. 77, 78, & *ibid. eadem parte*, cap. 8, & Register 43 a. And the *juramentum calumniæ* mentioned Co. 2 Inst. 657, was another invention of theirs to make a man accuse himself of crimes, which is not lawful. But as for answering upon oath in civil cases, it hath been their constant course time out of mind, **[248]** as it is in Chancery, and every jot as well allowable in this Court as in that; and in Chancery they never compel a man to answer upon oath to matter criminal, or scandalous. To which Maynard, King's Serjeant, in answer cited the Register 38. F. N. B. 41, and Co. 2 Inst. 621. He said, the Ecclesiastical Court had unquestionably a jurisdiction in the principal matter, but they had no jurisdiction but by incroachment to administer oaths *nisi tantum in causis testamentariis & matrimonialibus;* that the statute of Ed. 6 allows them jurisdiction in the case of tithes by any legal means other than that of the party's oath; which shews, that the Parliament intended that they should not have power to administer oaths in such cases; and yet this is a civil case: that they may proceed by answer without oath of the parties, and by proofs thereupon, as all proceedings are at common law, where the party is never compelled to put in his answer or plea upon oath, except in case it be a foreign plea, which stands upon a particular reason; viz. that it is to oust the Court of jurisdiction, and tends to manifest delay; that Dr. Cosins is of no authority where any difference is between the common and the canon law: and as to Chancery, that their taking answer upon oath is a very antient usage, but no precedent for other Courts to do the like in matters without such usage. Scroggs; There may be the same reason to take pleas and answers upon oath in this Court, that there is for so doing in Chancery; but the usage of Courts makes a law in such case. *Adjournatur*, and in *Trin. term. prox.* 'twas argued again at Bar, and against the jurisdiction of the Ecclesiastical Courts to give oaths in such cases were cited Rast. Stat. tit. Consultation, fol. 223 b. Hob. 84. Reg. 36. Co. 2 Inst. 557, 657. Roll. Chan. 371. And the civilians were also heard in this case, who affirmed it had been the constant practice of their Courts to proceed upon oath, and to oust them of this power would be to destroy their Courts: that this was never disputed 'till now by these defendants, who being Quakers would not take any oath, and so for their own particular sakes made this attempt to destroy the Ecclesiastical Courts: that the common law itself in some cases requires answer should be upon oath, as in *leygager;* and that the course and usage of all Courts was the law of the Courts: Dolben Justice cited the case of *Scarr* versus *Burwell* in this Court in 1664, when Scarr being sued in the Ecclesiastical **[249]** Court for being at church with his hat on in time of divine service, and compelled to answer upon oath, prayed a *prohibition* for that cause upon the same grounds now offered. Whereupon Twysden held a *prohibition* ought to be granted, to which also Kelynge inclined; but Hyde Chief-Justice *totis viribus contra:* and after the Court coming to know by information that this was always the course of the Court, a *prohibition* was denied: and afterwards in this case a *consultation* was granted *per totam Curiam*, Scroggs Chief-Just. Jones, Dolben and Pemberton.

FREAK *against* LEA.

Devise of 120l. legacies to be paid out of 10l. per an. within a year, and devises the land to J. S. and does not say *paying;* yet a fee passes. S. C. 2 Jo. 113. Poll. 553. 2 Show. pl. 28. *Vid. ante* 104. 2 Jon. 107, 113, 137. 1 Mod. 189. 1 Lutw. 762. Lat. 9, 39, 134, &c. *Ante* 104. Gilb. on Dev. 35. Cowp. 835. Doug. 321.

Ejectment upon *non culp.* and a special verdict, the case was: One seised in fee of lands worth 10l. per annum devised legacies to several persons to be paid out of the land, amounting in all to 120l. within a year after his death; and after devised the land without any limitation of estate to J. S. under whom the defendant claims. The devisee enjoyed the land three years, and paid 30l. of the legacies, and his executor

after his death secured the residue: the heir of the devisee entered, and brought an ejectment; and 'twas argued by Pollexfen for the plaintiff, that the devisee hath only an estate for life; for this is not a *devise paying*, but here the payment is to be made out of the profits, and the land is bound in the hands of the heir, or whosoever it comes to. Saunders *contra:* This must be a fee of necessity; otherwise the devisee can never pay 120l. out of the estate, being but 10l. per annum; and therefore 'tis to be looked upon as all one with the cases *paying*. Jones Just. held it was a fee, but conditionally, as *paying;* which condition by not paying within the year is broken, and therefore the entry of the *heir* good. *Cæteri tres;* 'tis a fee not conditional, but in *trust* to pay; and gave judgment for the defendant.

[250] HILL *against* BARNE.

Priest or not priest, how triable. S. C. 3 Keb. 567, 827. 2 Jon. 131. 2 Show. pag. 52.

Prohibition to stay a suit in the Ecclesiastical Court to deprive a parson, libelling there that he was not a *priest*, suggesting here that at the time of his institution he was a *priest* by episcopal ordination. The defendant pleaded, that at the time of his institution he was not a priest *per episcopal ordination, et de hoc ponit se super patriam.* The plaintiff demurred, and the sole question was, how this issue should be tried? For the defendant hath put it upon a trial *per pais.* And now 'twas argued by Masters for the plaintiff, and agreed that *priest* or *not priest* is triable by the Ordinary, but *priest* or *not priest* at such a time is triable *per pais.* Plow. Com. 14 b. Roll. Trial. 575. Pollexfen *contra.* By the Statute of Uniformity all that are not priests are disabled to have *livings*, and then if not *priest*, the presentation, &c. are all void, and the church itself void; and then void or not void is to be tried *per pais.* Jones Just. In this case the trial ought to be by the Ordinary, because the time refers to a *spiritual act, scil. institution;* but where the time refers to a *temporal act*, as a *feoffment, &c.* it shall be tried *per pais. Sed adjournatur.*

HERRING *against* FINCH.

Case against a mayor for not receiving his vote, and was nonsuit, he shall not pay double costs. *Vid. ante* 50, 1114, &c. *ib.* 6 Mod. 45. 1 Sal. 19, 20. 2 Sal. 502. 2 Vent. 50.

Case; whereas the plaintiff was a freeman, and had a voice in the election of *mayors*, the defendant the present mayor refused to receive his vote; and now upon issue and trial the plaintiff was nonsuit, but the *roll* not *marked* for double costs. And now the defendant moved to have double costs, which was opposed, because it does not appear whether the plaintiff was non-suit for want of proof that the defendant was the present mayor. 2. The statute gives double costs where the officer is sued for matter done by him in doing his office, and this suit is for *non fezans* in his office. *Cur'.* This case is not within the **[251]** intent of the statute; the scope whereof was, that whereas mayors, &c. were sued for false imprisonment, or such matters, wherein they ought to justify that they may plead the *general issue*, and shall have *double costs*, but not in such cases as this.

ETHERINGTON *against* THE ARCHBISHOP OF YORK.

Pope's bull pleaded as inducement notwithstanding stat. of H. 8. *Vide* dismes Roll. Abr.

A prohibition was prayed suggesting that by stat. 28 H. 8, 16, *all briefs, bulls, &c. of the Pope shall be void, and shall not be pleaded, used or allowed in any Court;* and yet the defendant libelled against him in the Spiritual Court for a pension, setting forth that the church of Rillington was appropriated *per Sanctissimum Patrem Clement. Divina providentia Papam sextum, anno Domini*, 1443, *al Abby de Belland*, and that upon

the appropriation the abbot granted to such a bishop the pension, and that so he grounded his suit upon the Pope's bull contrary to this statute: to which 'twas answered, that the bull and appropriation are not used otherwise than as inducements to his title, which is founded upon the grant of the pension, and 'twas necessary to shew the appropriation; for till the appropriation no pension could be granted by the abbot, and it ought to appear how the appropriation was. The statute does not extend to this case; for the statute directs that they who have liberties, &c. granted by the Pope, ought to come to the King within a year, and take new grants from the King, which shall be of the same force and efficacy as the Pope's bulls, &c. Here the bull was not made to the archbishop, nor could he have a grant of the pension from the King, for 'twas not granted to him by the Pope, as it is not necessary for the bishop to shew the King's confirmation, for that is not his title, but only matter of inducement. The *prohibition* was denied. Levinz for the archbishop.

[252] THE BARBER SURGEONS OF LONDON *against* PELSON.

Assumpsit by corporation aggregate for money forfeited upon a by-law.
S. C. 1 Danv. 28, pl. 11.

Assumpsit, and declares, that the defendant being indebted to him 20l. forfeited by the constitutions and ordinances of the company for not serving in the office of steward of the company, according to a by-law there made, promised to pay it. The defendant demurred, 1st, For that this action lies not for money forfeited by a by-law. 2ndly, A promise cannot be made to a corporation aggregate without deed. *Sed per Curiam:* The action lies; and both these objections were made to the case of *The Mayor of London* v. *Gorrey*. And yet judgment there given for the plaintiff; and so it was here.

HINKS *against* CLERK.

[*Goodman* v. *Mayor of Saltash*, 1882, 7 App. Cas. 645.]

Stranger puts his beasts into a common, commoner may distrain them.
S. C. 2 Show. pl. 12. *Vide ante*, 246.

Error of a judgment in replevin in Durham, where the plaintiff avowed that Sunderland is an ancient borough, consisting of twelve capital burgesses, *vocat. freemen*, and twelve inferior burgesses, *vocat'*, *stallingers* and that there is a custom there, that every freeman inhabiting any house there, hath common in the place where for so many beasts, *scil.* for two horse beasts, and four cows; and that every stallenger inhabiting any messuage there, hath common for one cow; and because the plaintiff being a stranger put his beasts there to the prejudice of his common, the defendant avowed the taking. The plaintiff traversed the custom; and the jury found that the capital burgesses *scil.* the freemen have had common for two horse beasts, and four cows, and that the stallengers have common for one cow. But farther they found, that the wife of every freeman or stallinger inhabiting, have the same common after the death of their husbands. And that the copyholders, burgesses and stallingers have **[253]** common also *pro vaches, vitulis, bobus, spadonibus, juvencis & omnibus ad quantitatem & loco & vice Anglice*, their stints, *ut præsent' limitat' & si super tota materia, &c.* for the plaintiff; upon which verdict judgment was given for the avowant, and therein two errors assigned. 1. That the common found varies and differs from the common pleaded, *scil. for sheep, calves, heifers, &c.* 2. A custom for inhabitants to have common, is naught, and all one with *Gateward's case*, 6 Co. Rep. To which it was answered and resolved. 1. The jury have found the custom expresly at first, and the farther finding is void, like the case in Dyer. *In assumpsit* the jury found that the defendant did assume *modo & forma*, if J. S. said true; this is good, and the *si, &c.* surplusage and void; and 3 Cro. 405, *Gray* v. *Fletcher*, *ibid. &c.* 546, *Lovelace* v. *Reynolds* in point. 2. The custom here is not for inhabitants, but for freemen and stallingers and inhabitants of the corporation, and the habitation in this case is only restrictive, *scil.* no common unless they inhabit. 3. The custom alledged for every

member is good, as well as when laid in the corporation, to have for them, and each member, &c. as was done in the case of Derby, *int' Stables and Mellor, ante.* And of this opinion was the Court, and affirmed the judgment. *Holt jutior pro querente*, Levinz for the defendant in error.

[254] TERM. SANCT. TRIN. ANNO 31 CAR. II. IN BANCO REGIS.

WORTLY *against* WATKINSON.

A man marries his first wife sister's daughter. S. C. 2 Jo. 118. Ray. 464. 2 Show. pl. 56. 3 Keb. 620, 666. *Vide* 2 Vent. 9. Vaugh. 206 to 330, & 302 to 330. 3 Lev. 364. 4 Leon. 16. 3 Keb. 151, 166, 620, 660. Nels. Lutw. 342. 1 Mod. 25. Hob. 181. Mo. 907. 2 Jon. 118.

Prohibition was prayed to stay a suit in the Court of York, Pasch. 28 Car. 2, for dissolving a marriage had betwixt one and the *daughter of his first wife*, because this is not within the Levitical degrees, and a prohibition was granted *nisi causa, &c.* at which day came Sir John King, and prayed a consultation, because it is within the Levitical degrees, *scil.* 8 Levit. ver. 14. *The nephew shall not marry his father's brother's wife, a pari ratione, the uncle shall not marry his wife's sister's daughter*, for they stand in the same degree of proximity; and he said *Parson's case*, Co. 1 Inst. 252, *in margine* is the only case against him; and though a prohibition was there granted, yet he said consultation was afterwards awarded. And as authorities for him he cited *Man's case*, Moore 907. 3 Cro. 228. Hill. 11 Car. 1, B. R. *Allen* v. *Weston.* Hob. 181. 2 Roll. 832, and *Hill* v. *Gord in Communi Banco*, 1672. Where the marriage of a man with the sister of his first wife, was not judged illegal, reported now by Vaughan. Twysden, Justice, cited *Allington's case*, wherein it was resolved, that tho' the *nephew* cannot marry the aunt, yet the uncle may marry the niece; because in the first case the wife was superior to her husband in point of parentage, and therefore the marriage incongruous. But in the latter case the uncle is superior to the niece as well in point of parentage as in point of **[255]** matrimonial government. But the Court being unwilling to grant a consultation upon motion, ordered the plaintiff should declare, so that the matter should come judicially before them. Accordingly it was done, and the case was argued again much to the same purpose as before for the consultation: and on the other side by Wallop, who much enforced the case of Allington, and cited Grotius de Jure Belli, lib. 2, cap. 5, sect. 12, and Seld. Ux. Hebraica, 594, and that the reason why a marriage between the nephew and the aunt is void, was for the contradiction, and because the wife ought to be in subjection to her husband in point of marriage, and yet in point of parentage would be superior to her own husband; and he said, marriages are not a moral law, but admitted by Christians by ecclesiastical authority, and therefore the Romish doctors hold, that as it was instituted by the authority of the Church, it may be dissolved by the same authority: and 'till marriage became a sacrament they held it dissolveable for many more causes than they have done since they have brought it to be a sacrament, and therefore it stands upon the same reason it did before; and not being in this directly prohibited by the Levitical law, though another case of the same propinquity be forbidden, *scil.* the nephew and the aunt, yet this marriage between the uncle and the niece ought not to be prohibited, because it is not of the same contradiction and absurdity. 'Twas adjourned, but afterwards (as I heard) a consultation was granted.

[*See* 2 Jon. 118. *That the prohibition was for marrying his* wife's sister's daughter; *and* Raym. 464, says, 'twas *his* sister's daughter. *But Levinz supra says, 'twas the* daughter *of his* first wife. *Ergo quære, & vide* Nelson's Lutw. 342. 3 Keb. 620, & 660.]

The REPORTS of SIR CRESWELL LEVINZ, Knt. late one of the Judges in the Court of Common Pleas, at Westminster. Containing divers CASES HEARD and ADJUDGED in the COURT of COMMON PLEAS, during the time that he himself was a Judge of that Court; as also of divers other CASES ADJUDGED both in that and the other Courts at Westminster, after his removal from being a Judge [which happened Hilary Term, in the First and Second Year of JAMES II.], till the Eighth Year of KING WILLIAM III. Translated into English by Mr. SERJEANT SALKELD, and others of the Middle Temple. With Special PLEADINGS to several of the Cases. The Third Edition of Part III. With the Pleadings translated. By THOMAS VICKERS, Esquire, Barrister-at-Law. 1797.

[1] EASTER TERM, IN THE THIRTY-THIRD YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

LEMAYNE *against* STANLEY.

[See *Roberts* v. *Phillips*, 1855, 4 El. & Bl. 453.]

A will written by the testator himself, but not signed by him, good. S. C. 3 Mod. 219. 2 Danvers 542, pl. 12. Lex Test. 484, 485. *Post* 86. 1 Ventris 341. 1 Sid. 315, 362. 2 Ventris 350. Douglas 230. *Right* v. *Price.*

In *ejectment* upon *not guilty*, and a special verdict the case was: Stanley seised in fee writ his *will* with his own hand; beginning, *In the name of God, Amen, I John Stanley make this my last will and testament*, and thereby devised the lands in question, and put to his seal, but did not subscribe his name, only had it subscribed by three witnesses in his presence; and all this was done after 29 Car. 2, against Frauds and

Perjuries; and whether this was a good *will* to pass the lands? was the question: and after several arguments it was adjudged by the whole Court, *sc.* North, Wyndham, Charlton, and Levinz, to be a good *will;* for being written by himself, and his name in the *will*, it is a sufficient signing within the statute, which does not appoint where the *will* shall be signed, in the *top*, *bottom*, or *margin*, and therefore a *signing* in any part is sufficient: and per North, Wyndham, and Charlton, the putting of his seal had of itself been a sufficient *signing* within the statute; for *signum* is no more than a *mark*, and sealing is a sufficient *mark* that this is his *will:* but Levinz (1) doubted of this upon the case in Roll. 1 Abridgm. 245, f. 25. Submission to an award *ita quod* it be made, *signed*, and delivered, the arbitrator makes an award, and delivers it, but does not *sign* it: *et* **[2]** *per Cur'*. It is not good; but all agreeing upon the other reason, judgment was accordingly given for the defendant.

MICHAELMAS, 32 AND 33 CHARLES II. ROLL 495.

THE COUNTESS OF PORTLAND *against* COLE.

Vide post 66. Declaration *in assumpsit*. Joinder.

London, to wit.—Maurice Cole, late of Whitlesly, in the Isle of Ely, in the county of Cambridge, gentleman, was attached to answer Frances Countess of Portland, of a plea of trespass upon the case, &c. And thereupon the said countess by Robert Bird her attorney complains, that whereas the said Maurice, upon the 20th day of October, in the 29th year of the reign of the lord the now King, &c. at London, in the parish of the Blessed Mary of the Arches, in the ward of Cheap, had accounted together with the said countess of divers sums of money by the said Maurice to the said countess then due and being in arrear, and as yet unpaid; and upon that account the said Maurice was found in arrear to the said countess in 1207l. 6s. 7d. of the lawful money of England, and so being found thereupon in the arrear aforesaid, the said Maurice in consideration thereof afterwards to wit, upon the said 20th day of October, in the 29th year aforesaid, at London aforesaid, in the parish and ward aforesaid, upon himself assumed and to the said countess then and there faithfully promised, that he the said Maurice the said 1207l. 6s. 7d. to the said countess when thereto afterwards he should be requested, would well and faithfully pay and content. And whereas also the said Maurice afterwards to wit, on the 1st day of May, in the 30th year of the reign of the said lord the now King, &c. at London aforesaid, in the parish and ward aforesaid, had accounted together with the said countess of divers other sums of money by the said Maurice to the said countess then due and being in arrear, and in like manner unpaid; and upon that account the said Maurice was found in arrear to the said countess in 1338l. 9s. 8¾d. of the like money, and so being found thereupon in the arrear aforesaid, the said Maurice in consideration thereof, afterwards to wit, on the said 1st day of May, in the 30th year aforesaid, at **[3]** London aforesaid, in the parish and ward aforesaid, upon himself assumed, and to the said countess then and there faithfully promised, that he the said Maurice the said 1338l. 9s. 8¾d. to the said countess when thereto afterwards he should be requested, would well and faithfully pay and content. And whereas also the said Maurice on the 1st day of February, in the 32d year of the reign of the lord the now King, &c. at London aforesaid, in the

(1) Nor do I think sealing is to be considered as signing, and I declare so now, because if that question ever comes before me, I shall not think myself precluded from weighing it thoroughly, and decreeing that it is not signing, notwithstanding the *obiter dicta* which in many cases were *nunquam dictâ*, but barely the words of the reporters, for upon examination I have found many of the sayings ascribed to that great man Lord C. J. Holt were never said by him. Per Willes, C.J. 1 Vesey jun. 13. But testator's declaration before three witnesses that it is his will is equivalent to signing it before them, and constitutes a good will within the 5th, or a revocation of a will within the 6th sections of the Statute of Frauds, the 29th Charles the 2d, c. 3. 1 Vesey jun. 11. The Irish Statute of Frauds is the 7th Wil. 3, c. 12, and its third section corresponds with the two above mentioned.

parish and ward aforesaid, had accounted together with the said countess of divers other sums of money by the said Maurice to the said countess then and in like manner due and being in arrear, and then unpaid; and upon that account the said Maurice was found in arrear to the said countess in 1924l. 7s. 3d. of the like money, and so being found thereupon in the arrear aforesaid, the said Maurice in consideration thereof afterwards to wit, upon the said 1st day of February, in the 32d year aforesaid, at London aforesaid, in the parish and ward aforesaid, upon himself assumed, and to the said countess then and there faithfully promised, that he the said Maurice the said 1924l. 7s. 3d. to the said countess when thereto afterwards he should be requested, would well and faithfully pay and content. And whereas also the said Maurice afterwards to wit, upon the 30th day of February, in the 32d year aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration that the said Maurice then and there had received of several persons several sums of money, amounting in the whole to two thousand pounds of the like money to the said countess due, to the use of the said countess, upon himself assumed and to the said countess then and there faithfully promised, that he the said Maurice the said two thousand pounds to the said countess, when thereto afterwards he should be requested, would well and faithfully pay and content. And whereas also the said Maurice afterwards to wit, upon the 1st day of March, in the 32d year aforesaid, at London aforesaid, in the parish and ward aforesaid, was indebted to the said countess in three thousand pounds of the like money, for money by the said Maurice for the said countess, to the use of the said countess before that time had and received; and so thereupon being indebted the said Maurice in consideration thereof, afterwards to wit, upon the day and year last specified, at London aforesaid, **[4]** in the parish and ward aforesaid, upon himself assumed and to the said countess then and there faithfully promised, that he the said Maurice the said three thousand pounds to the said countess when thereto afterwards he should be requested, would well and faithfully pay and content. Nevertheless the said Maurice his several promises and assumptions aforesaid not regarding, but contriving and fraudulently intending the said countess craftily and subtilly to deceive and defraud, the said several sums of money or one penny thereof to the said countess hath not paid, nor her in any wise hath contented for the same, [although so to do by the said countess afterwards to wit, upon the 20th day of March, in the 32d year aforesaid, at London aforesaid, in the parish and ward aforesaid, he oftentimes was requested,] but to pay the same to her hitherto altogether hath refused, and still doth refuse, to the damage of the said countess of 2000l. and thereupon she brings her suit, &c.

And the said Maurice Cole by Edward Ferrour his attorney cometh and saith that the said countess to her writ aforesaid ought not to be answered—because he saith that before the day of the suing forth of the original writ of the said countess, to wit, at the General Quarter Sessions of the Peace of the lord the King held at Westminster for the Liberty of the Dean and Chapter of the Collegiate Church of the Liberty of St. Peter, Westminster, of the city, borough and town of Westminster, in the county of Middlesex, and Saint Martin le Grand, London, on Monday, to wit, the 13th day of July, in the 26th year of the reign of our Lord Charles the Second, by the grace of God of England, Scotland, France, and Ireland King, defender of the faith, &c. before William Earl Craven, John Cutler, Knight and Baronet, Edward Grey, Esquire, Charles Herbert, Knight, Surveyor General of the said lord the King, Edmund Bury Godfrey, Knight, Richard Newman, Esquire, and others their fellows, justices of the said lord the King, assigned to preserve the peace of the said lord the King within the liberty aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds within the liberty aforesaid committed, by the oath of William Drew, Richard Ewstice, Edward Waite, Richard Rawlins, Alexander Hilton, Edward Watts, James Diston, John Felmingham, John Pierson, Thomas Crosse, Erasmus Draiton, William Lodge, William Farlowe, William Timbe, Thomas Hoskins, James Blundel, and John Nichols, good and lawful men of the liberty aforesaid, sworn and charged to enquire for the said lord the **[5]** King, and for the body of the liberty aforesaid, it was presented that the said countess, by the name of Frances Countess of Portland, then late of the parish of Saint Martin in the Fields, within the liberty aforesaid, in the county of Middlesex, upon the 1st day of March, in the 26th year of the reign of our Lord Charles the 2d, by the grace of God of

England, Scotland, France, and Ireland King, &c. then being of the age of sixteen years and upwards, from the said first day of March, in the year aforesaid, had not repaired to her parish church, nor to any other church, chapel, or usual place of common prayer, at any time within the space of one month next ensuing the said 1st day of March in the year aforesaid, but had forborne the same from the said 1st day of March in the year aforesaid, for the said space of one entire month, against the form of the statute in such case made and provided, and also against the peace of the said lord the now King, his Crown and dignity, &c. whereupon at the said Session of the Peace public proclamation was made, and then and there by the said proclamation according to the form of the statute in such case made and provided, by the said Court the said Frances Countess of Portland was commanded that she should surrender her body to the bailiff of the liberty aforesaid, before the next Quarter Session of the Peace to be held for the liberty aforesaid, or otherwise she would be convicted of the trespass and contempt aforesaid, in the indictment aforesaid above specified, according to the form of the statute in that behalf made and provided. And afterwards to wit, at the next Quarter Session of the Peace of the said lord the King held at Westminster aforesaid, for the liberty aforesaid, on Monday to wit, the 5th day of October, in the 26th year of the reign of the said lord the now King aforesaid, before William Earl Craven, John Cutler, Knight and Baronet, Edmund Bury Godfrey, Knight, Philip Matthews, Baronet, and William Dolben, Esquire, then justices of the said lord the King, assigned to preserve the peace of the said lord the King within the liberty aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds within the liberty aforesaid committed, [before which day the said Frances Countess of Portland, as appeared to the Court of Session aforesaid, did not surrender her body to the bailiff of the liberty aforesaid], the said Frances Countess of Portland did not appear of record, to answer the said lord the King of the trespass and contempt aforesaid, in the indictment **[6]** aforesaid above specified, but made default; and the said default of the said Frances Countess of Portland by the Court of Session aforesaid then and there was recorded, whereby the said Frances Countess of Portland of the trespass and contempt aforesaid, in the indictment aforesaid specified, according to the form of the statute in that behalf made and provided, in the said Court of Quarter Session then and there was convicted, as by the record thereof in the said Court remaining, [the tenor of which by the writ of the said lord the King of certiorari into the Court here is duly removed and remains], more fully is manifest and appears. And the said Maurice further saith that the said record had as aforesaid, in its full force and effect as yet remains not revoked, reversed, or annulled, and this he is ready to verify by the record of the conviction aforesaid, where, when, and as the Court of the said lord the King here shall consider. Whereupon the said Maurice prays that the plaint aforesaid may remain without a day, until the said countess shall conform herself and repair to church and hear divine service, and shall receive the Sacrament of the Lord's Supper according to the laws of this kingdom of England, and shall take the oath appointed and prescribed by a certain Act made and provided in the Parliament of the Lord James late King of England, held by prorogation at Westminster, in the county of Middlesex, the 5th day of November, in the 3d year of his reign, entitled An Act for the Better Discovering and Repressing of Popish Recusants, according to the form of the statute in such case made and provided. With this that the said Maurice further will verify that the said countess the now plaintiff, and the said countess in the record of the conviction aforesaid above named are one and the same person, and not other nor different; and with this that the said Maurice further also will verify that the said Frances Countess of Portland, after the said 5th day of October, in the 26th year of the reign of the said lord the now King aforesaid, and before the day of the suing forth of the original writ of the said countess, or as yet hath not conformed herself, nor hath repaired to church, nor hath heard divine service, nor hath received the Sacrament of the Lord's Supper according to the laws of this kingdom of England, nor hath taken the oath appointed and prescribed by the said Act, entitled An Act for the Better Discovering and Repressing of Popish Recusants, &c.

[7] And the said countess saith that the said Maurice, notwithstanding any thing by him above before alledged, ought to answer her writ aforesaid.—Because she saith

that after the indictment and conviction aforesaid, and before the day of the suing forth of the original writ of the said countess, the said lord the now King by his letters patent, sealed with his Great Seal of England, made at Westminster aforesaid, in the said county of Middlesex, on the eleventh day of June, in the 31st year of the reign of the said lord the now King, &c. hath pardoned, remised, and released to the said Frances Countess of Portland, the crime, offence, trespass, and contempt in the indictment and record of conviction in the said plea of the said Maurice above mentioned and specified by her the said countess so as aforesaid committed, and whereof as aforesaid she is convicted, and also the indictment and conviction aforesaid, and all pains and penalties whatsoever, of, for or concerning the premisses aforesaid, against the said countess, before that time had, made, rendered, or adjudged, and the firm peace of the said lord the King to her thereupon gave and granted, so that she should stand right in the Court of the said lord the King, if any person would speak against her concerning the premisses. And the said countess brings here into Court the said letters patent of the said lord the now King, sealed under the Great Seal of England, testifying the premisses which follow in these words—Charles the 2d, by the grace of God, &c. to all to whom our present letters shall come, greeting—Whereas at the General Quarter Session of our Peace held at Westminster, for the Liberty of the Dean and Chapter of the Collegiate Church of the Liberty of Saint Peter, Westminster, of the city, borough, and town of Westminster, and of St. Martin le Grand, London, on Monday to wit, the 13th day of July, in the 26th year of our reign, before William Earl Craven, John Cutler, Knight and Baronet, Edward Grey, Esquire, Charles Herbert, Knight, our Surveyor General, Edmund Bury Godfrey, Knight, Richard Newman, Esquire, and others their fellows, our justices, assigned to preserve our peace within the liberty aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds within the liberty aforesaid committed, by the oath of William Drew, Richard Ewstice, Edward Waite, Richard Rawlins, Alexander Hilton, Edward Watts, James Diston, John Felmingham, John Pearson, Thomas Crosse, Erasmus Draiton, William Lodge, William Farlowe, William Timbe, Thomas Hoskins, James Blundell, and John Nichols, good and lawful men of the liberty aforesaid, sworn and charged to enquire for us and the body of the liberty **[8]** aforesaid, it was presented that our beloved and faithful cousin Frances Countess of Portland, by the name of Frances Countess of Portland, then late of the parish of St. Martin in the Fields, within the liberty aforesaid, in the county of Middlesex, on the first day of March, in the 26th year of our reign, then being of the age of sixteen years and upwards, from the said 1st day of March, in the year aforesaid, had not repaired to her parish church, nor to any church, chapel, or usual place of common prayer, nor had been there during the time of common prayer, at any time within the space of one month next ensuing the 1st day of March, in the year aforesaid, but had forborne the same from the said 1st day of March, in the year aforesaid, for the space aforesaid of one entire month, against the form of the statute in such case made and provided, and also against our peace, our Crown and dignity, &c. Whereupon at the said Session of the Peace public proclamation was made, and then and there by the proclamation aforesaid according to the form of the statute in that behalf made and provided, by the said Court the said Frances Countess of Portland was commanded that she should render her body to the bailiffs of the liberty aforesaid, before the next Quarter Sessions of our Peace to be held for our liberty aforesaid, or otherwise she would be convicted of the trespass and contempt aforesaid, in the indictment aforesaid above specified, according to the form of the statute in that behalf made and provided. And afterwards to wit, at the next Quarter Session of our Peace held at Westminster aforesaid, for the liberty aforesaid, on Monday to wit, the 5th day of October, in the 26th year of our reign aforesaid, before the said William Earl Craven, John Cutler, Edmund Bury Godfrey, and Philip Matthews, Baronets, and William Dolben, Esquire, then our justices assigned to preserve our peace within the liberty aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds within the liberty aforesaid committed, [before which day the said Frances Countess of Portland, as appeared to the Court of Session aforesaid, had not rendered her body to the bailiffs of the liberty aforesaid], she the said Frances Countess of Portland did not appear of record to answer to us of the trespass and contempt aforesaid, in the indictment aforesaid

above specified, but made default; and the said default of the said Frances Countess of Portland, by the Court of Session aforesaid then and there was recorded, whereby the said Frances Countess of Portland of the trespass and [9] contempt aforesaid, in the indictment aforesaid specified, according to the form of the statute in that behalf made and provided, in the said Court of Quarter Sessions then and there was convicted, as by the record of the said conviction in the said Court remaining, more fully is manifest and appears—Now know ye that we moved with piety, of our especial grace, certain knowledge and mere motion have pardoned, remised and released, and by these presents for us, our heirs and successors do pardon, remise and release to the said Frances Countess of Portland, or by whatsoever other name or sir-name, or addition of name or sir-name, dignity, title, office, or place the said Frances Countess of Portland is known, reputed, called or named, or lately was known, reputed, called or named, the crime, offence, trespass and contempt in the indictment and record of conviction above recited, mentioned and specified by the said Frances Countess of Portland so as aforesaid committed, and whereof as aforesaid she is convicted; although the said Frances Countess of Portland is or is not for or concerning the premisses arrested, indicted, impeached, outlawed, condemned, convicted, or adjudged, and also the indictment and conviction aforesaid before recited in these presents, and all and singular other indictments, informations, inquisitions, convictions, condemnations, executions, imprisonments, punishments, and all other pains and penalties whatsoever, of, for, or concerning the premisses aforesaid or any of them, upon or against the said Frances Countess of Portland before this time had, made, rendered or adjudged, and also all, and all manner of actions, plaints, suits, and demands whatsoever, which we against the said Frances Countess of Portland, of, for, or because of the premisses have had, have or in any manner in future can have, or which our heirs or successors can have, and the suit of our peace which to us against her belongs or can belong, by reason of the premisses. And we give and grant to her thereupon, by these presents, our firm peace, so that she may stand right in our Court if any person will speak against her, because of the premisses. And further of our bountiful especial grace, we give, grant, and restore by these presents unto the said Frances Countess of Portland, her heirs, executors, and administrators, all and all manner of forfeitures and losses, of all and singular her goods and chattels, manors, messuages, lands, tenements and hereditaments whatsoever, to us [10] by reason of the premisses forfeited or lost, in whosesoever hands or possession they now are or ought to be. To have, hold and enjoy to the said Frances Countess of Portland, her heirs, executors, administrators and assigns, of our gift for ever, and to be taken in whosesoever hands or possession they severally are, without giving, paying, or making any account or any other thing therefore to us, our heirs or successors; being unwilling that the said Frances Countess of Portland, her heirs, executors, administrators or assigns, by the sheriffs, justices, escheators, bailiffs, or the other ministers of us our heirs or successors, should be molested, troubled, disturbed or in any wise opposed, because of the premisses. But that these our letters patent, or the enrollment thereof, and the pardon, grant and restitution in the same contained, as to all and singular the premisses above mentioned, are and shall be good, firm, valid and effectual in law, although the crime, offence, trespass or contempt aforesaid, is not certainly specified; and that this our pardon in all our Courts and elsewhere, shall be interpreted and adjudged in the most beneficial and benign sense, for the better discharging of the said Frances Countess of Portland, according to our true intent, without any ambiguity, question or delay whatsoever; and also shall be pleaded and allowed in all our Courts and before all our justices, without any writ of allowance in that behalf first obtained or to be obtained, notwithstanding the indictment or conviction aforesaid; and the several proceedings thereupon be not recited or mentioned; and notwithstanding the statute made in the Parliament of the Lady Elizabeth, late Queen of England, held in the 23d year of her reign; and notwithstanding the statute made in the Parliament of the said Queen Elizabeth, held in the 29th year of her reign; or any other statute, Act, ordinance, proclamation or restriction before this time made, enacted or provided, or any other thing, cause or [11] matter whatsoever, to the contrary thereof notwithstanding. In witness whereof we have caused these our letters to be made patent; witness our self at Westminster the 11th day of June in the 31st year of our reign;

and this the said countess is ready to verify; wherefore she prays judgment, and that the said Maurice to her writ aforesaid may answer, &c.

And the said Maurice saith, that the said countess at any time, before the making of the letters patent aforesaid, or afterwards, hitherto hath not conformed herself, nor hath repaired to church, nor hath heard divine service, nor hath received the Sacrament of the Lord's Supper, according to the laws of this kingdom of England: nor hath taken the oath appointed by the said Act of Parliament, entitled, An Act for the Better Repressing of Popish Recusants, in the plea of the said Maurice above-mentioned; and this he is ready to verify; wherefore as before, he prays that the plaint aforesaid may remain without a day, until, &c.

And the said countess saith, that the said plea of the said Maurice above by rejoining pleaded, and the matter in the same contained are not sufficient in law to delay the plaint aforesaid of the said countess against the said Maurice; and that she to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is she bound by the law of the land to answer, and this she is ready to verify; wherefore for want of a sufficient rejoinder of the said Maurice in this behalf, the said countess as before prays judgment, and that the said Maurice to her writ aforesaid may answer, &c.

And the said Maurice, because that he above by rejoining hath alleged sufficient matter in law to cause the said plaint to remain without a day, until, &c. which he is ready to verify; which matter the said countess doth not deny, nor to the same in any wise doth answer, but altogether, doth refuse to admit that averment, as before, prays judgment and that the said plaint may remain without day, until, &c. And because, &c.

COUNTESS OF PORTLAND *against* COLE.

Recusancy pleaded in abatement, not saying *papalis recusans.* It was the plaintiff demurred, *ut videas supra. Post.* 66. The English statutes against popish recusants are, 23 Eliz. c. 1. 29 Eliz. c. 6. 35 Eliz. c. 1. 1 Ja. I. c. 4. 3 Ja. I. c. 4, 5. 7 Ja. I. c. 6. 25 C. II. c. 2. 16 Geo. II. c. 30.

Assumpsit for monies received; the defendant pleaded in abatement, that the plaintiff was *recusant convict* for not coming to church. The plaintiff replied, that the King had pardoned the conviction; upon which the defendant demurred: and now it was objected, that the plea was naught for not averring that the plaintiff was a *popish recusant*, and the statute 3 Jac. 5 does not make any *recusant convict* excommunicate, but only such as are *popish* recusants convict; and any other persons may be convict for not coming to church. And North Chief Justice and Wyndham inclined, that an averment of popish recusant would not be sufficient here, if it be not expressed in the indictment itself, that he is *papalis recusans.* **[12]** Charlton and Levinz *contra;* they held it might be supplied by averment; for the indictments have run generally as this is, without express saying *papalis recusans.* And a *respondeas ouster* was awarded by the whole Court for want of this averment; and see Pasch. 33 C. 2, in Com. Banc. Rot. 703, *a like case.*

HILARY 32 & 33 CHARLES II. ROLL 495.

THE KING *against* THE ARCHBISHOP OF YORK, AND OTHERS.

Quare impedit.

York, to wit.—Richard Archbishop of York, and Stephen Sowton, clerk, were summoned to answer to the lord the now King, of a plea, that they permit the lord, the now King to present a proper person to the church of Fowlton, otherwise Fowleston, which is void and belongs to his donation, &c. And whereupon Creswell Levinz, Knight, Attorney General of the said lord the now King, who for the said lord the King in this behalf prosecutes, for the said lord the King saith, that Charles now Earl of Carlisle, late Charles Howard, Esq. was seized of the advowson of the church aforesaid; as of one in gross by itself as of fee and right, and so being thereof

seized, to the church aforesaid being vacant, presented one William Dealtry his clerk, who on the presentation of the said earl was admitted, instituted, and inducted into the same, in the time of peace, in the time of the said lord the now King; and the said Attorney General, &c. for the said lord the King further saith, that the said church being full and consulted, the said earl afterwards, to wit, on the first day of September in the 25th year of the reign of the said lord the now King, at Fowlton, otherwise Fowleston aforesaid, by his certain writing, sealed with his seal, gave and granted to one Thomas Stephens, clerk, his executors, administrators and assigns, the first and next advowson, donation, presentation and free disposition of the church aforesaid, to have perceive and enjoy the said first and next advowson, donation, presentation, and free disposition of the church aforesaid to the said Thomas, his executors, administrators and assigns for the first and next avoidance of the same only, by virtue of which grant, the said Thomas was possessed of the said advowson of the said church, for the said first and next avoidance of the **[13]** same only, and being so thereof possessed, the said Thomas afterwards, to wit, upon the first day of October, in the 25th year of the reign of the said lord, the now King, aforesaid, at Fowlton, otherwise Fowleston aforesaid, by his certain writing, sealed with his seal, granted and assigned to one William Stephens, his executors, administrators and assigns, all his right, estate, title and interest aforesaid, which he then had of and in the advowson aforesaid, by virtue of which grant the said William, was of the said advowson of the church aforesaid, for the said first and next avoidance of the same possessed; and the said William so being thereof possessed, afterwards to wit, upon the 29th day of May, in the 26th year of the reign of the said lord the now King, the church aforesaid became void by the death of the said William Dealtry, the last incumbent. And the said Attorney General, &c. for the said lord the King further saith, that by a certain Act made and provided in the Parliament of the Lady Elizabeth, late Queen of England, &c. held at Westminster, in the county of Middlesex, in the 31st year of her reign; among other things it is enacted by the authority of the said Parliament, that if any person or persons, bodies politick or corporate, at any time after the end of forty days, next after the end of the said session of Parliament, for any sum of money, reward, gift, profit, or benefit directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, should present or collate any person to any benefice with the cure of souls, dignity, prebend, or ecclesiastical living; or should give or bestow the same for or in respect of any such corrupt cause or consideration: that then every such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon should be void, frustrate, and of no effect in law; and that it might and should be lawful to and for the said lady the Queen, her heirs and successors to present, collate unto, or give or bestow every such benefice, dignity, prebend and ecclesiastical living, for that one time and term only, as by the said Act among other things more fully **[14]** appears: and the said Attorney General, &c. for the said lord the King further saith, that the said church at the said time of the making of the Act aforesaid, was and still is an ecclesiastical living; and that after the end of forty days next after the end of the said session of the Parliament aforesaid, to wit upon the 19th day of August, in the 26th year aforesaid, at Fowlton, otherwise Fowleston aforesaid, between the said Stephen Sowton and one Anne Stephens, the sister and familiar friend of the said William, the church aforesaid so being void, it was simonically and corruptly agreed, that in consideration that the said Anne would present or cause to be presented, the said Stephen Sowton to the said church of Fowlton, otherwise Fowleston, so as aforesaid void, the said Stephen should give to the said Anne 53l. whereupon the said William Stephens by the procurement of the said Anne, afterwards, to wit, upon the 1st day of October, in the 26th year aforesaid, to the church aforesaid, so as aforesaid void, presented the said Stephen Sowton, who at the presentation of the said William, afterwards, to wit, upon the 1st day of December, in the 26th year aforesaid, in fact was instituted and inducted into the said church; by colour of which, and by force of the statute aforesaid, the said presentation of the said Stephen Sowton, by the said William to the church aforesaid made, and the said institution and induction of the said Stephen thereupon had, became entirely void in law; and by reason whereof, it

belongs to the said lord the now King, by force of the statute aforesaid, to present a proper person to the church aforesaid, so void at the present: and the said archbishop and Stephen, the said lord the now King unjustly hinder, to the damage of the said lord the now King of 100l. And this the said Attorney General of the said lord the now King, is ready to verify, &c.

And the said archbishop and Stephen, by Thomas Langley their attorney come and defend the force and injury, when, &c. And the said archbishop saith, that he neither has nor claims to have any thing in the church aforesaid, nor in the advowson of the said church, except the admission and institution of the parsons into the said church, and the amoval of them therefrom, and the other things which belong to the Ordinary, as the Ordinary of the place, and this he is ready to verify; wherefore he doth not apprehend that the said lord the now King, without a special disturbance in the person of the said archbishop to be assigned, the said archbishop will or **[15]** ought to impeach or trouble, &c. And the said Stephen Sowton saith, that he neither hath nor claims to have any thing in the advowson of the said church; but further saith that he is the parson of the said church by the presentation of the said William Stephens, who as yet is alive and in full life, to wit, at Fowlton, otherwise Fowleston aforesaid, wherefore because that the said William is not named in the said writ, he prays judgment of the said writ, &c. And the said Attorney General, who, &c. as to the said plea of the said archbishop, because the said archbishop neither has nor claims to have any thing in the said church, nor in the advowson of the same, except the admission and institution of the parsons into the said church, and the amoval of them therefrom, and the other things which belong to the Ordinary, as the Ordinary of the place, prays judgment against the said archbishop, and the writ to the said archbishop, &c. Therefore it is considered that the lord the now King recover against the said archbishop his presentation to the said church, and that he have the writ to the said archbishop; that notwithstanding the disclaimer of the said archbishop he admit a proper person to the said church at the presentation of the said lord the King, &c. and no amercement against the said archbishop, because he hath excused himself of the special disturbance, &c. But let execution thereupon stay, until the said plea, between the said lord the now King, and the said Stephen be determined. And as to the said plea of the said Stephen for quashing of the said writ in the manner and form aforesaid pleaded, the said Attorney General, who, &c. saith, that the said plea of the said Stephen, in the manner and form aforesaid pleaded, is not sufficient in law to quash the said writ of the said lord the King, and that he for the said lord the King to the said plea by the said Stephen, for quashing of the said writ in the manner and form aforesaid pleaded, hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore, because the said writ is sufficient in law he prays judgment, and that the said writ may be adjudged good, &c.

And the said Stephen because that he sufficient matter in law for quashing of the said writ above hath pleaded, which he is ready to verify; which matter the said Attorney General, who, &c. doth not deny, nor to the same in any wise answer; but altogether doth refuse to admit that averment, as before prays judgment of the writ aforesaid. And because the justices here will advise of and upon the premises before they give their judgment **[16]** thereupon, day is given to the parties aforesaid, here until the day of Easter, in fifteen days to hear their judgement thereupon, because the justices here thereupon not as yet, &c.

THE KING *against* THE ARCHBISHOP OF YORK AND STEPHEN SOWTON.

In quare impedit for *simony* need not make the patron a defendant. *Vide post.* 83, 115, 206, 237. 2 Lut. 1086, 1087, &c. Nel. Lut. 345. 2 Bla. Com. 279. 19 Vin. Ab. 474.

Quare impedit, and counts, that Charles Earl of Carlisle was seised in fee of the advowson of the church of Foulston *ut de uno grosso*, and presented Dealtry, who was instituted and inducted, and after granted the next avoidance to Stephens, and the church became void by the death of Dealtry, and then sets forth the Statute of Simony, and a simoniacal agreement between the defendant and Anne, sister of Stephens; whereupon

the defendant was presented, admitted, &c. *Cujus prætextu & vigore statuti* it belongs to the King to present, and the defendants hindered him. The archbishop claims nothing but as Ordinary. Sowton pleads in abatement, that the *patron is not named in the writ:* upon which the Attorney General demurred, and after argument it was adjudged that the patron need not be named in this case, for his title is not now in question, but admitted; for the King claims in *affirmance* of his *title*, and in his right, but by the fault of the defendant; and the patron shall not be put out of possession by the recovery in this action; and he hath had the fruit of his presentment; but his clerk shall be removed because of the *simony;* and therefore the patron need not be made a party; by North, Wyndham and Levinz, upon 7 Co. 26, *Hall's case de quare impedit.* 7 H. 4, 35. 47 E. 3, 11. But Charlton doubted, for the patron is not only to have his clerk admitted, but to have him some time in under his induction, by which he came in: but a *respondeas ouster* was awarded.

[17] Bowyer *against* Blorksidge.

Upon a bad plea in award, a breach needs not be assigned. *Vide post*, 23, 24. 1 Salk. 69, 72, 138. Freeman, 62, 139. Comberbach, 318. Kyd on Awards, 22, 23.

Debt upon an obligation against William Blorksidge, *conditioned* that if he and Joseph Blorksidge his son, and each of them, perform the award of A. and B. arbitrators indifferently chosen to arbitrate between the parties, &c. *ita quod, &c.* then the obligation to be void: the defendant pleads, that Joseph his son was within age; and the plaintiff demurred. And now it was argued by Bigland, that submission by an infant is void, and a submission being void in part, both that and the award are void *in toto;* and cited March Rep. 141, *Rudson* v. *Yates*, and Jones Rep. *Knight* v. *Stone.* As to the point, whether the submission by an infant, or by the father on behalf of an infant, be void? the Court gave no opinion. But they held clearly, that the father's submission for himself was good, and the arbitrators may make their award between him and the plaintiff only; and the plea does not answer to that, but contains a collateral matter in bar, and therefore though no breach be assigned, nor no award pleaded in the replication, judgment for the plaintiff.

Cranden *against* Walden.

That a parson preaches lies, suable in the Ecclesiastical Court. *Post.* 18.

Prohibition for saying of a parson, *He preaches nothing but lies and malice in the pulpit;* for these words are actionable at common law; 1 Roll. Abr. 58, *Drake's case,* and therefore not suable in the Ecclesiastical Court: but a consultation was granted; for it concerning an ecclesiastical person and an ecclesiastical matter, it is fit to be tried there, and it is no certain rule that a thing triable here is not triable there; witness violent hands upon a parson, a pension by prescription, &c.

[18] Linfield *against* Ferne.

Award to pay, upon condition that he shall acquit. Award to pay the charge of a suit upon a bill delivered.

Debt upon an *obligation* condition to perform an *award;* the defendant pleaded *no award:* the plaintiff replied, an award that he should pay the defendant 20s. upon condition that each should acquit the other of all things submitted, and that the defendant should pay the plaintiff the charge of a suit now depending between them, and the plaintiff gave the defendant a bill of charges; and for breach assigns, that the charges amounted to 40s. of which he delivered a bill to the defendant, and he had not paid it. Upon this the defendant demurred, and now took two exceptions. 1. That the award is not *absolute,* but *conditional, scil.* that the plaintiff should pay the defendant 20s. upon condition that each shall acquit the other, &c. 2. That the award does not ascertain what the charges are, but refers them to a bill to be given

by the plaintiff: *sed per Cur'*. As to the first on condition they shall acquit is an award that they shall acquit; and as to the second, the charges are ascertained by the bill delivered, Cro. Cha. *Beale* vers. *Beale*. Judgment for the plaintiff.

BLACKHOUSE *against* MOORE.

S. C. 1 Danvers 25, 9.

Trover de aliis utensiliis. 2 Lev. 85, 176. 2 Stra. 738, 809, 810, 827.

Trover for several goods in particular, & *aliis utensiliis, Anglice implements.* After verdict and entire damages, judgment was stayed, for *aliis utensiliis quot, quanta, vel qualia*, are uncertain.

YATES *against* LODGE.

Suit for saying of a parson, *He lies with all the women in D.* and prohibition denied. *Ante.* 17.

A prohibition was prayed to stay a suit in the Spiritual Court, which was for saying of the Parson of Hatton, *He is a lying fellow, and has lain with all the women between Hatton and D. He lies so much with other women, that he lies not with his (own) wife*, but denied; for these words spoken of an ecclesiastical person are very scandalous though not actionable, at common law.

[19] PITT *against* RUSSEL.

A *que estate* in a term, when it may be pleaded. 1 Salk. 363. 2 Salk. 562. 1 Lev. 190. Raym. 389. 1 Mod. 231. Nel. Lut. 29. 1 Lev. 190. *Non infregit conventiones.* 1 Lev. 183. 1 Sid. 289.

Covenant, and declares of a *lease* made by the Queen to George Baker, and brings the reversion to himself by divers mesne conveyances, and the term to the defendant by a *que estate* he hath by several mesne conveyances generally, *concurrentibus his quæ in jure requiruntur*, and assigns divers breaches in not repairing the premisses. The defendant pleads, *non infregit conventiones.* The plaintiff demurs; and upon argument by George Strode for the plaintiff, and Baldwin for the defendant, judgment was given for the plaintiff. 1. A *que estate* in a term may be pleaded in a person under whom the party claims not, but is a stranger, for he is not privy to the estate, nor to the conveyances made to a stranger; but one cannot plead a *que estate* in a term in himself, or in any other under whom he himself claims; Hill. 18 E. 4, pl. 29. Dy. 238, 6, and so it was adjudged Mich. 18 Car. 2, B. R. *Cotes* versus *Wade*, and so are Co. Lit. 121 a. and Cro. Eliz. 22, to be understood. 2. The plea is too general; for first, several breaches are alledged; secondly, two negatives cannot make a good issue, and the breach is *in non reparando*, and therefore *non infregit, &c.* can be no good plea. Judgment for the plaintiff.

CONYERS *against* FRANKE.

Amercement pleaded without affeerment, bad. 4 Bac. Abr. 89. 1 Salk. 108.

Trespass for taking several goods; the defendant justifies for several amerciaments assessed in a court-baron, but shews no affeerment by the affeerers. Upon this the plaintiff demurred generally, and adjudged for the plaintiff by the whole Court upon the first argument for this cause.

[20] COTES *against* MICHILL AND OTHERS.

Officer may justify by the writ without the judgment, but plaintiff cannot. *Post* 113. 4 Bac. Ab. 450.

Trespass for breaking his house, and taking his goods, against a bailiff and the lessor in ejectment. The plaintiff pleaded an *habere facias possessionem*, and a warrant

thereupon, and so justifies. The lessor pleads *non culp.* The plaintiff demurred to the plea of the bailiff, because he shews no judgment whereupon the *habere facias possessionem* was founded; but *per Curiam;* The plea is good, for the sheriff and his bailiffs are bound to obey the King's writs without enquiry after the judgment. But if the party himself had justified, he must have shewn a judgment as well as a writ. Judgment for the defendant.

DOBSON *against* DOUGLAS.

In replevin the being bailiff traversed. 1 Leon. 50. 2 Leon. 169, 216. Yelverton 148. 1 Salk. 107. Cro. El. 14. 1 Rol. Rep. 46. Repleader. *Vide post* 440. 6 Mod. 2, 3, 102. 1 Lev. 32. 2 Lev. 135. 1 Salk. 216. 2 Salk. 579. 4 Bac. Ab. 80, 388.

Replevin; the defendant makes conusance as bailiff of J. S. for a rent-charge. The plaintiff in bar says, that he took the distress without the privity or command of J. S. and that such a day after the distress J. S. came first to have notice, & *de advocavit captiones prædictas.* The defendant demurred generally: and *per Cur';* The bar is naught, for he should have traversed his being bailiff; and he was ruled to replead accordingly, and to mend his bar, paying costs, and go to trial upon issue bailiff, or not?

[21] TRINITY TERM, IN THE THIRTY-THIRD YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

BENNET *against* KING.

In avowry for fealty, &c. Statute of Limitations no plea. Anderson 57, 58.

Replevin, and avows upon tenure by fealty, rent, and suit of court. Plaintiff confesses the tenure, but pleads that the avowant nor none of his ancestors were seised of the said services, or any of them within 50 years. The defendant demurred, and had judgment: for fealty, homage, and such casual services, which peradventure may not happen in 50 years, are not within the statute H. 8 of Limitations, according to *Bevil's case,* 4 Co. 8, 9, &c.

LANGDON *against* GOOLE.

Obligation not said to whom made good by the intent of the condition. 1 Lev. 3, 45, 77. 2 Shower 15, 16. 1 Lut. 436. Croke El. 561, 729, 758. 3 Bac. Ab. 692.

Debt as administrator of John Garnes, upon an obligation to John Garnes for 16l. The defendant craved oyer of the obligation, & *ei legitur in hæc verba: Know all men, that I Philip Goole do stand bound* (not said to whom) *in the sum of* 16l. *and is to be paid to the said John Garnes the elder's executors; for which payment to be made, I bind me, my heirs and executors* (but does not say to whom). Then the defendant craves oyer likewise of the condition; which was long and senseless in divers recitals, and *inter alia* was recited a devise of 8l. by a stranger to be paid to *John Garnes the elder within one year after* **[22]** *his death: if therefore the defendant shall pay to John Garnes the elder's executors, within one year after his death, the bond shall be void.* Whereupon the defendant demurred. And now it was objected for the defendant, that this is no obligation to John Garnes as the plaintiff hath declared; for this is to be paid to John Garnes the elder's executors; so that if the defendant be bound at all, he is bound to the executors of John Garnes; and then the plaintiff being his executor should have sued in his own name, and not as executor upon an obligation made to his testator. But upon argument and deliberation it was resolved by the whole Court, that judgment should be given for the plaintiff; for an obligation cannot be made to executors in the life of the testator, because he cannot have an executor during his life: and this obligation was sealed and delivered to the testator, and it shall not be void, if by any means it can be made good; and some held, that the words *John Garnes the elder's executors* should be disjoined, and be read, *John Garnes the elder his executor,* and to be taken *John*

Garnes the elder and his executors. Others held these words, the *elder's executors*, should be wholly rejected as void, and then the words are to be read *to be paid to John Garnes* only; for he cannot have executors in his life-time, as Cro. Ja. 358, *Goodman* versus *Knight;* where the insensible words in a covenant are rejected as void, and the covenant read in the sensible words only; and *per totam Curiam* judgment was given for the plaintiff.

GIBBONS *against* SUMMERS.

Devise of a term to J. and if he die not married, and without issue, to his sisters; and if J. be married, and hath no issue living to enjoy it, to his sisters after the death of J.'s wife. The limitation to the sisters is void as being too remote. 1 Salk. 224, 225, 230. 1 Levinz, 25, 290. 3 Levinz, 264. 1 Mod. 50, 114. 1 Cha. Rep. 229. 1 Eq. Ab. 192. 1 Mod. 52. 1 Sid. 37.

In ejectment upon a long special verdict and *devastavit* alledged by an executor, and not denied by him, the case was. One possessed of a long term of years in the manor or Whimple *devised the same to his son John, and if John die unmarried and without issue, all to go to his daughters and their executors; and if John be married, and have no issue living to enjoy it, then after the death of John's wife to the daughters.* John died without issue, and made his sisters his executors. If the sisters take the estate by the devise of their **[23]** father, they have not wasted: but if they take it as executors to their brother, for whose debts they are sued, then they have wasted. And upon argument and consideration it was now adjudged, that this remainder of the term to the daughters by the devise of the father was void, being a remainder to them upon the death of their brother without issue; and for this reason they take it as executors of their brother, for this is not, as the counsel for the daughters would have had it, to be construed *without issue living at his death*, whereby the contingency would happen within the compass of a life. And yet if it were so, the Court held it would be void according to *Child and Bayly's case*, Cro. Ja. 459, for though this hath prevailed in the case of a devise of an inheritance, as in *Pell and Brown's case*, Cro. Ja. 590, yet it hath never yet obtained in the case of a term: and the Court will not extend a devise of chattels to make *perpetuities* farther than has been already allowed.(1)

FRUMPTON *against* PETTIS.

Judgment upon an attachment in London upon an obligation made out of their jurisdiction, voidable by plea. 2 Salk. 675. 1 Lev. 16, 31. *Post.* 24, 41.

Assumpsit; the defendant pleaded two several *attachments* of the money in London; *scil.* one for part of the money due to himself upon obligation, the other for the residue upon an obligation to a stranger. The plaintiff replied, that the two several obligations, upon which the attachments were made, were made *extra jurisdictionem Cur' de London.* The defendant rejoined, that the obligation to himself was made *infra jurisdictionem Cur' de London.* The plaintiff demurred, and upon argument and consideration it was adjudged for him; for judgment there given of a thing out of their jurisdiction is absolutely void, and advantage may be taken thereof in pleading, without reversal by writ of error, according to the case of *James and Richardson*, Trin. 14 Car. 1, B. R. Rot. 1590, reported 1 Roll. 809. Litt. F. pl. 3. And then the rejoinder in this case answers only to part of the replication, and gives no answer to the residue, and therefore the plaintiff ought to have judgment for the whole.

(1) The authority of this case and of *Child* v. *Baily*, Cro. Ja. 459, upon which it was adjudged, have been over-ruled by the Lord Nottingham in *The Duke of Norfolk's case*, 3 Cha. Ca. 1. Ferne's Essay, 2d Vol. 182. C. L. 20 a. n. 5.

[24] MICHAELMAS TERM, IN THE THIRTY-THIRD YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

GENNE *against* TINKER.

An award ill pleaded by the defendant; the plaintiff need not assign a breach. 1 Salk. 138. 1 Saunders, 102. 3 Bac. Ab. 716.

Debt upon an obligation, whereby the defendant and two others were to perform an award made betwixt them and the plaintiff. The defendant pleaded the award; which was, that the defendant should pay the † plaintiff 20s. and each of the others 20s. a-piece, and that he tendered the 20s. so to be paid by him, which the plaintiff refused to accept of. The plaintiff replied, that at a day after the refusal he demanded the said 20s. of the defendant, which the defendant then refused to pay him. The defendant demurred; and *per Cur'*; the replication is idle: for the 20s. being a sum collateral to the obligation was lost for ever by the first refusal, 9 Co. 79 a. Co. Lit. 207 a. Lit. sect. 338. But then it was resolved that the bar was ill, as answering only to part, *scil.* that 20s. to be paid by himself, and not to the other sums to be paid by the others, and he is answerable for all; and then the defendant pleading a collateral matter, which is insufficient in law, the plaintiff needs not assign a breach; and so judgment was given for the plaintiff.

[25] BARRINGTON *against* TURNER AND OTHERS.

Count in trespass *vi & armis* for killing two greyhounds.

Essex, to wit.—Edward Turner, late of London, Knight, Humphry Fletcher, late of Hatfield Bradock, in the county of Essex aforesaid, yeoman, Robert Casse, late of the same, yeoman, and John Fletcher, late of the same, yeoman, were attached to answer John Barrington, Esquire, of a plea, wherefore with force and arms two greyhounds of the said John Barrington, at Whitfield Bradock in the county aforesaid being, they took and killed—and other wrongs to him did, to the great damage of the said John Barrington, and against the peace of the said lord the now King, &c. And thereupon the said John Barrington by John Brocket his attorney complains, that the said Edward, Humphry, Robert, and John, on the 8th day of April, in the 33d year of the reign of the lord the now King, two greyhounds of the said John Barrington at Hatfield Bradock aforesaid being, did take and kill, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereby the said John Barrington is damaged to the value of 20l. and thereupon he produces his suit, &c.

And the said Edward, Humphry, Robert, and John, by Thomas White their attorney, come and defend the force and injury when, &c. and say that the said John Barrington ought not to have his action aforesaid against them, because they say that the said Edward Turner, Knight, before the said time in which the trespass aforesaid is supposed to be committed, and also at the said time in which, &c. was and as yet is possessed of and in a certain chase, called Hatfield Forest, otherwise Hatfield Chase, in the parish of Hatfield Bradock, in the county aforesaid, in which chase there were and are deer, and at the said time in which, &c. there were deer and other beasts of chase; and the said Edward so being thereof possessed, the said two greyhounds at the time in which, &c. hunted and chased the deer being in the said chase, and one deer of the deer aforesaid in the said chase then and there killed, whereupon the said Edward and **[26]** they the said Humphry, Robert, and John, as the servants of the said Edward, and by his command, the said greyhounds of the said John Barrington in the chase aforesaid, at the said time in which, &c. took, and in and for the preservation of the said deer in the chase aforesaid being, [lest the said greyhounds should destroy all the deer in the said chase], the said greyhounds killed as it was well and lawful for them to do; and this they are ready to verify, wherefore

† *Scilicet—to the plaintiff.*

they pray judgment if the said John Barrington ought to have his action aforesaid thereupon against them, &c.

And the said John Barrington saith that he by any thing before alledged, ought not to be precluded from having his action aforesaid against the said Edward, Humphry, Robert, and John, because he saith that long before and at the said time in which, &c. one John Barrington, Knight and Baronet, was and as yet is seised of and in the manor of Barrington Hall, in Hatfield Bradock aforesaid, in his demesne as of freehold, which manor is and at the said time in which, &c. was without the said chase, called Hatfield Forest, otherwise Hatfield Chase, and without any other chase or forest, but lying contiguous to the said place called the chase, and that the said deer in the said plea mentioned to be killed, and many other deer at the said time in which, &c. were in and upon the said manor eating the grass and corn there growing, and thereupon he the said John Barrington the now plaintiff, as the servant of the said John Barrington Knight and Baronet, with the greyhounds aforesaid, for chasing the deer aforesaid, so being in and upon the said manor, and by his command, the said deer at the said time in which, &c. hunted and chased the said deer in and upon the said manor, &c. and that the said deer so chased then and there ran towards and into the chase aforesaid, in, through and over the hedge of the said John Barrington, Knight and Baronet, in the parish, &c. between the said chase and the said manor, in the ditch of the said John Barrington, Knight and Baronet, in the parish, &c. and that the said greyhounds in chasing the said deer in the said chase, when one of the said deer in their flight forcibly over the hedge aforesaid, into the ditch aforesaid, then and there leaped and ran, in that ditch, the said deer then and there took and killed, and in chasing and pursuing the said [27] deer in the form aforesaid, in the chase aforesaid, the one deer aforesaid there killed, and the said other deer in the chase aforesaid, in the manner and form aforesaid, terrified, hunted and chased, which is the same hunting and chasing of the said deer and the killing of the deer aforesaid, in the plea aforesaid mentioned, without this that the said greyhounds in the chase aforesaid, at the said time in which, &c. hunted and chased the said deer, or killed the said deer in any other manner, and this he is ready to verify; wherefore he prays judgment, and his damages by occasion of the said trespass to be adjudged to him, &c.

And the said Edward, Humphry, Robert and John say that the said plea of the said John Barrington the plaintiff above by replying pleaded, is not sufficient in law to maintain the action aforesaid of the said John Barrington the plaintiff, against them the said Edward, Humphry, Robert and John, and that they to that plea in the manner and form aforesaid pleaded have no necessity, neither are they bound by the law of the land to answer, and for cause of demurrer in law they the said Edward, Humphry, Robert and John, according to the form of the statute in such case made and provided, shew to the Court here that the said John Barrington the plaintiff by his replication aforesaid doth not answer, nor traverse the matter in the bar of the said Edward, Humphry, Robert and John alledged; and this they are ready to verify: wherefore for want of a sufficient replication of the said John Barrington the plaintiff in this behalf, the said Edward, Humphry, Robert and John pray judgment, and that the said John Barrington may be precluded from having his action aforesaid thereupon against them, &c.

And the said John Barrington because that he above by replying hath alledged sufficient matter in law to have and maintain his action aforesaid, against the said Edward, Humphry, Robert and John, which he is ready to verify; which matter the said Edward, Humphry, Robert and John do not deny, nor to the same in any wise answer, but altogether refuse to admit the verification thereof, as before prays judgment, and his damages by occasion of the said trespass to be adjudged to him, &c. And because the justices here will advise themselves of and upon the premisses before they give their judgment thereupon, day is given to the parties aforesaid here until from the day of St. Michael in three weeks to hear their judgment thereupon, because that the justices here thereupon not as yet, &c.

[28] BARRINGTON *against* TURNER.

A deer being in my land, I chased her with my dogs, who pursue and kill her in the park, the park-owner may kill the dogs. 1 Saunders 84, 85, 220. 1 Lev. 216. Cro. Ja. 45. Lut. 481. *Post* 227. Cro. Eliz. 125. 5 Bac. Ab. 174, 263. 1 Poph. 161.

Trespass *quare cepit & interfecit* two dogs called greyhounds. The defendant justifies, for that the said greyhounds chased a deer in his park, and there killed her, upon which to prevent more mischief by them, he took them and killed them. The plaintiff replied the deer was out of the park in the plaintiff's land, eating his grass, and that thereupon he hounded the greyhounds to chase the deer out of his land, and that they followed the deer into the park, and there killed her. Upon which the defendant demurred; and upon argument it was adjudged, that the replication was ill, because he does not say that he did his endeavour to stop the greyhounds at the side of the park to stay them from entering into the park. But then it was objected, that the bar was ill; for though it was not lawful to chase within the park, yet when the defendant took the greyhounds there, he ought not to have killed them; and for this they cited Roll. 2 Abr. 567, *Lewis's case*. On the other side was cited Cro. Ja. 45, *Wadhurst* v. *Dam*, and afterwards upon consideration of both these books judgment was given for the defendant.

HEWLET *against* FRAMINGHAM.

Plene administravit ill pleading, if it want the words, *& quod ipse non habet, &c.* Lex Testm. 413. 1 Show. 81. Hobart 133, 178, pl. 206, 218, pl. 284. Aleyn. 37. Cro. Eliz. 592. Cro. Cha. 373. 2 Saunders 226. 1 Lev. 286. 1 Ventris 94. 1 Sid. 448. 1 Mod. 174. *If the executor who has no effects belonging to the testator, will not take advantage of that defence at the proper time, he shall not do it afterwards.* 3 Term Rep. 689.

Assumpsit against the defendant executor of J. S. The defendant pleaded several obligations by the testator to several persons not satisfied, and that he *plene administravit omnia bona quæ fuerunt testatoris tempore mortis suæ vel unquam postea præterquam bona & catalla ad valentiam* 10*l. quæ non sufficiunt ad satisfaciendum debita super obligationem prædictum debita & quæ eisdem onerat' existunt.* Upon which the plaintiff demurred, and *per totam Curiam* was adjudged ill for want of this intervening clause, *& quod ipse nulla habet bona vel catalla testatoris vel* **[29]** *habuit die impetrationis brevis prædict' vel unquam postea.* For the *plene administravit*, as here pleaded, refers to the time of the plea pleaded, and he might have paid debts upon simple contracts without suit after this writ purchased and before the plea, which if issue were joined upon this *plene administravit*, he might give in evidence upon the trial, and therefore the plaintiff hath no other remedy in this case but to demur; wherefore judgment was given for the plaintiff.

HAGE *against* SKINNER.

Outlawry pleadable in bar to an *assumpsit*. 2 Lut. 1513, 1514. Nelson Lut. 487, 515. Conroy on Custodiam 19, 22. 2 Bac. Ab. 762. 5 Com. Dig. 655. 2 Levinz 49. *Sed vide post.* 311, 393.

Assumpsit upon a bill of exchange for 20*l.* against the drawer; for that the person against whom it was drawn refused to accept it, and declares upon the custom of merchants. The defendant pleaded outlawry of the plaintiff in bar; whereupon the plaintiff demurred, and for him it was argued, that outlawry is not pleadable in bar, but in abatement only in this case, because the recovery is to be of damages only, which are uncertain as in trespass. But *per Curiam:* it is pleadable in bar in this case, for the debt itself is certain, though it is to be recovered in damages, and it is forfeitable by outlawry, as debts upon simple contract. But because the defendant

concluded his plea ill, with a *hoc paratus est verificare*, instead of *prout patet per recordum*, judgment was given for the plaintiff.

ONSLOW *against* RAPLEY.

S. C. 2 Ventris 37.

Case for a double return to Parliament lies not before the return determined in Parliament. *Vide* 2 Lev. 114, 115. 3 Keble 365, 389. Pollexf. 470. Nel. Lut. 32. Double returns forbidden by the English stat. 7 Wil. 3, c. 4, and by the Irish stat. 35 Geo. 3. *Vide* 6 Mod. 45, 49. 2 Lev. 50, 115. 2 Lev. 115, 86. 6 Mod. 47. 2 Sid. 168. Nel. Lut. 32. *Nelson's Lutwyche doth not seem to be a book of authority. Vide* Worrall's Catalogue, title "Reports."

Case for a double return upon an election of members for Parliament. The defendant pleaded, that the plaintiff was not chosen, and issue thereupon, and verdict for the plaintiff. And now it was moved in arrest of judgment, that no action lies for a double return; and so after divers arguments by the serjeants at Bar, it was at last resolved. For first, this matter **[30]** hath not yet been examined in Parliament, as it was in *Bernardiston's case;* and it would be great presumption in this Court to meddle with elections to Parliament before the matter hath been determined in Parliament. 2. No such action was ever maintained but in *Bernardiston's case*, and in that the judgment for the plaintiff in B. R. was after reversed in the Exchequer-Chamber, and no writ of error brought in Parliament upon that reversal. 3. *Nevill's case* about the restoration was sent to Parliament, as a case too grand for this Court, and there it stopped without any determination. 4thly, The statute 23 H. 6 gives remedy for a false return, but none for a double return; and now for this Court to maintain this action would be to break an Act of Parliament, and to give a further remedy than the Parliament itself hath given, and that in matters touching themselves. 5. The Parliament cannot be misconusant of double returns; for they have been frequent; there were no less than 70 double returns to Parliament in 1641, as North Chief Justice said, and yet the Parliament have never thought fit to make a law in this case; wherefore it is not for this Court to make a law in this case, and to maintain that actionable, for which no action was ever yet maintained, which is proof enough against it by the opinion of Littleton upon the Statute of Wards. Therefore judgment was, that the plaintiff shall take nothing by his writ.

SIR THOMAS CLARGES *against* ROWE.

Case by an officer for calling him Papist. S. C. 3 Mod. 26. Ray. 482. 2 Shower 140, 250. *Post* 50, 68. Nelson's Lut. 421. Farresly 107, 108. 2 Salk. 694, 2 Ld. Ray. 812. Buller N. P. 4. 1 Strange 617. 2 Ld. Ray. 1364. 3 Wilson 181. 2 Black. Rep. 751.

Case, and declares, that he is and always was a Protestant, *& per diversos annos* hath been and is a deputy-lieutenant of the county of Middlesex, and one of the Privy Council of Ireland, and *tempore propalationis verborum sequentium* stood for member of Parliament for Christ-Church in Hampshire, and that the defendant *falso & malitiose*, to make him lose his said offices, and also his election, said to A. one of the electors, and to divers others of them, *He is a Papist*, whereby he became subject to the laws against Papists, and hath lost his offices, and was put to great **[31]** expence to prove his innocence, and upon *non cul.* and 100l. damages, it was moved in arrest of judgment by Jefferies, that the words are not actionable, for which he cited 2 Brownl. 166, *Ireland* versus *Smith*, and 2 Cro. 484, *Tasburgh's case.* But after divers motions *pro & con.* the plaintiff had judgment by the whole Court. And Wyndham and Charlton held, that to call a common person Papist is actionable in respect of the penal laws against Papists; more especially at this time just after the popish plot, for it is dangerous as to their persons to be reputed a Papist, in respect of assaults by the rabble, and words are no otherwise actionable than in respect of

the scandal, damage, and danger, they subject a person to. North and Levinz held it not actionable to call a common person Papist, but that it was actionable to call officers Papists, and that in respect of their dignity, and the danger of losing their offices, of which Papists in most cases are not capable; and words may be actionable in respect of officers of dignity, and who are interested in the administration of the Government, which are not actionable in the case of common persons, 3 Cro. 195, *Sir William Walgrave's case;* 2 Cro. 561, *Sir John Harper* versus *Beaumont; ibid.* 202. Style 22, 23, *Hammond* versus *Kingsmil;* 3 Cro. 502. Sty. 363, 364. Het. 167, 168. Upon which judgment was given for the plaintiff.

TRINITY, 33 CHARLES II.

THE MAYOR, SHERIFFS, CITIZENS AND COMMONALTY OF NORWICH *against* JOHNSON.

Declaration in waste. *Statutes concerning waste are,* 52 H. 3, c. 23. 6 Ed. 1, c. 5. 13 Ed. 1, c. 14. 20 Ed. 1, stat. 2. 11 H. 6, c. 5.

City of Norwich, to wit.—Richard Johnson, executor of the testament of William Cooke was summoned to answer the Mayor, Sheriffs, Citizens and Commonalty of the City of Norwich, for that, whereas, it is provided by the common council of the lord the King of England, that it should not be lawful for any person to commit waste, sale, or destruction of lands, houses, woods or gardens to them demised for term of life or years; the said executor of houses in Norwich, which the mayor, sheriffs, citizens and commonalty for the time being, the **[32]** predecessors of the said now mayor, sheriffs, citizens and commonalty of the city aforesaid, demised for a term of years, committed waste, sale and destruction,(1) to the disherison of the said now mayor, sheriffs, citizens and commonalty of the city aforesaid, and against the form of the provision aforesaid, &c. And whereupon the said now mayor, sheriffs, citizens and commonalty of the city aforesaid, by John Westhorpe their attorney, say that whereas, they the said predecessors of the said now mayor, sheriffs, citizens and commonalty of the city aforesaid; upon the 1st day of April, in the year of our Lord 1658, by a certain indenture made at the City of Norwich aforesaid, between them the said mayor, sheriffs, citizens and commonalty of the city aforesaid, by the names of the Mayor, Sheriffs, Citizens and Commonalty of the City of Norwich of the one part, and the said William Cooke, by the name of William Cooke, citizen and alderman of Norwich, of the other part; which other part of which indenture sealed with the seal of the said William Cooke, the said now Mayor, Sheriffs, Citizens and Commonalty of Norwich aforesaid, bring into Court, the date whereof is the same day and year aforesaid; had demised to the said William, one barn and close of pasture with the appurtenances in Norwich aforesaid; except all timber trees, called pellings, growing and being upon the premisses, other than such as were seared and dead, to have and to hold the said barn and close of pasture with the appurtenances, unto the said William Cooke, from the Feast of St. Michael the Archangel then next ensuing the date of the said indenture, until the full end and term of thirty-one years, from that time next ensuing, and fully to be compleated and ended; by virtue of which demise, the said William into the tenements aforesaid, with the appurtenances as aforesaid demised, entered and was thereof possessed; and the said William within the term aforesaid, of the tenements aforesaid, as aforesaid possessed, died, to wit, at Norwich aforesaid, after whose death the said Richard, as the executor of the testament of the said William, into the said tenements with the appurtenances entered, and was and as yet is thereof possessed; and so being possessed thereof, the said executor made waste, sale and destruction, in the tenements aforesaid with the appurtenances as aforesaid demised, to wit in prostrating one barn thereof, of the value of one hundred pounds, and in taking and carrying away the timber and roof of the said barn; and also in cutting down six posts, every one of them of the value

(1) *The* 52 *H.* 3 *c.* 23, *hath the word exile, but the writ hath been adjudged good without this word.*

of ten shillings, parcel of the tenements aforesaid with the appurtenances above demised, **[33]** and in taking and carrying away them in like manner, to the disherison of the said mayor, sheriffs, citizens and commonalty of the said city, and against the form of the provision aforesaid, whereby they say they are prejudiced and have damage to the value of 100l. and thereupon they produce their suit, &c.

And the said Richard by Thomas Balston his attorney, comes and defends the force and injury, when, &c. and saith that the said mayor, sheriffs, citizens and commonalty of the city aforesaid ought not to have their action aforesaid against him, because he saith that the said William Cooke in his life-time, by virtue of the demise aforesaid, in the declaration aforesaid abovementioned, into the tenements aforesaid in the said declaration in like manner mentioned, with the appurtenances entered and was thereof possessed; and so being thereof possessed the said William Cooke afterwards, to wit, upon the first day of December, in the year of our Lord 1666, at Norwich aforesaid, died intestate, no testament by the said William Cooke in writing or otherwise howsoever being composed or made; and that after the death of the said William Cooke, administration of the goods and chattels which were the said William's at the time of his death, or of any part thereof, to the said Richard never was committed; and the said Richard further saith, that the term of years in the declaration aforesaid, above specified, or any part of the said term or any right, title, or interest in the tenements aforesaid, with the appurtenances, or any part thereof, or to the same or any part thereof by the said William in his life-time, or by any administrator, or administrators of the goods and chattels which were the said William's at the time of his death, or of any part thereof after the death of the said William, to the said Richard in no manner was or were assigned, conveyed or made over, and this he is ready to verify; wherefore he prays judgment if the said mayor, sheriffs, citizens and commonalty ought to have their action aforesaid against him, &c.

And the said mayor, sheriffs, citizens and commonalty of the city aforesaid, say that they by any thing before alledged, ought not to be precluded from having their action aforesaid against the said Richard; because they say that the said Richard after the death of the said William Cooke as the executor of his own wrong of the said William Cooke into the tenements aforesaid, by the mayor, sheriffs, citizens and commonalty aforesaid, the predecessors of the said now **[34]** mayor, sheriffs, citizens and commonalty of the city aforesaid, to the said William Cooke as aforesaid demised, entered, claiming the term aforesaid; and by virtue thereof was possessed, and as yet is possessed of the said tenements aforesaid, with the appurtenances for the term aforesaid, as the executor of his own wrong of the said William, and the said Richard so being thereof possessed, the said Richard committed waste, sale and destruction in the said tenements with the appurtenances as the said mayor, sheriffs, citizens and commonalty of the city aforesaid, above against him have declared, and this they are ready to verify; wherefore because the said Richard above hath confessed the waste, sale and destruction aforesaid, the said mayor, sheriffs, citizens and commonalty aforesaid, pray judgment, and their damages by occasion of the waste, sale and destruction aforesaid to be adjudged to them, &c.

And the said Richard saith, that the said plea of the said mayor, sheriffs, citizens and commonalty of the city aforesaid above by replying pleaded, is not sufficient in law to maintain them the said mayor, sheriffs, citizens and commonalty of the city aforesaid, to have their action aforesaid against the said Richard, and that he to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient replication in this behalf, the said Richard prays judgment, and that the said mayor, sheriffs, citizens and commonalty of the city aforesaid, may be precluded from having their action aforesaid against him, &c.

And the said mayor, sheriffs, citizens and commonalty of the city aforesaid, because that they in their plea aforesaid, above by replying have alledged sufficient matter in law to maintain them the said mayor, sheriffs, citizens and commonalty of the said city to have their action aforesaid against the said Richard, which matter the said Richard doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, they the said mayor, sheriffs, citizens and commonalty of the said city pray judgement and their damages, by occasion of the

waste, sale and destruction aforesaid to be adjudged to them, &c. And because the justices here will advise themselves of and upon the premises before they give their judgment thereupon; therefore day is given to the parties aforesaid here, until from the day of St. Michael in three weeks, to hear their judgment thereupon, because that the said justices here thereupon not as yet, &c.

[35] Mayor and Commonalty of Norwich *against* Johnson.

S. C. 3 Mod. 90. 1 Show. 242. 2 Show. 457. Lex Test. 523. Comb. 7.

Waste against a tort executor of a term. 2 Lev. 110, 133. 1 Lev. 147, 154. 1 Sid. 76. 1 Cha. Rep. 257. 5 Mod. 136, 145. 2 Vent. 179. 2 Chan. Rep. 83. 1 Vent. 349. Noy 69. Golds. 116. Yelv. 137. Cro. El. 102, 810. 3 Leon. 198. Godb. 217. 5 Co. 30, 34. Sty. 327. 1 Rol. Ab. 919, 922, 923. Hobart 49. Carthew 116. 2 Bac. Ab. 389. 1 Com. Dig. 266. Freeman 218, 251. 11 Viner Ab. 222. 2 Mod. 174.

Waste against the defendant, as executor of Cooke, and declares upon a lease for 31 years made to Cooke, and that he died and the defendant being executor to Cooke entered, and did *waste:* the defendant pleaded, that Cooke died intestate, and that administrator was not granted to him, nor the term assigned to him by Cooke, or any administration of Cooke. The plaintiff replied, that the defendant after the death of Cooke entered as executor, and did the waste. Upon this the defendant demurred, and Baldwin argued for the defendant, that one could not be a *tort executor* of a term, for no man can apportion his own wrong; but if a man enter tortiously he is a disseisor, and not a termor. In Styl. Rep. *Porter* versus *Swetman*, 'tis doubted even in an action of debt reserved upon a lease for years, whether one can be a *tort executor* of a term; which though it be admitted, yet it cannot be so in *waste*, which is founded upon a penal statute, whereby the action is given *de domibus dimissis*, and here is no lease to the defendant: and that a tortious entry makes the party a disseisor in fee, though he claims a particular estate only, was cited 28 Ass. 11. 9 H. 6, 20 b. Dyer 134 b. 14 H. 8, 18. Co. Lit. 127. Baldoc for the plaintiff cited *Stephens* versus *Cart* in this Court in the time of Vaughan Chief Justice, wherein it was held by Wylde and Archer Justices, that debt lies against an *executor de son tort* of a term. *Tyrril contra. Sed per Vaughan;* If a stranger enter and pay no rent, he is a disseisor; *aliter*, if he pay rent, for thereby he shows the intent of his entry. *Et adjournatur.* But afterwards upon consideration of the books, judgment *per totam Cur'* was given for the plaintiff: for in the cases cited there was no particular estate or term *in esse*, and the claim of the tort-fesor cannot create a particular estate, and so apportion his own wrong, but of necessity he is a disseisor in fee; because there is no particular or other estate *in esse*. But in the case at Bar there was a rightful term *in esse*, and he in **[36]** reversion cannot maintain trespass during the term, and therefore it is reasonable that he should have his remedy upon the contract against him that claims to be in by the contract. And Mo. pl. 126, it seems to be admitted, that there may be a tort executor of a term.

Hutchinson's Case.

Fine levied by an infant vacated *without writ of error.* 1 Salk. 337, 339, 341. 2 Shower 281. 1 Cruise 301, 302. "*If the fine is not reversed during minority it must ever afterwards stand good.*" 1 Cruise 111, 112, 113, 114. Shep. Touch. 6.

Hutchinson and his wife, she being an infant of 16 years old, levied a fine of the wife's land, and paid the King's silver, and the said fine was compleat and exemplified. But upon complaint by the remainder-man in fee next after the estate-tail of the wife, the husband and wife were brought into Court *by rule*, and examined; whereby the levying of the fine and the infancy appeared, and the father and mother of the infant came into Court, and prayed the fine might stand: and Maynard their counsel insisted that the fine, the King's silver being paid ought not to be vacated. But upon view of a record, Hill. 4 Jac. 1, Rot. 70, *Pierpont's case* entered among the rolls of *fines*

and King's silver, where such a fine was vacate, and upon the information of North Chief Justice, and Robinson Chief Prothonotary, that there are divers other precedents in Court of such fines vacate notwithstanding the King's silver paid, and the fines perfected, the Court now vacated this fine, and caused the exemplification to be brought into Court, and delivered up, and ordered him in reversion to prosecute an information against the commissioners who took the conusance of the fine. But note, the vacate was entered *quoad* the wife only: and Trin. 34 another fine levied by Sir Robert Massam and his wife, an infant, was vacate for the same cause.

[37] BASELY *against* CLARKSON.

Difference *inter* trespass involuntary, and *per* mistake.

Trespass for breaking his close called the *balk* and the *hade*, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a *balk* and *hade* adjoining to the balk and hade of the plaintiff, and in mowing his own land he involuntarily and by mistake mowed down some grass growing upon the balk and hade of the plaintiff, intending only to mow the grass upon his own *balk* and *hade*, and carried the *grass, &c. quæ est eadem, &c. Et quod ante emanationem brevis* he tendered to the plaintiff 2s. in satisfaction, and that 2s. was a sufficient amends. Upon this the plaintiff demurred, and had judgement; for it appears the fact was voluntary, and his intention and knowledge are not traversable; they cannot be known.

MAYOR AND COMMONALTY OF LONDON *against* HUNT IN THE EXCHEQUER-CHAMBER.

S. C. 1 Danvers 769, pl. 1. 2 Danvers 429, pl. 7.

Custom of London for weighage for all goods brought into the port. Lit. Rep. 101, 103. 1 Lev. 37, 97. *Post.* 424. 3 Burr. 1402. 2 Wilson 95. 1 Term Rep. 616, 660.

Error of a judgment in B. R. *in assumpsit* brought by the mayor and commonalty against Hunt, wherein they declared of a custom, that they and their predecessors, mayors, &c. have had of every master of a ship 8d. per ton for every ton of cheese brought from any part of England to the port of London, *ab oriente de London-bridge*, in the name of weighage, and the defendant being master of a ship had brought to the port of London so many ton, which at the rate aforesaid came to so much, and had not paid it; and upon *non assumpsit* verdict and judgment for the plaintiff. Upon which Hunt the defendant brought a writ of error, and two errors were assigned; 1. That the action lies not against the master, for the duty is due from the merchants owners of the goods. 2. That there is no consideration here for the duty; for this is only in the nature of a [38] *toll-through*, which is not due without consideration, 22 Ass. 58, and the river is a common highway. But the judgment was affirmed; for first the master is intrusted with the goods; he hath recompence from the merchants for the portage; he is responsible for them, and shall be charged for the duty; and indeed it would be infinite to search out the owners of the several goods: besides, the goods are in the custody of the master; he brought them into port, and therefore shall be charged. 2dly, The consideration is sufficient; he had the liberty of bringing them into port, which is a place of safety, and therefore implies a consideration in itself, and Cotton's Rec. 678, the Mayor and Commonalty of London have the view and correction of the river of Thames by stat. E. 4, and Hill. 33 & 34, the judgment was affirmed.

[39] HILARY TERM, IN THE THIRTY-THIRD AND THIRTY-FOURTH YEARS OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

HARDY *against* GILDING.

Want of pledges substance, but amended after demurrer and argument. British. 4 Anne, c. 16. Irish. 6 Anne, c. 10.

Case for wards by attachment of privilege. The defendant demurred upon the declaration for want of pledges; and it was argued for the plaintiff, that want of pledges is but form, and that they may be found at any time, pending the plea. Trin. 9 E. 4, pl. 37. 18 E. 4, 9 Hut. 92. *Sed per Cur'*. This is substance, 1 Cro. *Wolfe* versus *Hole;* also the defendant hath demurred specially for this cause, and the plaintiff having now joined in demurrer, and thereby put it upon the judgment of the Court, though otherwise pledges might be found at any time pending the plea, yet they cannot be found now after the demurrer joined, but judgment must be given for the defendant; yet afterward, by the importunity of counsel, the declaration was mended, and pledges entered, upon payment of costs.

RANDAL *against* BREES.

Discontinuance as to part, cured by verdict. *Post* 55.

Debt for rent reserved upon a lease of lands, part copyhold, and part freehold. The defendant pleaded eviction from all by the devisee of the lessor, father of the plaintiff. The plaintiff replied, *protestando* that he was not evicted from the lands copyhold, *pro placito dicit*, that the freehold was intailed, and therefore the devise void. The defendant traversed the intail, and issue thereupon, which was found for **[40]** the plaintiff, and verdict for the whole rent: and now it was moved in arrest of judgment, that here was a discontinuance as to the copyhold, and the issue upon part only, and yet verdict for the whole rent, and it may be the greater part of the land was copyhold, and so the defendant is charged for the whole rent, and yet had only the lesser part of the land, and so the issue immaterial, and not aided by any statute. It was agreed the rent issues out of the whole land, as well the copyhold as the freehold, according to 3 Cro. *Collins* versus *Harding*. But the greater part of the justices held this discontinuance was cured by the statute of 32 H. 8, as 11 Co. *Higden's case*. Battery against two; discontinuance as to one is cured by a verdict against the other; so here a discontinuance as to part of the land is cured by a verdict as to the residue: and this issue is not an immaterial, but a good issue as to part; whereupon judgment was given for the plaintiff. *Vide postea Graves* versus *Morley*, all put in issue, jury omit part, ill.

THOMAS *against* NICHOLS.

The lord may drive the cattle of the commoners, mixed with those of strangers, to sever them. 2 Lutw. 1492, 1497.

Trespass for entering his close, and spoiling his grass *pedibus ambulando*, and taking and driving his beasts to places unknown, so as they could not be replevied. The defendant pleaded, that the place where is a *waste* parcel of his manor, and that the beasts of the plaintiff were there intermixed with the beasts of strangers, which had no right there, and because he could not sever the beasts of the plaintiff from those of the strangers he drove them all together to a pound within the *waste* to part them, and there severed them, and drove the strangers beasts out of the waste, and left the beasts of the plaintiff in the *waste*. The plaintiff, *quoad* the plea as to the entry into his close, demurred, because it amounts but to the general issue: and *quoad* his plea, as to taking and driving the beasts, he prescribes for common and says, that immediately after the defendant impounded his cattle, the plaintiff requested him to deliver them to him, which he refused, and after drove them to places unknown. **[41]** The

defendant rejoined, and maintained his bar, *absque hoc quod die & loco* alledged by the plaintiff, the plaintiff immediately after the impounding requested the defendant to redeliver them; upon which the plaintiff demurred, and it was adjudged that this traverse of the *day and place* in the *rejoinder* was ill; also that it is multifarious, and the defendant should have traversed some single point, and not so many things together: 2. The *replication* was ill, for the plaintiff ought to have traversed the bar, *scil.* either, first, that the defendant did not leave the beasts in the *waste* after the severance; or 2dly, that he might have severed them without impounding; or 3dly, *de injuria sua propria absque tali causa*, and then the defendant upon this issue must have proved a necessity of impounding. 3. It was resolved by all the justices *præter Charlton*, that the bar was good without alledging custom to drive in the common; for the lord or any commoner seeing a stranger's beasts there may impound or drive them out of the common without custom; and to sever them from the beasts of the commoners, if it cannot otherwise be done, may drive them and the beasts of the commoners together, to a convenient place to separate them. But where the usage is at certain times of the year to *drive a common for view*, if the beasts of strangers are found there; or if the common be over-charged, in such case the party must prescribe, and shew the custom; but here in this case the beasts of strangers were seen in the common, and that was sufficient. 4. It was resolved, that the bar being entire, though the plea *quoad* entering the close and *pedibus ambulando* be no more than the general issue being his own act, yet it being here joined with special matter of justification in one entire plea, it is good.

COLE *against* SHALLET.

One covenant is not pleadable in bar of another covenant in the same deed. 1 Ld. Ray. 124. 2 Saunders 155, *Jones* v. *Barkley*. Douglas 684.

Covenant upon a charter-party, whereby the master of a ship covenanted to sail the first fair wind to Barcelona, and that his mariners should attend with his boat to relade the ship there, and that then he would return with the first fair wind to London, and would unload and deliver the goods. The merchants covenant to pay him so much for freight, and so much *per diem* during his stay there, and the master brought **[42]** this action for the money due to him for the freight, and for the demurrage, and declares that he sailed with the first fair wind, and so on according to the articles. The defendant *quoad* the freight pleaded, that the ship did not return directly to London, but went to Alicant and Tangier, and made divers deviations, by which the goods were spoiled. And *quoad* the demurrage, that that was occasioned by the neglect of the mariners to attend with their boat to relade the ship. Hereupon the plaintiff demurred; *et per totam Curiam* judgment was given for the plaintiff; for the covenants are mutual and reciprocal, whereupon each hath his action against the other; and cannot plead the breach of one covenant in bar of the other; and perhaps the damage of the one side and the other was not equal, and therefore the one not pleadable in bar of the other; but each party is by his action to recover against the other the certain damage he sustained, and so it was adjudged Hill. 13 Car. 2, B. R. *inter Thompson & Noel.*

HILARY, 33 AND 34 CHARLES II.

LORD GORGES *against* GORE, ESQUIRE.

Declaration against a sheriff for an escape. *Vide* Lilly Entr. 60. 3 Morgan Vad. Mec. 294. 1 Mallory En. 136, 174-5-6, 219.

London, to wit.—Thomas Gore, late of Alderton, in the county of Wilts, Esquire, late Sheriff of the county of Wilts, was attached to answer Richard Gorges, Lord Gorges in the kingdom of Ireland, of a plea of trespass upon the case, &c. And whereupon the said Richard by William Hayes his attorney complains, that whereas one Thomas Packer, of Ashley, in the county of Wilts aforesaid, yeoman, on the 1st

day of October, in the 33d year of the reign of the said lord the now King, &c. at Ashley aforesaid, justly was indebted to the said Richard in the sum of two hundred and fifty pounds, of the lawful money of England, for the arrears of rent of certain tenements of the said Richard, in Ashley aforesaid, by the said Richard to the said Thomas before that time demised. And whereas the said Richard, for the obtaining of his debt aforesaid, to wit, in the term of the Holy Trinity, in the 33d year aforesaid, in the due manner prosecuted out of the Court of the said lord the King of the Bench here, to wit, at Westminster, in the county of Middlesex, a certain writ of the **[43]** lord the King of *capias ad respondendum* against the said Thomas Packer, to the then Sheriff of Wilts aforesaid directed, by which writ the said lord the King the said then sheriff commanded that he should take the said Thomas if he could be found in his bailiwick, and him should safely keep, so that he should have his body before the justices of the said lord the King here to wit, at Westminster aforesaid, from the Day of St. Martin, in fifteen days then next ensuing, to answer the said Richard of a plea, wherefore with force and arms he broke the close of the said Richard at Ashley, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the now King, and also to answer to the said Richard according to the custom of the said Court of the Bench, in a certain plea of debt upon a demand of three hundred pounds, and that he should have here that writ, which writ the said Richard prosecuted with intention, that the said Richard upon the appearance of the said Thomas to be made in the said Court here upon the return of the said writ, should declare against the said Thomas among other things in a plea of debt for the said two hundred and fifty pounds, to be recovered, to the said Richard by the said Thomas so as aforesaid then due; and the said writ the said Richard afterwards and before the return thereof, to wit, upon the 14th day of October, in the 33d year aforesaid, at Ashley aforesaid, to the said Thomas Gore then being Sheriff of the county of Wilts delivered, in the form of law to be executed, by virtue of which writ the said Thomas Gore afterwards and before the return thereof, to wit, upon the 14th day of October, in the 33d year aforesaid, at Ashley aforesaid, [the said Thomas Gore then being Sheriff of the county of Wilts aforesaid], the said Thomas Packer took and arrested; and him the said Thomas Packer then and there by virtue of that writ in his custody had and detained: nevertheless the said Thomas Gore not ignorant of the premisses, but the duty of his office of Sheriff of the county of Wilts aforesaid lightly regarding, and contriving and fraudulently intending the said Richard in this behalf unjustly to oppress, and to obstruct him in obtaining his debt aforesaid, afterwards to wit, upon the 21st day of October, in the 33d year aforesaid, [the said Thomas Gore then being Sheriff of the county of Wilts aforesaid], the said Thomas Packer being under the custody of the said Thomas Gore for the cause aforesaid, at London, in the parish of the Blessed Mary of the Arches, in the ward of Cheap, out of his **[44]** custody wheresoever he would did permit to go and escape, without any security for the appearance of the said Thomas in the said Court here, according to the command of the said writ by the said Thomas Gore taken or had, and against the will of the said Richard, [the said Richard then or at any time afterwards not being satisfied for his debt aforesaid or for any part thereof], whereby the said Richard is entirely hindered and deprived of recovering and obtaining his debt aforesaid, and forasmuch as the said Thomas Packer after his escape aforesaid hath concealed himself, and hath withdrawn and as yet withdraws himself to places to the said Richard entirely unknown, so that the said Richard by any process of the law could not nor as yet cannot again take or arrest the said Thomas Packer, the said Richard is very likely to lose his debt aforesaid; whereupon he saith that he is injured and hath damage to the value of 300l. and thereupon he produces his suit, &c.

And the said Thomas Gore by John Atkins his attorney comes and defends the force and injury when, &c. and saith that the said Richard ought not to have his action aforesaid against him; because he saith that well and true it is that the said Richard prosecuted out of the said Court of the said lord the King of the Bench here to wit, at Westminster aforesaid, the said writ of the said lord the King of *capias ad respondendum* against the said Thomas Packer, [he the said Thomas Gore then being Sheriff of the county of Wilts aforesaid], and that he the said Thomas Gore by virtue of that writ the said Thomas Packer took and arrested, and had in his custody as the

said Richard above hath alledged; but the said Thomas Gore further saith that after the taking and arresting of the said Thomas Packer in the form aforesaid, and in bringing the said Thomas Packer to the common gaol of the said county, at Forherton Anger, in the said county; and before he came to the said gaol, to wit, upon the said 20th day of October, in the 33d year aforesaid, at Blackheath, in the said county of Wilts, one Robert Packer, of Ashton Keynes, in the said county of Wilts, yeoman, John Hill, of Great Bedwyn, in the said county of Wilts, husbandman, Francis Hill, of Marlborough, in the said county, butcher, Anthony Hill, of Marlborough, in the said county, butcher, and Stephen Bullen, of Marlborough aforesaid, in the said county, labourer, with force and arms in and **[45]** upon one Nathaniel Bayly, then the bailiff of the said Thomas Gore, then sheriff as aforesaid, who by virtue of the warrant of the said sheriff then was conducting the said Thomas Packer, then being in the custody of the said sheriff, to the gaol aforesaid, made an assault, and the said Thomas Packer out of the custody of the said Nathaniel, and out of the custody of him the said Thomas Gore then being sheriff as aforesaid, then and there rescued, and caused to go at large, against the form of the statute, &c. and to the great damage, &c. as well of the said Thomas Gore as of the said Nathaniel, without this that the said Thomas Gore permitted the said Thomas Packer to escape out of the custody of the said Thomas Gore in the manner and form as the said Richard above by declaring hath alledged, and this he is ready to verify; wherefore he prays judgment if the said Richard ought to have his action aforesaid against him, &c.

And the said Richard saith that the said plea of the said Thomas above in bar pleaded, and the matter in the same contained, are not sufficient in law to preclude the said Richard from having his action aforesaid against the said Thomas, and that he to that plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer; and this he is ready to verify: wherefore for want of a sufficient answer in this behalf, the said Richard prays judgment and his damages by reason of the premisses to be adjudged to him, &c.

And the said Thomas Gore, because that he above hath alledged sufficient matter in law to preclude the said Richard from having his action aforesaid against him, which he is ready to verify; which matter the said Richard doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, prays judgment, and that the said Richard may be precluded from having his action aforesaid against him, &c. and because, &c.

[46] LORD GORGES *against* GORE.

In case for an escape defendant pleads rescue, not saying it was returned. Cro. Ja. 419. Buller N. P. 63. 1 Stra. 429. F. N. B. 232. Note (*a*).

Case against the sheriff for an *escape* upon *mesne* process. The defendant pleaded a *rescue*. The plaintiff demurred. And this was resolved a good plea in an action upon an arrest by mesne process; not upon an execution according to 2 Cro. *May* versus *Proby and Lumly*. Then exception was taken to the plea, that it does not shew the rescue was returned; whereupon *Curia advisare vult;* but after it was resolved to be good enough, and judgment for the defendant; and *Hill and Mountague's case* 27 Car. 2, B. R. were cited to be so adjudged.

NERVIN *against* MUNNS, &C. EXECUTOR OF FINEUX.

Covenant, that notwithstanding any thing by him done he was seised in fee, and that he hath good right to sell, are synonymous, and of the same effect. Cro. El. 9, 44. Cro. Car. 106, 496. Cro. Ja. 644. Comyns Rep. 181.

Covenant. And declares upon a feoffment of land, wherein the testator covenanted, 1. That notwithstanding any thing by him done to the contrary, he was seised in fee-simple, or in fee-tail, without any condition or limitation to determine his estate. 2. That he had full power and good authority to sell it. 3. That the lands were clear of all incumbrances made by him, his father, or grandfather: and 4. The said Fineux

covenanted, that the feoffee should enjoy against all persons claiming under him, his father, or grandfather; and declares that the testator had no power to sell. The defendant pleaded, that the testator, notwithstanding any thing by him done, had power to sell. The plaintiff demurred; and now upon argument it was admitted by the whole Court, that all the covenants are distinct and several; and North Ch. Justice held the second covenant absolute, and not restrained *by things done by him* in the first covenant, *or by him, his father, or grandfather*, as in Cro. Car. *Crayford* versus *Crayford*, covenant that notwithstanding any thing by him done he was seised in fee, and that there was no **[47]** reversion in the Crown, and that it was of the yearly value of 300l. per ann. each is distinct and absolute; and *Bennet's case.*

Cæteri tres justiciarii contra; Though the covenants are distinct, yet the first two covenants are synonymous, and of the same nature, for if he was seised in fee, he had power to sell, and when by the first covenant he covenants against his own acts, it cannot be intended that immediately by another covenant to the same effect he would covenant against all the world. But in the cases cited, the covenants are of divers natures, and concern different things, although relating to the same land; and the two subsequent covenants in this case are particular and limited, and therefore the middle covenants shall not be construed indefinite and general. *Sed adjornatur.*

HOLT *against* THE BISHOP OF WINCHESTER, &c.

Same person both patron and parson dies, his heir shall present, not his executor.
Post, 59, 377, 435. Cro. Ja. 371. 2 Bac. Ab. 419. Godolphin 121, 123.

Quare impedit; upon special pleading the case was: One and the same person being parson of the church, and seised in fee of the advowson, died; and who should have the next presentation, whether it belonged to the heir, or to the executor, was the question upon a demurrer. For it was objected, that the advowson descended not to the heir till after the death of the ancestor, and that by the death of the ancestor the church was void, and the avoidance thereby severed and vested in the executor. But the whole Court upon the first argument held and adjudged, that the heir should have it in this case for the descent to the heir and this fall of an avoidance to the executor happened all in one instant; and where two titles concur in one instant, the more elder right shall be preferred; as is the case of jointenants, the one devises his part, if the title of the devisee and of the survivor fall in one instant, the title of the survivor being the elder right shall be preferred.

[48] WOODCROFT *against* THOMPSON.

Trespass lies not for taking in one county, and impounding in another, but action upon the statute.

Trespass for taking his gelding at Cattonen *in com. Norfolk*, and driving and impounding him at a place unknown, so that he could not be replevied. The defendant justified as *damage feasant en son franktenement*, and that he impounded him at Carrow-Ably within three miles of the place where he took him; the plaintiff replied, that Carrow-Ably is in the county of the City of Norwich, and not in the county of Norfolk. The defendant demurred, and contrary to the opinion of North Ch. Justice, it was adjudged by the other three justices for the defendant; for at common law a distress might be drove out of the county, 2 Inst. 106, and the Statute of Marlborough, cap. 4, and 1 & 2 Ph. & Ma. 12, have prohibited such driving upon penalties; and therefore he that would take advantage of these statutes ought to do it by way of *action*, that may entitle the King to a fine, and not by way of *bar*. 2 Inst. 131. Also this replication is a *departure*, for the action is founded upon the common law, and the replication would make it good, and support it by the statute.

WELLS *against* COTTERELL.

Prescription for the steward, with the consent of the homage to make by-laws, ill. Comyns Dig. title Bye-law A. 1 Roll. Ab. 365.

Replevin for four cows. The defendant made conusance as bailiff to J. S. lord of the manor of D. and pleads a custom for the steward with the *consent of the homage* to make by-laws, and impose penalties for good government within the manor, to be forfeited to the lord of the manor; and a custom to distrain for such penalties; and that the inhabitants of Ovington within the manor used to repair a bridge within the manor for the convenience of the commoners who have common in such a *waste within* the **[49]** manor; and that at a court of the manor held such a day the steward with the consent of the homage made a by-law, that the inhabitants of Ovington should repair the bridge before such a day, under penalty of 5l. which not being done, and presented at the next court, this distress was taken upon the plaintiff, one of the tenants of Ovington: the plaintiff replied, *de injuria sua propria absque tali causa:* the defendant demurred; and the whole Court besides Levinz held the replication good without any particular traverse. But Levinz held it ill and multifarious, because the conusance contains the title of the manor, the custom, the by-law, and not making the bridge. *Sed per omnes:* The conusance is ill; for 1. It is for the steward to make the by-laws, and the homage only to consent; whereas the by-laws ought to be made by the homage. 2. To impose the penalty upon the whole township, and to levy it upon one particular person, who hath no remedy by contribution; for the commissioners of sewers cannot impose penalties by *townships*, but by *headships:* and therefore judgment was given for the *plaintiff*.

[50] EASTER TERM, IN THE THIRTY-THIRD YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

HUDSON *against* SPIER.

Defendant in pleading covenants omits part. Plaintiff prays the articles may be entered, and demurs, and judgment for him. 8 & 9 Wil. 3, c. 10. English. 9 Wil. 3, c. 35. Irish. 1 Saunders 8, 9. 1 Lev. 55, 303. 2 Wilson 100. 4 Term Rep. 370, 371.

Debt upon obligation. The defendant demanded oyer of the obligation and of the condition, which was to perform articles, and then pleads the articles, and that he hath performed them. The plaintiff prayed, that the articles might be inrolled *in hæc verba*, and that being done, the plaintiff demurred generally, and for cause shewed, that the defendant in pleading the articles had omitted part: whereupon, by the opinion of the whole Court it was adjudged for the plaintiff; for perhaps the plaintiff might have assigned his breach in those articles which are omitted, of which advantage he is deprived by this means. And North Chief Justice remembered a case in B. R. wherein it was adjudged accordingly.

STAWEL *against* CAUNE.

Papist said of a justice of peace, and deputy-lieutenant; jury find he was justice of peace, but not deputy-lieutenant. *Vide ante* 30, *Sir Thomas Clarges* v. *Roe*. *Post* 248.

Case, and declares, that he is and always was a Protestant, and that he now is, and hath been for several years a deputy-lieutenant and justice of peace of the county of Somerset, and stood to be elected Parliament-man for Bridgwater, and that the defendant maliciously **[51]** intending to scandalise him, and procure him to be turned out of his offices, and hinder his being chosen burgess of Parliament, said of him, *He is a Papist*, and said to one of the electors, *Do not you vote for him, for he is a Papist:* whereby he was much scandalised, and in danger of losing his offices. Upon *non culp.*

a special verdict found that the defendant is not guilty of any of the words, *præterquam he is a Papist:* and they found that he is and always was a Protestant, and that he is and for divers years hath been a justice of peace, and that he stood Parliament-man for Bridgwater; and that the defendant knowing that, maliciously, &c. and with intent to hinder him of his election, and to cause his removal from his office of justice of peace, spoke these words of him, *He is a Papist.* But they find that he was not then a deputy-lieutenant: and now upon the first opening of this case the whole Court was of opinion, that the word *Papist* spoken of a justice of peace, who by the statutes is intrusted with putting the statutes against Papists in execution, is actionable; and that his not being deputy-lieutenant is not material, being inserted to no other end, but to shew his title; that his being justice of peace is sufficient, and deputy-lieutenant is no more than surplusage, for which no damage is given: and judgment was given for the plaintiff, as it was in the case of Sir Thomas Clarges *antea*, where not proving part of his title was also ruled not to be material.

Hilary 32 & 33 Charles II.

Barrow *against* Hagget.

Formedon.

Heretofore as appears in the term of the Holy Trinity, last past, Roll 1158, it is thus contained. Cumberland, to wit. William Barrow gentleman, by John Patterson his attorney, demandeth against Barbara Hagget widow, two messuages and two acres of meadow with the appurtenances in Amstapleth, and the Rectory of Amstapleth with the appurtenances, and also all the tythes of corn and hay, annually growing, increasing or renewing in Amstapleth, of which Henry Barrow gentleman, the grandfather of the said William **[52]** was seized in his demesne as of fee, and so being thereof seized after the 4th day of February, in the 27th year of the reign of the Lord Henry the VIII. late King of England, of the said tenements, rectory and tythes with the appurtenances, enfeoffed John Vaux, Esq. and Humphry Gowling, gent. to have and to hold to the said John and Humphry, and their heirs to the use of John Barrow, son of the said Henry and his heirs male, which the said John Barrow should beget of the body of Jane Simpson, and which after the death of the said John Barrow, and of Leonard Barrow, the son and heir of the said John, by him of the body of the said Jane begotten; to the said William as the brother and heir of the said Leonard, and the son and heir of the said John by him of the body of the said Jane lawfully begotten, ought to descend by the form of the feoffment aforesaid, and by force of a certain statute for transferring uses into possession, made and provided in the Parliament of the said late King Henry the VIII. held at Westminster in the county of Middlesex, on the said 4th day of February, in the 27th year of his reign aforesaid, &c. And whereupon the said William saith, that the said Henry, the grandfather of the said William, was seized of the tenements, rectory and tythes aforesaid, with the appurtenances in his demesne as of fee, and so being thereof seized after the 4th day of February in the 27th year of the reign of the late King Henry VIII. to wit, upon the 16th day of October, in the 4th year of the reign of the Lord Charles the 1st, late King of England, of the said tenements, rectory and tythes with the appurtenances, enfeoffed the said John Vaux and Humphry Gowling and their heirs to the use of the said John Barrow the son of the said Henry, and of his heirs male which the said John should beget of the body of the said Jane Simpson, by virtue of which feoffment, and by force of the statute aforesaid, the said John Barrow was seized of the tenements, rectory and tythes aforesaid, with the appurtenances in his demesne as of fee tail and of right, to wit to him and to his heirs male, by him of the body of the said Jane lawfully begotten, by the form, &c. in the time of peace, in the time of the late King Charles the 1st, by taking the explees thereof to the value, &c. and from the said John, the said tenements, rectory and tythes with the appurtenances descended by the form of the feoffment, &c. and by force of the statute aforesaid, to the said Leonard as the son and heir, &c. which Leonard was thereof seized in **[53]** his demesne as of fee tail and right, to wit to him and to the heirs male by the said John Barrow of the

body of the said Jane lawfully begotten, by the form, &c. in the time of peace, in the time of the lord the now King, by taking the explees thereof, to the value, &c. and from the said Leonard who died within twenty years now last past, the right descended by the form of the feoffment, &c. and by force of the statute aforesaid to the said William who now demandeth as the brother and heir of the said Leonard, and the son and heir of the said John Barrow by him of the body of the said Jane lawfully begotten, and which after the death, &c. and thereupon he produces his suit, &c.

And the said Barbara by James Bird her attorney cometh, and saving to herself all, and all manner of advantages and exceptions, as well to the writ as to the count aforesaid, prays leave to impart thereto here until from the day of St. Michael in three weeks, and she hath, &c. The same day is given to the said William here, &c. At which day here cometh as well the said William by John Patterson his attorney aforesaid, as the said Barbara by James Bird her attorney aforesaid, and saving to herself all, &c. prays leave to impart thereto, here until the octave of St. Hilary, and she hath, &c. At which day here cometh as well the said William, by John Patterson his attorney aforesaid, as the said Barbara, by James Bird her attorney aforesaid; and the said William prays that the said Barbara may answer his count aforesaid, &c.

And the said Barbara by James Bird her attorney aforesaid, cometh and saith that she cannot restore the said tenements and rectory aforesaid, with the appurtenances and the tythes aforesaid to the said William, because she saith that she is not tenant of the said tenements and rectory aforesaid, with the appurtenances and of the tythes aforesaid as of freehold, nor was at the day of suing out the original writ of the said William or at any time afterwards, and this she is ready to verify; wherefore she prays judgment of the said writ, &c.

And the said William saith, that his writ aforesaid, for the reason before alledged ought not to be quashed, because he saith that the said Barbara long before the day of the suing forth of the original writ of the said William, was seized of the tenements, rectory and tythes aforesaid, with the appurtenances in her demesne as of fee, and so being thereof seized, of the said tenements, rectory and tythes with the appurtenances before the day of the suing forth of the said writ, enfeoffed divers persons to the said **[54]** William unknown, by fraud and collusion, that the said William should not have notice of the names of the persons against whom he should sue out his writ aforesaid, of *formedon in descender;* and the said William further saith, that the said Barbara continually after the feoffment aforesaid made until the day of suing forth of the original writ of the said William, to wit, the 20th day of January, in the 30th year of the reign of the said lord the now King, and from that day continually afterwards hath perceived, and as yet doth perceive to the proper use of the said Barbara, the issues and profits of the said tenements, rectory and tythes, with the appurtenances now demanded, and this he is ready to verify; in which case, the said Barbara ought to be adjudged tenant of the tenements, rectory and tythes aforesaid with the appurtenances by the form of the statute, &c. Wherefore he prays judgment, and that his writ aforesaid may be adjudged good, and that the seisin of the tenements, rectory and tythes aforesaid, with the appurtenances may be adjudged to him, &c.

And the said Barbara saith that the said plea of the said William in maintainance of his writ aforesaid, above pleaded, and the matter in the said plea contained, are not sufficient in law to maintain the writ aforesaid, against the said Barbara in the form aforesaid, and that she to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is she bound by the law of the land to answer, and this she is ready to verify; wherefore for want of a sufficient plea to the said William in this behalf, the said Barbara as before prays judgment of the writ aforesaid, &c.

And the said William because that he above hath alledged sufficient matter in law in his plea aforesaid above, by replying pleaded in maintenance of his writ aforesaid, and also of his action aforesaid against the said Barbara, which he is ready to verify; and which matter the said Barbara doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, as before prays judgment, and that his writ aforesaid may be adjudged good, and that the seisin, &c. may be adjudged to him, &c. And because the justices here will advise themselves of and upon the premises aforesaid, &c. here until from the day of Easter in fifteen days to hear their judgment thereupon, because that the said justices here thereupon, not as yet, &c.

[55] BARROW *against* HAGGET.

Non-tenure of all, or part, no plea after general imparlance. *The imparlance seems to be special. Vide antea* 53.

Formedon en descender. Tenant imparls, and after pleaded non tenure *de tout.* Demandant demurs; and *per totam Curiam*, this is not pleadable after general imparlance, 5 E. 3, 2. 41 E. 3, 31, though it was objected, that non-tenure *de tout* generally is, but non-tenure of part is not.

GRAVES *against* MORLEY.

Trespass for two things; jury found as to one, not as to the other. *Antea* 39. 1 Salk. 94, 179, 180. 2 Strange, 844.

Trespass for taking the plaintiff's gown and mantua. Upon not guilty, a special verdict found, that the defendant, as constable, took the gown for a tax; but found nothing as to the mantua; and the Court held the whole a discontinuance for this cause, as 3 Cro. 133, *Tingman* versus *Starkey*, debt for 7l. Jury found *debet quoad* 6l. and did not find *nil debet*, for the residue. *Vide antea* 39, *Randal* versus *Brees*, and the difference.

LOBLY *against* GILDART.

Obligation by an executor in satisfaction of an obligation of his testators no plea. 1 Mod. 225. Cro. Car. 85. Nel. Lut. 138, 139, 154. 1 Lut. 466, 502. Hobart 68, 69. Cro. El. 304, 716, 727. Cro. Ja. 579. Cro. Car. 85, 192. 9 Coke 79. 6 Coke 44. Co. Lit. 212 b. *postea*, 269. Buller N. P. 182. 1 Bac. Ab. 23. 5 Coke 117. 4 Mod. 88. 7 Mod. 17. 1 Ld. Raym. 122, 566. 2 Wils. 86. Com. Dig. Accord. A. 2. 1 Viner Ab. 128.

Debt upon an obligation dated the 23d of March, 24 Car. 2, upon condition to pay 10l. The defendant pleaded an accord the last of April, 31 Car. 2, whereby it was agreed, that the defendant should give the plaintiff a new security for this debt, and for another due to him by obligation likewise, and he being the executor of the obligor, and the person with whom this accord was made, gave security pursuant to the accord by a bill sealed by himself. The plaintiff demurred; and by the whole **[56]** Court judgment was given for the plaintiff; for one obligation given in satisfaction of another is no discharge, whether grounded upon an accord, or not; for the *concord* does not mend the matter, and yet here the new obligation binds him *de bonis propriis*, whereas the first obligation bound him only *de bonis testatoris.*

[57] TRINITY TERM, IN THE THIRTY-FOURTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

LEMUN *against* FOOKE.

Assumpsit against an executor; he pleads an obligation payable at a future day. Cro. Eliz. 315. Swin. 457. B. R. H. per An. 208. 1 Term Rep. 690. *Post* 267, 368. 2 Bac. Ab. 434.

Assumpsit against the defendant, executor of Walwin. The defendant pleaded an obligation of 40l. entered into by the testator *adhuc insolut'* and no assets *ultra* 5l. *quæ non sufficiunt ad satisfaciend' debit predict' & ad ill' onerat' & obligat'.* The plaintiff replied, that the said obligation was upon condition to pay 20l. at a day not yet come. And upon demurrer judgment was given for the defendant; for the plaintiff in his replication does not say the defendant had assets *ultra* the 20l. and if he hath not, he is not obliged to pay the plaintiff his debt upon simple contract, before the debt due upon obligation payable at a day not yet come.

DUNCOMB *against* WALTER.

S. C. Sir T. Raymond 478. 1 Ventris 370.

Executor arrests before probat, and after proved the will; not legal as to strangers. *Post*, 93. 1 Rolle Ab. 917. But good as between the parties. 1 Salk. 302. 2 Bac. Ab. 413.

Assumpsit as *assignee* of the *commissioners of bankrupts, scil.* to one Staly a goldsmith, wherein upon *non assumpsit* and a special verdict, the case was, Staly being indebted to Walter 1090l. by *judgment*, and to other persons several other sums, particularly 1000l. to one Clerk, who died and made one Crew his executor: Crew sued out a **[58]** bill of Middlesex against Staly 6 Novemb. which was before probat of the will, which was not till the 18th of November; and Staly was arrested before probat, *scil.* on the 8th of November; and committed; and the same day that the probat was, *scil.* the 18th of November, Staly paid the 1000l. due to Walter; it does not appear whether the payment was before, or after the probat, but it was upon the same day: afterwards a commission of bankrupt was sued out against Staly, and this 1000l. paid to Walter was assigned by the commissioners to the plaintiff, as part of Staly's estate. In this case divers points were not unanimously agreed on by the Court. But in this all agreed, *scil.* that the arrest of Staly by the executor before probat was not legal, *quoad* Walter; and then Staly could not become bankrupt the 8th of November, when the arrest was made, *quoad* Walter, and so the payment to Walter good. They agreed that between the parties, *scil.* between Crew and Staly, the bill of Middlesex and the arrest thereupon before probat were made good by the probat afterwards, according to 1 Roll. Execut. 917. An executor sues a writ and arrests a man before probat, and after proves the will; now between them, being parties, all is made good; but here in the case at Bar it shall not prejudice Walter a third person to make the payment to him bad, which had been good, were it not for this arrest, which in *rei veritate* is not good before probat, though as to the parties it may be by relation. *Note*, The words of the statute are, that a man *arrested and imprisoned six months shall be a bankrupt from the time of the first arrest;* and in this case Staly was arrested the 8th of November, and lay in prison six months. *Vide* Raym. 478. Error upon this judgment, but the judgment affirmed. 1 Ventr. 370.

RIDER *against* FOWLE.

A trader paid 120l. to put his son apprentice to another of the same trade, and afterwards was found to be a bankrupt before the payment. *Post*, 69, 191. 1 Jo. 438. Cro. Ja. 127. 2 Jo. 196. 1 Ventris 137, 360. 3 Keble 82. 1 Mod. 45, 76. 2 Shower 103, 238. Forrester 69. 2 Vernon 599. Cooke B. L. 236. 1 Vesey, 330.

Trover for 120l. and upon *non culp.* and a special verdict, the case was. Portman a goldsmith, having committed an act of bankruptcy in 1673, kept on his trade, and in 1677 bound his son apprentice to the defendant another goldsmith, and paid with him 120l. a usual sum given in such cases, and afterwards in 1679 a **[59]** commission of bankrupt was sued out against Portman, and he was found bankrupt, and this 120l. was assigned by the commissioners to the plaintiff as the money of Portman in the hands of Fowle. And by the opinion of the whole Court this money was not assignable by the commissioners, being paid so long before the commission and assignment, when neither he himself, nor no one else, suspected his becoming bankrupt; also the money is paid to put his son apprentice to the same trade which his father used, and was the usual sum given in such cases: so that no fraud can be intended; and the defendant is bound by the covenants to maintain him and instruct him in the trade; and it would be unreasonable to deprive him of the money which was given him upon the consideration, since no fraudulent intention is found or can be imagined in the case; and they conceived this was out of the intent of the statute; wherefore in this point they all agreed, but in some other points the Court differed in opinion.

HOLT *against* HOLLAND.

Ante 47.

In a *quare impedit* plaintiff shall not have damages, where he recovers the church, though six months be past. *There were no damages in quare impedit by the common law.* Comyns Dig. Damages, A. 2. *But see the Stat. West.* 2, *c.* 5, *s.* 3, *in what cases damages are given* 2. *Inst.* 362.

Quare impedit against the bishop and three others. The bishop claims nothing but as Ordinary. Two of the others pleaded specially, whereupon it was demurred. The third pleaded to issue, which was tried for the plaintiff; and the jury that tried the issue inquired and found the value of the church, and that it was still vacant, and taxed damages for the half-year; and judgment was entered for the plaintiff, as well upon the demurrer, as upon the issue. And now it was moved, that in this case the church being still vacant, and the patron to have the fruit of his presentation, that he ought not to recover damages for the value of the half-year, and the *prothonotary* said, that the constant course is, that the plaintiff shall recover no damages for the half-year where the church remains void: and though the jury tax damages, yet in such cases where the church continues void, they enter a *remittitur de damnis;* and that so they would have done of course in this case without troubling the Court, if the parties had made application to them.

[60] COKE *against* CRETCHET, &c.

Suit for mariners wages may be in the Admiralty. 1 Salkeld 33. Comyns Dig. Admiralty, E. 15.

A prohibition was moved for to stay a suit in the Admiralty for mariners wages, suggesting, that the suit is founded upon the charter-party, which was made at land, and not upon *altum mare.* But the prohibition was denied; for mariners wages grow due to them for labour done at sea, and this charter and contract at land is only to ascertain them; and North Chief-Justice said, that this was the opinion of Hale Chief-Justice in his time, upon conference with him at the desire of the Court of Common Pleas, since he was Chief-Justice of this Court. The day after there was the like case and the same rule between *Middleton and Scolly.*

MASON *against* JACKSON.

[Over-ruled, *Henshall* v. *Roberts*, 1804, 5 East, 154.]

Executor non-suit shall not pay costs, tho' the action be for a tort in his own time. *Postea* 375. 4 Mod. 244. 2 Lev. 165. 2 Jo. 47. 1 Ventris, 92, 94, 166. Cro. El. 503. Cro. Cha. 29. Hutton 79. Cro. Ja. 229. Yelver. 168. 3 Leon, 152. 6 Mod. 91. B. R. H. per A. 351. 2 Stra. 871. 4 Term Rep. 277. *Contra,* 1 Ventris 109. Cro. Cha. 219. 1 Bac. Ab. 518. 2 Bac. Ab. 446. 1 Salk. 207. 2 Barnes 107. 2 Burrow 1451, 1584. B. R. H. per A. 193.

Trover by an administrator, and declares, that he was possessed of such goods, and lost them, and the defendant converted them. Upon *non culp.* it was found for the defendant; and the question was, whether the plaintiff should pay costs? For it was objected by Serjeant Seis, this action being founded upon his own possession, he needed not have named himself administrator, and he cited *Atkey and Heard's case,* Cro. Car. 219, a like case, where the plaintiff paid costs. On the other side were cited *Peacock's case,* Cro. Cha. 29, where in ravishment of ward by an executor for a ravishment from himself, the plaintiff being nonsuit paid no costs; and *Bull and Palmer's case,* 2 Lev. 165. Pasch. 28 Car. 2, B. R. where in an *assumpsit* by an executor upon an *insimul computasset* with himself for a debt due to the testator, the executor was nonsuit, and paid no costs; and *per totam Curiam* the plaintiff shall pay no costs; for the action is in right of the intestate, though the conversion was done in the time of the administrator; and whatever damages or costs are either lost or recovered must be upon the intestate's account.

[61] PARKER *against* WEBB.

Information for 20l. *per mensem* for not coming to church *contra formam statuti.* Sir Tho. Ray. 433, 434. 2 Shower 205, 340. 1 Hale P. C. 667. 2 Hale P. C. 173. 2 Hawk. 357. Douglas 445, *Rex* v. *Smith.*

Information by the King for 20l. *per mensem* against a Papist for not coming to church *contra formam statuti hujusmodi casu editi & provisi.* Objection. This ought to be *statutorum*, for it is contrary to divers statutes, *scil.* 1 Eliz. and 13 Eliz. *sed non allocatur;* for though the 1 El. does enact that all shall come to church, yet the 13 Eliz. only gives the penalty of 20l. *per mensem. Vide* Cro. El. 750, *Dengly* versus *Moor.*

HILARY, 33 & 34 CHARLES II.

FURSDON *against* WEEKS AND OTHERS.

Declaration in trespass. *Quare clausum fregerunt*, with false imprisonment. Continuance.

Devonshire, to wit.—Richard Weeks, late of Crediton, in the said county, weaver, John Brown, late of Crediton, in the said county, weaver, George Hempton, otherwise Ames, late of Crediton, in the said county, weaver, and Benjamin Weeks, late of Crediton, in the said county, woolcomber, were attached to answer Nicholas Fursdon, gent. of a plea wherefore with force and arms, the close and house of the said Nicholas at the parish of South Taunton they broke and entered, and upon him the said Nicholas there made an assault, and him beat, wounded, ill-treated, and imprisoned, and him so in prison there against the law and constitution of this kingdom of England for a long time detained, so that his life was despaired of, and other wrongs to him did, to the great damage of the said Nicholas, and against the peace of the lord the now King, &c. And whereupon the said Nicholas by Thomas Northmore his attorney complains that the said Richard, John, George, and Benjamin, on the first day of August, in the 32d year of the reign of the said lord the now King, with force and arms, to wit, with swords, staves, and knives, the close of the said Nicholas called the Court-lardge, and his house called Great Cooktree House, at the parish of South **[62]** Taunton, broke and entered, and upon him the said Nicholas then and there made an assault, and him did beat, wound, ill-treat and imprison, and him so in prison there for a long time, to wit, for the space of twenty-four hours, against the law and custom of this kingdom of England did detain, so that his life was greatly despaired of, and other wrongs, &c. to the great damage, &c. and against the peace, &c. Whereupon he saith that he is prejudiced and hath sustained damage to the value of four hundred pounds, and thereupon he produces his suit, &c.

And the said Richard, John, George, and Benjamin, by Thomas Flood their attorney, come and defend the force and injury when, &c. And as to the coming with force and arms, and the whole trespass aforesaid, except the assault and imprisonment aforesaid, say that they are not guilty thereof, and of this they put themselves upon the country; and the said Nicholas doth the like. And as to the residue of the trespass aforesaid above supposed to have been committed, they the said Richard, John, George, and Benjamin say that the said Nicholas ought not to have his action aforesaid thereupon against them, because they say that long before the time in which the assault and imprisonment aforesaid is above supposed to have been committed, to wit, in the term of St. Hilary, in the 31st and 32d years of the reign of the Lord Charles the Second, the now King of England, &c. one Arthur Bury, Doctor in Divinity, in the due manner prosecuted out of the Court of the said lord the King before the King himself, [the said Court being at Westminster in the county of Middlesex] a certain writ of the said lord the King of *latitat* against the said Nicholas, by the name of Nicholas Fursdon, gent. and Valentine Evans, John Cleake, and John Clarke, in the said writ in like manner named, to the then Sheriff of the county of Devon directed, by which writ the said Sheriff of the county of Devon was commanded, that he should take the said Nicholas Fursdon, Valentine Evans, John Cleake, and John Clarke, if they should be found in his bailiwick, and them should safely keep, so that he should have their bodies before the lord the King at West-

minster, on the Monday next after the morrow of the Ascension of our Lord then next ensuing, to answer to the said Arthur Bury of a plea of trespass; and also to a bill of the said Arthur against the said Nicholas for sixty pounds of debt, according to the custom of the Court of the said lord the King before the King himself to be exhibited, which writ afterwards and before the return thereof to wit, upon the 9th day of May, in the 22d year of the reign of the said lord the now King, the **[63]** said Arthur Bury delivered to one Edward Seymour, Baronet, then sheriff of the said county, at South Taunton aforesaid, in the due form of law to be executed, by virtue of which writ the said Edward Seymour, then sheriff of the county aforesaid, afterwards to wit, upon the 10th day of May, in the 33d year aforesaid, and before the return of the said writ, at South Taunton aforesaid, made his certain warrant in writing sealed under the seal of his office, to the said Richard, John, George, and Benjamin, and to one Robert Eastbrook directed, by which warrant the said then sheriff on the behalf of the lord the King, to the said Richard, John, George, Benjamin, and Robert, and to every of them, did command that they should take the said Nicholas Fursdon, if he should be found in his bailiwick, and him should cause to be brought or, &c. to his prison in the parish of St. Thomas the Apostle, in the county aforesaid, so that the said sheriff might have his body before the said lord the King at Westminster aforesaid, on the said Monday next after the morrow of the Ascension of our Lord, to answer the said Arthur Bury of the plea in the bill aforesaid, which warrant afterwards, to wit, upon the said 10th day of May, in the 32d year aforesaid, at South Taunton aforesaid, to the said Richard, John, George, and Benjamin was delivered, in the form of law to be executed, by virtue of which warrant they the said Richard, John, George, and Benjamin, afterwards and before the return of the said writ, to wit, upon the said 20th day of May, in the 32d year aforesaid, at South Taunton aforesaid, the said Nicholas Fursdon took and arrested, and him in their custody, by virtue of the said warrant then and there had, and the said Nicholas for the time aforesaid in the declaration aforesaid above specified detained, as it was well lawful for them, which taking and arresting of the said Nicholas in the form aforesaid, and for the cause aforesaid, are the same assault and imprisonment whereof the said Nicholas above now complains; without this that the said Richard, John, George, and Benjamin, or any of them, are guilty of any assault or imprisonment otherwise or in any other manner before or after the said 20th day of May, in the 32d year aforesaid, and this they are ready to verify, wherefore they pray judgment if the said Nicholas ought to have his action aforesaid thereupon against them, &c.

And the said Nicholas as to the said plea of the said Richard, John, George, and Benjamin, as to the residue of the **[64]** trespass aforesaid, above in bar pleaded, saith that he by any thing in the said plea before alledged ought not to be precluded from having his action aforesaid thereupon against them the said Richard, John, George, and Benjamin, because he saith that the said Richard, John, George, and Benjamin, on the day, year and place in the declaration above specified, of their own proper injury, and without the cause by them above in pleading alledged, upon him the said Nicholas made an assault, and him did imprison, and him so in prison there for the time in the declaration aforesaid above specified, against the law and custom of this Kingdom of England did detain, as the said Nicholas above complains thereof against them.

And the said Richard, John, George, and Benjamin say, that the said plea of the said Nicholas above by replying pleaded, and the matter in the same contained, are not sufficient in law for the said Nicholas to have or maintain his action aforesaid against the said Richard, John, George, and Benjamin, and that they to the said plea in the manner and form aforesaid by replying pleaded have no necessity, neither are they bound by the law of the land to answer, and this they are ready to verify; wherefore for want of a sufficient replication of the said Nicholas in this behalf, they the said Richard, John, George, and Benjamin pray judgment, and that the said Nicholas may be precluded from having his action aforesaid against them, &c.

And the said Nicholas because that he above hath replied sufficient matter in law to maintain his action aforesaid, which he is ready to verify, which matter the said Richard, John, George, and Benjamin do not deny, nor to the same in any wise answer, but altogether refuse to admit the verification thereof, as before prays

judgment and his damages, by occasion of the trespass, assault, and imprisonment, to him to be adjudged, &c. And because the justices here will advise themselves of and upon the premises aforesaid specified before that they give their judgment thereupon, day is given to the parties aforesaid here from the day of Easter in fifteen days to hear their judgment thereupon, because that the said justices here thereupon not as yet, &c.

[65] FURSDON *against* WEEKS.

Replication *de injuria sua propria, &c.* naught upon a general demurrer. *Ante* 49. 8 Cok. 132. 5 Bac. Ab. 209, 210. 4 Bac. Ab. 68. 7 Viner Ab. 504.

Trespass for battery and false imprisonment 1 Aug. 31 Car. 2. at D. *in com. Devon.* The defendant justifies by virtue of a writ *ex Banc. Regis com' Middlesex Vicecom' Devon.* and a warrant and arrest thereupon at D. and traverses all other places and times. The plaintiff replies *de injuria sua propria absque tali causa.* The defendant demurred, and had judgment; for to thrust matter of record, and matter of fact, and varieties of matters, as the warrant, the arrest, &c. at once in issue is naught upon general demurrer; according to *Crogate's case*, 8 Co. Rep. 102. Also the replication here wants a conclusion, *scil. & hoc petit quod inquiratur per patriam;* for the replication in this case ought to make an issue of itself; but the words which ought to make the issue, *& hoc petit, &c.* are omitted.

PHILPOTT *against* WALLET.

Promise to marry is within the Statute of Frauds. 6 Mod. 155. 2 Salk. 437, 438. *This case is over-ruled by the case of Cork* v. *Baker.* 1 Strange 34. English Stat. of Frauds, the 27 Cha. 2, c. 3, Irish, the 7 Wil. 3, c. 12.

Assumpsit in consideration that the plaintiff at the defendant's request would consent *recipere* the defendant *in virum suum.* The defendant promised *ducere* the plaintiff *in uxorem suam*, and that she *parata fuit & obtulit eum recipere in virum suum*, but he refused. Upon *non assump'* the jury found the promise *ut sup'* but that it was made after June 24, 1677, and without writing; (1) and now it was objected against the action; 1. That this is no promise within the Statute of Frauds and Perjuries, for that must be intended of promises for payment of money upon marriages, not of promises to marry. 2. The jury having found the promise, their farther finding of it to be without writing is surplusage and void. But to this it was answered and resolved, that this promise is directly within the words, and not out of the intent of the statute; because the **[66]** promise is, that in consideration the one would marry the other, and the other would marry him, and therefore it is a promise in consideration of marriage: and as to the 2d, the subsequent or further finding is but pursuant and expositive of the first part of the verdict, *scil.* that there was actually a promise, but no writing; whereupon the jury doubt whether it be a good promise in law to maintain the action, and thereupon refer it to the Court.

CULL AND HIS WIFE *against* SARMIN.

A small variance or mis-spelling in an obligation will not vitiate an obligation. *Ante* 21. 3 Bac. Ab. 693. 4 Bac. Ab. 7. Com. Dig. Obligation, B. 4.

Debt upon a bill obligatory, whereby the defendant promised the plaintiff to pay him 20l. after he married the widow Sarmin, and assigns for breach, that the defendant married her and did not pay. The defendant craved oyer of the bill, which was, *If he pay within two months after he marry the widow Sarmine*, and demurred for the variance. *Sed non allocatur;* for the intent is apparent, and mispelling will not vitiate an obligation, and judgment was given for the plaintiff.

(1) The French is, *Et or deux objections fueront fait versus le plaintiff*, 1. *Que ceo n'est un promise dien un Statute de Frauds et Perjuries, &c. It seems as if these were answers to the objections, and not the objections themselves.*

RICAUT *against* TOMLIN.

Assumpsit; defendant pleads, the plaintiff is *papalis recusans* and convicted thereof *secundum formam statuti, &c.* held good. *Ante* 10.

Assumpsit for 18l. upon an *insimul computasset.* The defendant pleaded, that the plaintiff being a popish recusant was indicted for not coming to church for 11 months, and sets forth the indictment and conviction at large, and concludes *prout patet per recordum*, and pleads the conviction to be *secund' formam statuti in hujusmodi casu provis. & hoc &c. unde petit judicium si responderi debet, cum hoc* that the plaintiff being a popish recusant convict had not conformed. The plaintiff demurred. And now it was argued that this conviction was insufficient, for the statute of 3 Jac. cap. 5 does not disable any persons but only such as are popish recusants, convict of popish recusancy, and such by the statute are *ipso facto* excommunicate upon conviction; but in this indictment there are no words of popish recusant, or convict of popish recusancy; and other persons refuse to come to church, and may for that be **[67]** convict, but no persons are disabled but only popish recusants, convict of popish recusancy, by the statute; to which the Court agreed: but inasmuch as the indictment is after the common form of indictments against popish recusants upon this statute, and the plea saying that the plaintiff being *papalis recusans* was indicted, and that the conviction thereupon was *secundum formam statuti;* with an averment that he being *papalis recusans* convict hath not conformed, this is a sufficient demonstration of the recusancy, and that he is *papalis recusans convictus de papali recusantia*, and the plea was adjudged good.

CHETHAM *against* SLEIGH.

Formedon of a manor and 35 mess. tenant pleads 6 mess. *sunt bis petita.* Hobart 295. 2 Salk. 213. 2 Ventris 222. B. R. H. per A. 120, *Wilkins* v. *Perry.* Com. Dig. Abatement G. 1. *How the plea would have been good.*

Formedon of the manor of Etwall *cum pertinent', & 35 messuag' 5 toftis 30 gardin' 200 acris terræ 100 acris prati 100 acris pastur' 500 acris bosc' & 200 acris jampner' & bruer' cum pertinen' in Etwall & Eggington.* The tenant comes and defends *jus suum quando, &c.* and says, 6 *mess. 10 acris terræ 10 acris prati & 20 acris pastur' cum pertinen' parcell' tenementor' in Etwall superius petit* are and time out of mind have been parcel *maner' de Etwall prædict' unde ex quo sunt bis petit' petit judic' de brevi.* Demandant demurs, and upon argument and view of precedents the plea was adjudged ill; for where it is said that the 6 messuages, &c. are parcel *tenementorum prædict'*, that may well be parcel of the manor, and demanded as parcel of the manor, *ultra & præter* the 35 messuages, &c. and a plea in abatement ought to be certain to every intent: to have made this a good plea, he should have said, that the 6 messuages, parcel of the 35 messuages, are parcel of the manor, and then they would appear to be *bis petita;* but the 6 messuages may be parcel of the manor, for the manor may comprehend 100 messuages, &c. and the 35 messuages, &c. are not demanded as parcel of the manor, but *ultra & præter* the manor. Farther it was said for the demandant, that in case they are *bis petit'*, the demandant may abridge his demand, and the writ need not abate. But to that the Court gave no regard, but gave judgment upon the other point. **[68]** But it seems the demandant cannot abridge his demand in a *formedon*, or any other writ, wherein the thing demanded is particularly mentioned in the writ; for that would be to falsify his own writ, and therefore in such case the writ shall abate for all; but otherwise where the writ is general, and comprehends no certainty, as in an assise, which is generally *de libero tenemento in D.* and in dower *unde nihil habet, &c.* for there the writ being general, *de libero tenemento*, notwithstanding an abridgment, the writ remains true as to the residue; for it is *liberum tenementum* still. But in an assise, dower, &c. if the demand be *de libero tenemento in D. & S.* there can be no abridgment as to all the lands in either of the vills particularly named, as appears by 14 H. 6, 3, 4. 9 H. 6, 43 a. 8 H. 6, 13 a. 19 H. 6, 13 b.

SIR JO. KNIGHTLY *against* MARROW.

I heard that one see a priest give him the eucharist and extreme unction, *innuendo* a popish priest. *Ante* 30, 50. Sir T. Ray, 482, 483. 2 Shower 140, 250. 3 Mod. 26.

Case, and declares he is a justice of peace, and hath been for several years, and also a deputy-lieutenant of the county of Warwick, and that the defendant *id satis sciens*, to scandalise and cause him to be removed from his offices, and to lose his election of Parliament-man for that county, for which he then stood, *falso & malitiose dixit* of him, *I have heard that a maid-servant of Sir John Knightly's should report, that Sir John Knightly being sick, the maid-servant, looking through a hole of the door where Sir John Knightly then lay, saw a priest, innuendo a popish priest, give the eucharist and extreme unction to Sir John Knightly, & ex ulteriori malitia* at another day said, *I have heard that a maid-servant, who then lived with Sir John Knightly, peeped through a cranny of the door where Sir John lay sick, and saw a popish priest anoint him (extreme unction innuend') and give him the sacrament of the eucharist;* and avers, that he never heard it. After verdict for the plaintiff upon *non culp.* and 1000l. damages, it was moved in arrest of judgment Pasch. *ultim.* that the words are not actionable, and that they amount not to calling Papist, for in the first words it does not appear what the priest was, nor that he was **[69]** a popish priest, unless by the *innuendo*, which is not sufficient, and in the latter words it does not appear that he gave him extreme unction, unless by the *innuendo*, which is not sufficient: and the words eucharist and extreme unction are not actionable, for that it is not penal to give or receive extreme unction, and eucharist is an appellation common as well to our Sacrament of the Lord's Supper, as to the popish sacrament; and so likewise is the word priest a common appellation of Protestant, as well as Romish priests; whereupon it was adjourned till this term, when it was argued again by counsel of both sides, and at last resolved that the words altogether are actionable, *for one part explained the meaning and the scandal of the other;* for the first words, a priest that gave the eucharist and extreme unction must be a popish priest, and he to whom it was given must be a Papist, for their priests never give their sacraments to any that are not compleat and perfect Papists; and the last words *anoint*, being of one that was sick, and applied by a popish priest, cannot be intended any thing else but *extreme unction.* And judgment was given for the plaintiff; whereupon the defendant immediately brought a writ of error returnable the last day of Michaelmas term next, which shews it was for delay chiefly.

PHILIPS *against* THOMPSON.

S. C. *post* 191.

One becomes bankrupt after an execution delivered to the sheriff, but before the writ executed, whether the commissioners can assign this? *Ante* 58, 59. 2 Sid. 115. 2 Jo. 196. 1 Jo. 438. 1 Ventris 137, 360. 1 Lev. 13, 14. 2 Show. 156, 137. Cro. Cha. 166, 176. 1 P. Wms. 93. 1 Bur. 20. 1 Black. Rep. 65. 3 Wilson 307. Cowper 123. Comyns Dig. Execution. D. 2. 1 Term Rep. 156, 480. 4 Term Rep. 411. H. Black. 665. Green's B. L. 126. 1 Bac. Ab. 262. Com. Dig. Bankrupt. D. 20.

Assumpsit by Philips, assignee of the commissioners of bankrupts, for moneys of one Watson received by Thompson, after Watson became bankrupt; and upon *non assumpsit* and a special verdict the case was; Thompson had a judgment against Watson for 600l. and on the 19th of June sued out a *fieri facias* which on the 30th of June was delivered to the sheriff *in mane ejusdem diei.* Watson having notice thereof went away from his house the same night, and thereby became bankrupt; and on the first of October the sheriff levied 400l. on the goods of Watson, and paid it to Thompson, and the commissioners assigned this money in the hands of Thompson to the plaintiff Philips as the goods of Watson **[70]** in his hands; and if the defendant assumed, as the plaintiff declares, they find for the plaintiff; *si non*, for the defendant:

and upon argument it was held by Pemberton Chief Justice, and Levinz, that judgment ought to be given for the plaintiff; for though by the (1) new statute the goods are bound by the delivery of the writ to the sheriff, yet they are no otherwise bound by that delivery than they were by the *teste* of the writ at common law: and by the statute 21 Jac. it is enacted, that all goods shall be equally distributed among creditors, *whereof no execution is sued and executed;* and the delivery of the writ to the sheriff is not of itself an execution. Wyndham and Charlton *contra*. They grounding themselves upon the case of *Adly and Halsey*, Cro. Cha. 148, where after extent upon a statute, and before *liberate*, the party became bankrupt, the commissioners were held to have no power over those goods being *extended*, though there were yet no perfect execution. And Jones in the report of that case says, it is so in the case of a bargain and sale, if after the bargain the bargainor become bankrupt, yet by inrolment afterwards the power of the commissioners as to selling these lands is gone: to which it was answered by the other two Judges, that in the stat. of 21 Jac. there are these words, *whereof no extent or execution is served and executed*, and an extent is an extent served; and as to the case of a bargain and sale, if the statute had said, *whereof no bargain and sale is executed*, a bargain and sale before bankruptcy would not be made good by subsequent inrolment. And the last day of this term the case was intended to be adjourned into the Exchequer-Chamber, but the Chief Justice being then sick, it was not; and I suppose the parties agreed, for it was not moved again. But afterwards this point appears to be so adjudged.

PARKER *against* THACKER.

S. C. Nelson Lut. 249, 250. 1 Mod. 87. 2 Sid. 73. Carth. 170. Devise to A. and his heirs, and for want of heirs of him to B. who was his heir. A. takes an estate-tail. 2 Lev. 58, 59, 162. 3 Mod. 104, 123. Raym. 425. Hobart 75. 10 Coke, 78. 1 Coke, 175. 1 Lutw. 823. *Post*, 431. 2 Cro. 415, 448, 591. 2 Roll. Rep. 196, 217. Hutton, 83. Lit. Rep. 6, 320, 347. 2 Sid. 73. Cro. El. 40. Cowper, 234, 410, 833. 4 Term Rep. 607. Fearne's Essay, 350. Cro. Ja. 415. 5 Term Rep. 302. Douglas, 254, *Goodright* v. *Dunham*.

In ejectment upon special verdict, the case was; William Day seised in fee devised the land to William Turner for his life and to his heirs, *and for want of heirs of him to George Turner in the same manner, and for want of* [71] *heirs of him to William Flint and his heirs for ever*. William and George Turner died without issue. William Flint died, and the lessor is his heir; and *per totam Curiam* judgment was given for the plaintiff; for William and George Turner were only tenants in tail, the remainder in fee to Flint; for these words, *for want of heirs of him*, are to be taken *for want of heirs of his body*, according to *Beresford's case*, 7 Co. Also it is found by the verdict, that William Flint was next cousin and heir to William and George Turner, though it was not so expressed in the will, which proves his intent, and that he meant heirs of the body; for they cannot die without heirs living William Flint or any of his heirs, therefore heirs of his body must necessarily be intended. Cro. Ja. *Webb* versus *Hearing*.

RAYNOR QUI TAM *against* FITLER.

Debt upon 5 Eliz. for using a trade, brought in the Courts of Westminster.

Debt on the statute 5 Eliz. for using a trade at Bristol, and the action was brought in *Com. Banc.* and tried by Nisi Prius at Bristol; after verdict for the plaintiff, it was moved in arrest of judgment, that the action ought to have been brought at the Assises of Bristol in the proper county, by reason of the statute of 21 Jac. *Curia contra*. Debt cannot be brought before justices of assise, therefore the statute does not extend to actions of debt; and judgment was given for the plaintiff *nisi causa;* and then, the

(1) English, the 29th Cha. 2, c. 3. Irish, the 7th Wil. 3, c. 12, by which writs of execution shall bind the property of goods, but from the time of their delivery to the officer.

Judges having conferred with the Judges of the King's Bench in the mean time, continued their opinion, and gave judgment for the plaintiff absolutely.

[72] MICHAELMAS TERM, IN THE THIRTY-FOURTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

BONSEY *against* LEE.

In suit for tithes in the Spiritual Court, if letters patents, &c. come incidentally in question, this Court will grant a prohibition. Salkeld 547. Cowper 424.

A prohibition was moved for, suggesting, that the trial of letters patents and all grants from the Crown are triable at common law, and not in the Spiritual Court, and that the defendant had libelled there against him for tithes, upon title to the rectory by letters patents; whereas the plaintiff hath a precedent right to the rectory by letters patents from the Crown more antient. *Nota*, The libel is only in common form, *scil.* that he is proprietor of all the tithes without making out his title in the libel; but upon the pleadings, titles are made by letters patents on both sides; and now by North, Wyndham and Charlton, a prohibition was granted, for the Spiritual Court are not to try the validity of letters patents. *Levinz contra.* The suit is founded upon the tort only, in withdrawing the tithes, and the title, if it comes in question, falls in only as an incident; and in all suits at common law for tithes, the declaration is general as proprietor without shewing a title in the declaration: and when the foundation of a suit is spiritual, and a temporal matter falls in question incidentally, the Ecclesiastical Court shall try the temporal matter so long as they proceed as the temporal law would in such case; but when they proceed in a temporal matter otherwise than the temporal law would, they are to be prohibited, but not before. 12 Co. 65, a rule is cited out of the register, *quod non est* **[73]** *consonum rationi quod cognitio accessurii in Curia Christianitatis impediatur, ubi cognitio principalis pertinet ad forum ecclesiasticum*, 1 R. 3, 4. When a thing determinable in the Spiritual Court is well commenced there, though a matter triable at law comes in question, they shall not be prohibited thereupon, so long as they proceed therein according to the common law, 12 Co. 65. Libel for tithes upon a lease of a rectory; defendant pleaded a former lease, and that he had but one witness; yet they shall proceed, unless they refuse the testimony of one witness, 12 Co. 66, *Fuller* versus *Whitehead*, the validity of livery came incidentally in question between two grantees of rectory, and was tried there. Reg. 57, 58. And the rule already cited from 12 Co. Rep. that rule is part of the writ of consultation. Cro. Eliz. 466, *Nector* versus *Gennet*. Whether one taken upon a *capias utlagat.* five years after the judgment be in execution for the party was tried there, Cro. Eliz. 788, *Baker* versus *Rogers*, a general act of pardon incidentally in question there was tried there. Trin. 24 Car. 2, B. R. *Sir William Juxon* vers. *Lord Byron*. Mortgage was of a rectory; proviso that the mortgagor shall retain possession till default of payment: default was made, and the rectory being in Story a trustee, it was by Act of Parliament taken out of him, and vested in Sir William Juxon, who before entry sued for tithes there, and they sentenced that he could not, and a prohibition was denied *per Hale & totam Curiam;* for before entry made, or a recovery of the rectory, he could not at common law maintain debt for the tithes. But in the principal case here, the prohibition was granted, *ut supra.*

ASHLY *against* FRECKLETON.

In case for disturbing his seat in the church; if against the bishop he must shew title, *aliter* if against a stranger. Gibson's Codex, 197. 1 Wilson, 326. 1 Term Rep. 430, 431. 5 Term Rep. 296. 1 Levinz 71.

Case, and declares, that he is seised of a messuage, and that he and all those whose estate he hath, have time out of mind had all the seats and the sole sepulture in an ayle of the church, and the defendant disturbed him. After verdict for the plaintiff upon *non culp.* it was moved in arrest of judgment, that he had shewed no

consideration for his propriety in not prescribing to repair the ayle. And Co. Entr. 8. Cro. Ja. 605, *Dawny* vers. *Dee*, in an action upon the case, a consideration of this kind is set forth. To which it was answered, that in an action upon the case against a stranger and wrong-doer, no title or consideration is necessary to be shewn, though it is indeed **[74]** so set forth in the cases cited, which like this are but actions upon the case against meer strangers; but where he claims against the Ordinary himself, who hath *prima facie* the disposal of all the seats in the church, he ought to shew some cause, as building, repairing, &c. but against a stranger who hath *prima facie* no right, his possession is sufficient ground for his action; and so was *Bunton and Bateman's case*, Mich. 14 Car. 2, cited to be resolved, *& adjournatur.* Afterwards at another day upon consideration of *Bunton and Bateman's case* it was resolved by the whole Court, and judgment for the plaintiff.

SALTER *against* CODBOLD, ADMINISTRATOR OF CODBOLD.

Action first *versus* executor in the *debet* for part, and in the *detinet* for part, naught. 1 Sid. 266, 342. 1 Lev. 128, 130, 224, 250, 251. 3 Lev. 80, 228. 2 Jo. 169. Cro. El. 711, 840. Cro. Ja. 238, 549. Cro. Cha. 225. 2 Bac. Ab. 440. Hobart 88. Cro. El. 406. Com. Dig. Action G. 4 Term Rep. 277.

Debt against the defendant administrator, and declares upon a lease made to the intestate, for 129l. due in the life of the intestate in the *detinet*, and for 64l. in his own time in the *debet & detinet.* The defendant demurred; and it was adjudged that the action lies not against the defendant to charge him in the *detinet* for part, and in the *debet* and *detinet* for the other part, because they require several judgments, *scil. de bonis propriis* for the arrears in his own time, and *de bonis intestati* for the arrears incurred due in the intestate's time; and the severing of the said sums in the declaration is not sufficient, but the plaintiff ought to bring several actions.

GRAHAM *against* CRAWSHAW.

Obligation to the sheriff upon a condition impossible. 1 Saunders 65. Raym. 61. 1 Lev. 85, 86. 1 Show. 15, 16. Lut. 670, 695. Nel. Lut. 207, 216. *Ante* 21, 66. *Post*, 137. 5 Coke 22. 1 Mod. 624. 2 Mod. 200. Co. Lit. 206. 1 Lev. 3, 45, 77. 1 Jo. 171, 179. Palm. 514, 549, 552. 3 Bac. Ab. 702.

Debt upon an obligation to the sheriff, conditioned to appear *coram justic. domini Regis apud Westmon' die Lunæ prox' post octab' Pur' ad respond' &c.* The defendant pleads, that Hillary term this year *finivit die Sabbati prox' post octab' Pur'*, and that no Court was *tent' apud Westm' die Lunæ prox' post octab' Pur' qua ratione apparere non potuit secund' consuetud' scripti obligator' prædict;* upon which the plaintiff demurred, and had judgment, for then the condition being impossible at the time the obligation **[75]** was made, the obligation is single according to Co. Lit. But note, the defendant did not plead statute 23 H. 6, for if he had pleaded the obligation to be without condition, or condition impossible, which is all one, it had been void by the statute; *ut videtur.*

TRINITY 34TH CHARLES II.

CARVER *against* PINCKNEY.

Action of debt upon an indenture and the stat. of the 29th Car. 2. Demurrer.

Nottingham, to wit.—William Pinckney, late of Mansfield Woodhouse in the county aforesaid, Esq. was summoned to answer Charles Carver, clerk, of a plea that he render to him 26l. 13s. 4d. which he owes him and unjustly detains, &c. And whereupon the said Charles, by Francis Wyld his attorney saith, that whereas by a certain indenture made at Mansfield Woodhouse aforesaid, the 24th day of July, in the 23d year of the reign of the lord the now King, between one Michael Honeywood, Doctor of Divinity, late Dean of the Cathedral Church of the Blessed Virgin Mary of Lincoln,

deceased, of the one part, and him the said William Pinkney of the other part; one part of which, sealed with the seal of the said late dean, the said William hath in his power, it is witnessed, that whereas the said dean in his life-time for divers causes and considerations him thereto specially moving, had demised, granted and to farm let, and by the said indenture for him and his successors did demise, grant and to farm let, unto the said William Pinckney, all that Rectory and Parsonage of Mansfield in the said county of Nottingham, with all members and appurtenances, and all and all manner of glebe lands, tenements, tythes, fruits, oblations, profits, commodities, emoluments, rents, services and hereditaments whatsoever; with all and singular the appurtenances to the said rectory and parsonage, and to the chapels of Mansfield Woodhouse and Skegby, or to any of them belonging or appertaining [the portion of the Vicarage of Mansfield, and the presentation thereto when it should become vacant, and the pension of the parochial church of Sutton in Ashfield always being excepted and reserved] to have and to hold the said rectory and parsonage, with all and singular the other premises [except the before excepted] to the said William Pinckney and his heirs from the time of the making **[76]** of the said indenture, for and during the natural lives of the said William Pinckney and of Elizabeth his wife, and of Elizabeth Pinckney the daughter of the said William Pinckney, then of the age of one year or thereabouts, and for the life of the longest liver of them, under the annual rent of 30l. to the said dean and his successors, Deans of Lincoln, or their assigns annually, to be paid at the Feast of the Purification of the Blessed Virgin Mary, and of the Nativity of St. John the Baptist. And the said William Pinckney by the said indenture did covenant, grant and agree to and with the said dean and his successors, that he the said William Pinckney, his heirs and assigns during the lives aforesaid, would find and provide one sufficient minister or priest to celebrate divine service in Mansfield Woodhouse aforesaid, and another sufficient minister or priest in the chapel of Skegby, and each and every of them should be such as should be allowed and approved by the said dean and his successors. And that the said William Pinckney, his heirs and assigns during the lives aforesaid, or the life of any of them, would allow and pay annually to the minister or priest of Mansfield Woodhouse, the sum of forty marks at the least, at the church or chapel of Mansfield Woodhouse, and to the minister or priest of Skegby, the sum of twenty marks at the least, at the church or chapel of Skegby; which payments should be made by even and equal portions at the said two feasts or days of payment above limited for the said annual rent to be paid to the said dean and his successors, as by the said indenture more fully appears. And whereas by a certain Act enacted in the Parliament of the lord the now King, held by prorogation at Westminster in the county of Middlesex, the 25th day of February in the 29th year of his reign, entitled An Act, for Confirming and Perpetuating Augmentations made by Ecclesiastical Persons to Small Vicarages and Curacies; among other things it is enacted, that all and every augmentation of what nature soever, granted, reserved or agreed to be made payable, or intended to be granted, reserved, or made payable from the 1st day of June, in the 12th year of the reign of the said lord the now King, or which at any time afterwards should be granted, reserved or made payable to any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be for the use or benefit of any vicar or curate, by any archbishop, bishop, dean, provost, dean and chapter, archdeacon, **[77]** prebendary, or other ecclesiastical corporation, person or persons whatsoever, so making the said reservation out of any rectory impropriate, or portion of tythes, belonging to any archbishop, bishop, dean, provost, dean and chapter, or other ecclesiastical corporation, person or persons, should be deemed and adjudged to continue and be, and for ever afterwards should continue and remain, as well during the continuance of the estate or term upon which the said augmentation was granted, reserved or agreed to be made payable as afterwards, in whose hands soever the said rectories, or portion of tythes should be chargeable therewith, whether the same be reserved again or not. And the said vicars and curates respectively by the said Act are adjudged in the actual possession thereof, for the use of themselves and their successors; and the same should be for ever afterwards taken, received and enjoyed by the said vicars and curates and their successors, as well during the continuance of the term or estate upon which the said augmentations were granted, reserved or agreed to be made payable as afterwards. And the said vicars

and curates should have remedy for the same, either by distress upon the rectories impropriate, or portions of tythes charged therewith, or by action of debt against that person who ought to have paid the said augmentation, his executors or administrators; any disability in the person or persons, bodies politick or corporate so granting, or any disability or incapacity in the vicars or curates, to whom or for whose use or benefit the said augmentations were granted or intended to be granted; the Statute of Mortmain, or any other law or custom, or other matter or thing whatsoever to the contrary notwithstanding; as in the said Act is more fully contained. And the said Charles further saith, that he the said Charles afterwards, to wit, upon the 5th day of June, in the 32d year of the reign of the said lord the now King, by the allowance and approbation of the said late dean, at the nomination of the said William, and by the licence of Richard now Archbishop of York, in the due manner was admitted curate of the church of Mansfield Woodhouse aforesaid, and from that time continually afterwards, hitherto was and as yet is curate there; and the said 26l. 13s. 4d. of the augmentation aforesaid, by the said William to the curate of Mansfield Woodhouse aforesaid, in the form aforesaid granted to be paid, and by force of the said Act to the said Charles confirmed and continued for one whole year, ended at the Feast of the Nativity of St. John the Baptist last past, in the **[78]** 33d year of the reign of the said lord the now King, were in arrear and as yet are unpaid; whereby an action hath accrued to the said Charles to demand and have of the said William the 26l. 13s. 4d. aforesaid, nevertheless the said William, although oftentimes requested, the said 26l. 13s. 4d. to the said Charles hath not paid, but the same to him to pay hitherto hath altogether refused, and still doth refuse, whereupon he saith he is injured, and hath received damage to the value of 20l. and therefore he produces his suit, &c., &c.

And the said William, by Sylvester Petyt his attorney, comes and defends the force and injury, when, &c. and saith that the said Charles ought not to have or maintain his action aforesaid thereupon against him, because he saith that well and true it is, that the said dean did demise, grant and to farm-let to the said William, the rectory, parsonage, tenements and premises aforesaid, with the appurtenances, to have and to hold to the said William and his heirs, for and during the lives of the said William, Elizabeth and Elizabeth under the annual rent aforesaid, in the declaration aforesaid mentioned, and that the said William did covenant with the said late dean by the said indenture in the manner and form as the said Charles by his declaration aforesaid supposes. And the said William further saith, that he the said William, upon the 25th day of November, in the year of our Lord 1672, at Mansfield Woodhouse aforesaid, nominated the said Charles to the said late dean to be curate of the said church of Mansfield Woodhouse aforesaid, and that he the said late dean thereupon afterwards, on the said day and year, allowed and approved the said Charles to be curate of the said church of Mansfield Woodhouse aforesaid, whereby the said Charles, afterwards on the said day and year was in the actual possession of the said benefice, by virtue of such nomination and approbation aforesaid; but the said William saith, that by a certain Act enacted in the Parliament of the lord the now King, held at Westminster in the county of Middlesex, the 8th day of May, in the 13th year of his reign, among other things it was enacted by the authority of the said Parliament; that all and singular the ministers in any cathedral, collegiate or parochial church or chapel, or other place of public worship within this realm of England, should be bound to say and use the morning prayer, evening prayer, the celebration and administration of both the sacraments, and all other the publick and common prayer in such order and form as is mentioned in the book in the said statute annexed and joined, and entitled, The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies **[79]** of the Church according to the Use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in the Churches, and the Form or Manner of Making, Ordaining and Consecrating of Bishops, Priests and Deacons. And further by the said statute it was enacted, that every person who from that time afterwards should be presented or collated, or put into any ecclesiastical benefice or promotion within this realm of England, in the church, chapel or place of publick prayer belonging to his said benefice or promotion, within two months next after he should be in the actual possession of

the said ecclesiastical benefice or promotion, upon some Lord's Day, openly, publickly and solemnly, should read the morning and evening prayers appointed to be read by and according to the said Book of Common Prayer, at the times by the said book appointed or to be appointed; and after such reading thereof, openly and publickly before the congregation there assembled, should declare his unfeigned assent and consent to the use of all things in the said book contained and prescribed, according to the form in the said statute before appointed; to wit, *I do hereby declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book, intitled* The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, and the Form or Manner of Making, Ordaining and Consecrating of Bishops, Priests and Deacons. And that all and every such person, who without any lawful impediment, to be allowed and approved by the Ordinary of the place, should neglect or refuse to do the same within the time aforesaid, or in case of such impediment, within one month next after such impediment removed, should be *ipso facto* deprived of all his said ecclesiastical benefices and promotions, and that from thenceforth it should and might be lawful to and for all patrons and donors of all and singular the said ecclesiastical benefices and promotions, or any of them, according to their respective rights and titles to present or collate to the same, as though the person or persons so offending or neglecting was or were dead; as by the said Act among other things is more fully contained. And the said William further saith, that the said Charles within two months next ensuing **[80]** after he was put and invested as aforesaid into the actual possession of the church of Mansfield Woodhouse aforesaid, upon some Lord's Day after the reading of the morning and evening prayers appointed to be read by and according to the said Book of Common Prayer, at the times by the said book appointed to be read by him in the church of Mansfield Woodhouse aforesaid, did not declare his unfeigned assent and consent to the use of all the things in the said book contained and prescribed, according to the form before recited by the said statute as aforesaid made and enacted, according to the form and effect of the said statute; he the said Charles during the said space of two months next ensuing after as aforesaid, he was in the actual possession of his benefice aforesaid, having no legal impediment by the Ordinary of the place allowed or approved of, but his unfeigned assent and consent to all and every thing in the said book contained for the time aforesaid, according to the form and effect of the statute aforesaid, did neglect and refuse to declare, whereby he the said Charles, by virtue of the statute aforesaid, became deprived of his benefice aforesaid, as if he the said Charles had been actually dead; and that he the said William at any time after the said 25th day of November, in the year of our Lord 1672 aforesaid, did not nominate the said Charles to the said late dean to be curate of Mansfield Woodhouse aforesaid, and this he is ready to verify; wherefore he prays judgment if the said Charles ought to have his action aforesaid, thereupon against him, &c. &c.

And the said Charles saith that he by any thing before alledged ought not to be precluded from having his action aforesaid, because he saith that well and true it is that the said William on the said 25th day of November, in the year of our Lord 1672, in the said plea above mentioned nominated the said Charles to the said dean to be curate of the church of Mansfield Woodhouse aforesaid; and that he the said late dean thereupon afterwards, on the said day and year, allowed and approved the said Charles to be curate of the church aforesaid, whereby the said Charles was and continued to be in the actual possession of the said benefice until the 5th day of June in the declaration aforesaid mentioned, and the said Charles on the said 5th day of June, so being in possession with the assent and sufferance of the said William, and by the allowance and approbation of the said late dean, and by the licence of the said Richard, now Archbishop of York, to the said curacy of the said church in the due manner was admitted, and as yet is curate there; and the said Charles further saith, that he within two months next after the said 5th day of June in the declaration aforesaid specified, upon the Lord's Day, **[81]** to wit, upon the 13th day of June, in the 32nd year aforesaid, in the said church of Mansfield Woodhouse aforesaid, openly, publickly and solemnly, read the morning and evening prayers appointed to be read by and according to the said

Book of Common Prayer at the times by the said book appointed, and after such reading thereof, then and there openly and publickly before the congregation there assembled, did declare his unfeigned assent and consent to the use of all things in the said book contained and prescribed, according to the form appointed in the said statute, in the said plea in bar mentioned, to wit, in the form following: I Charles Carver do hereby declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book entitled, The Book of Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the Use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, and the Form or Manner of Making, Ordaining and Consecrating of Bishops, Priests and Deacons, according to the form and effect of the statute aforesaid: and this he is ready to verify; wherefore he prays judgment and his debt aforesaid, together with his damages by occasion of the detention of the said debt to him to be adjudged, &c.

And the said William saith, that the said plea of the said Charles above by replying pleaded is not sufficient in law to maintain the said Charles to have his action aforesaid against the said William, and that he to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient replication of the said Charles in this behalf, the said William prays judgment, and that the said Charles may be barred from having his action aforesaid, &c.

And the said Charles, because that he above by replying hath alledged sufficient matter in law to maintain his action aforesaid, against the said William, which he is ready to verify, which matter the said William doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof; as before prays judgment of his debt aforesaid, together with his damages by occasion of the detention of his said debt, to be adjudged to him, &c. and because the said justices, &c.

[82] CARVER *against* PINKNEY.

Debt upon an indenture and upon the statute 29 C. 2, for Augmentation of Vicarages. 3 Wils. 355.

Debt, and declares that Honywood, Dean of Lincoln, by indenture on the 24th of July, 23 *Regis nunc*, which the defendant *penes se habet*, demised to the defendant the Rectory of Mansfield for three lives, rendering to the dean and his successors, 30l. rent per annum; and that the defendant *per eandem indenturam* covenanted with the dean to find and to provide a sufficient minister, or priest to serve in the church of Mansfield, such a one as by the dean and his successors should be allowed and approved; and to pay to the said priest 40 marks per ann. *ad minus* by even portions at the Nativity of St. John the Baptist and Lady Day. And then set forth the statute of 29 Car. 2, for Perpetuating Augmentations to Poor Vicarages; whereby it is enacted, that every augmentation reserved or made payable to any vicar, curate, &c. should continue payable to them, and that they should be adjudged in actual possession of them and should have remedy for recovery of the same by distress or action of debt; and farther saith, that the plaintiff 5 June 32 Car. 2, by allowance and approbation of the dean, at the nomination of the defendant, and with the license of the bishop was admitted, *& abinde hucusque fuit curat'* of the church of Mansfield; and for 40 marks of the said pension due for a year brings his action: the defendant pleaded *actio non*, and confesses the lease and the covenants, but saith, that the plaintiff was nominated, &c. the 25th of November, 1672, and had possession; but farther saith, that by the stat. 13 Car. 2, of Conformity, it is enacted, that all ministers in any church or chapel, or other ecclesiastical benefice, shall read the prayers appointed by the Act, and within two months after actual possession had of their vicarage, curacy, &c. declare their assent and consent to all matters in the Book of Common Prayer contained, and upon neglect thereof shall *ipso facto* be deprived, and that it shall be lawful to the patron to present or collate, as if the incumbent &c. were dead; and that the plaintiff did not within two months after his possession declare his assent according to the stat. whereby he became deprived. [83] And that he at no time

after the said Nov. 25, 1672, did nominate the plaintiff to the dean to be curate. The plaintiff by replication confesses the nomination, 25 Nov. 1672, and that he continued the possession till June 5, 32 Car. 2, and afterwards so being in possession *ex assensu & permissione* of the defendant with the allowance of the dean and licence of the bishop, within 2 months after the said 5th of June, 32, declared his assent and consent, &c. according to the statute. Defendant demurred. And upon argument these points were agreed by the whole Court; 1. That this stipendiary was within the Statute of 13 of Conformity, notwithstanding the words of the statute, which are, that the patron shall present as if the other were dead; and there is no presentation requisite in this case, but only nomination to the dean, and approbation by him; so Cro. Cha. 331, *Bawderock & Mackaller*, a donative is within the Statute of Simony, though the statute speaks of *presentations*, and so as was said it was resolved in this Court within these two years between the same parties; but judgment was then given against the plaintiff upon other exceptions. 2. The declaration is good without shewing the indenture, neither that nor the counter-part belonging to the plaintiff, and therefore good in this manner, which the defendant *penes se habet;* and the plaintiff is enabled to sue by the statute of 29 Car. 2. 3. That debt lies in this case though the lease be for three lives, upon which the reservation is made, and that by the words of the statute, which gives him election of remedy either by action of debt, or distress. 4. The principal point was, that though he was *ipso facto* deprived by the *statute* for his neglect in declaring his assent within two months after his first nomination and possession, yet this statute not disabling him to have a new nomination, as the Statute of Simony does, and he continuing always after in possession, performing the office, the permission, and allowance of the defendant, and the approbation of the dean, 'till 5 June 32, this amounts to a new nomination, which together with the declaration of his assent within two months after the 5th of June 32 makes him curate within the statute, and enables him to bring this action; and judgment was given for him *per totam Curiam.*

[84] SUTTON AND HIS WIFE *against* ROLFE.

Dower lies against a tenant in common before partition. Co. Lit. 32 b. Co. Lit. 34 b. 2 Bac. Ab. 135. 3 Bac. Ab. 189.

Dower against the heir of the first husband, and demands the third part of the third part of the tenements. The tenant pleaded that A. being seised devised the tenements to the first husband of the wife, whereof she demands dower, and to the wife of the demandant, and to a third person, equally to be divided; and so demands judgment of the writ, supposing that the wife could not sue dower against the other tenants in common before partition. But upon demurrer it was adjudged the writ lay.

[85] HILARY TERM, IN THE THIRTY-FOURTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

GEERE *against* BURKENSHAM.

S. C. 2 Danvers 429, pl. 9.

Custom, if the ship perish, that the lord shall have the best anchor and cable. *Void. Contra. Post*, 307. *Ante*, 37. 2 Lev. 96, 97. 1 Lev. 37. 1 Mod. 104, 105. Raym. 232. *Post.* 160.

Trover for an anchor and cable; and upon *not guilty* pleaded, and a special verdict, it appeared that the plaintiff was possessed of them; and that the manor of Miching in Sussex lies bordering upon the sea, and that the custom of the manor is, that if any ship or boat failing upon the sea, *percutit in & supra fundum & solum manerii per quod periret, quamvis non sit wreccum, vel accidit dissolvere a fundo*, that the best anchor and cable belongs to the lord of the manor, and that the ship, to which this anchor and cable belonged, *& percussit super fundum & solum manerii, & adtunc & ibidem periit;* but that the seamen were saved, and that the defendant seized this

anchor and cable to the use of the lord: and it was adjudged by Pemberton Chief Just. Wyndham and Charlton, *ægrotante Levinz*, that the custom is void, and without consideration. *Nota*, no custom of salvage is found.

[86] HILTON *against* KING.

Will signed by the testator; revocation upon the same paper not signed, is not valid. *Ante* 1. 2 Ventris 350. 1 Shower 89. 3 Mod. 218, 220, 259. 1 Sid. 90, 315, 362. Raym. 225, 240, 335. *Post*, 108. Lex Testm. 470, 471. 2 Danvers 527, to pl. 7. Powel on Devises 650. 1 Vesey, jun. 11. 5 Term Rep. 49.

Ejectment, and upon *not guilty* a special verdict found, that Edward King was seised of the tenements in question in fee, and the 29 Nov. 1679, devised them to his daughters Diana and Susan, and their heirs, and that the will was duly made according to the Statute of Frauds and Perjuries, and the name Edward King subscribed to the bottom of the will; and they found that the said Edward King afterwards *ad intention' revoc'* the will, *quoad Diana*, who (1) was married and had her portion paid to the lessor, *direxit verba sequentia* to be subscribed *super eandem voluntatem, viz. We whose names are under-written, do testifie that the above-named Edward King did the day of the date hereof publish and declare, that the several clauses and devises in his will, any way relating to his daughter Diana should cease and be void, she being since married, and her portion paid: in witness whereof we have hereunto set our hands this 28th of October*, 1680, *J. S. J. D. F. N. & G. W.* and that the said words were written under the same will, upon the same paper, by the direction of the said Edw. King, and subscribed by the said four witnesses in his presence; but farther they find, that the said writing subscribed as aforesaid was not subscribed by the said Edward King, or any other by his direction or authority; and that after the death of Edward King Diana and her husband entered and demised to the plaintiff, and if the defendant be guilty, they find as to one moiety for the plaintiff, and as to the other moiety for the defendant. *Nota*, the words of revocation were written upon the same paper, and upon the same side of the paper with the will, immediately under the name of Edward King subscribed to the will; and whether the revocation *quoad Diana* be good, according to the Statute of Frauds and Perjuries, being not subscribed by Edward King? was the question. And note, the clause concerning wills directs, that all wills shall be subscribed by the testator, or any other in his presence, or by his direction, and attested by three or four **[87]** witnesses, and subscribed in his presence; and the clause touching revocations saith, that no devise shall be revocable *but by some other will or codicil in writing, or other writing declaring the same, or by cancelling, &c. by the testator himself or in his presence, or by his direction; but all devises shall remain good till revoked or altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses declaring the same, any former law to the contrary notwithstanding.* And upon the first argument last term North Ch. Justice and Levinz held, that forasmuch as the devisor's intent appears fully in writing, and by consequence no doubt of fraud or perjury, that the subscribing by King upon the same paper may serve as well for the codicil, as for the will; and that it is not material whether the signing be at top or bottom of the will, or writing; for the statute doth not say subscribed, but signed by the testator: but now this term North being removed into Chancery, and Levinz sick, rule was given, that judgment should be entered for the plaintiff for a moiety, by Pemberton Ch. Justice, Wyndham and Charlton, *nisi causa* before such a day; at which day Levinz being present the cause was adjourned till next term; and whether any judgment be entered *quære*, for I do not remember it was moved again.(2)

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(1) In the French there is "*puis.*"

(2) The words of the revoking clause in the Irish Stat. of Wills the 7th Will. 3, c. 22, s. 3, are, And moreover no devise in writing of any lands, tenements, or hereditaments, that at any time after the said Feast Day of the Nativity of St. John the Baptist which shall be in the year 1696—be revokable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning,

HILARY, 34 CHARLES II.

SPRIGG *against* NEAL.

Declaration in trespass *quære clausum fregit, &c.*

Leicester, to wit.—Henry Neal, late of Lubenham, otherwise Lubinam, in the county aforesaid, yeoman, was attached to answer Samuel Sprigg of a plea, wherefore with force and arms the close of the said Samuel at Lubenham otherwise Lubinam he broke, and his grass to the value of sixty shillings there lately growing with feet by walking trod down and consumed, and other his grass to the value of forty shillings there to wit lately growing with certain cattle depastured, trod down, and consumed, and also his gates, walls, and hedges to the **[88]** value of ten pounds there lately made, erected, growing, and being, did spoil, break, cut down, tear up, and prostrate, and other wrongs to him did, to the great damage of the said Samuel, and against the peace of the lord the now King, &c. And whereupon the said Samuel by William Parker his attorney complains, that the said Henry on the first day of January, in the 28th year of the reign of the said lord the now King, with force and arms, &c. the close, to wit, a certain portion of land commonly called the yard of the said Samuel, appurtenant to and adjoining the messuage or tenement now or late in the tenure of the said Samuel at L. aforesaid broke, and his grass the value, &c. there lately growing with certain cattle, to wit, horses, oxen, cows, hogs, and sheep, did depasture, tread down, and consume, and also his gates, to wit, four gates, and his walls, to wit, five perches of his walls, and his hedges, to wit, five perches of his hedges, to the value, &c. there lately made, erected, growing, and being, did spoil, break, cut down, tear up, and prostrate, the trespass aforesaid as to the breaking the close aforesaid, and the treading down and consuming the grass aforesaid with feet by walking, and the depasturing, treading down, and consuming the other grass aforesaid with the cattle aforesaid, and the spoiling, breaking, cutting down, and tearing up the gates, walls, and hedges aforesaid from the said 1st day of January, in the 28th year of the reign of the said lord the now King aforesaid, until the 10th day of April, in the 34th year of the reign of the said lord the now King aforesaid, at sundry days and times continuing, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon he saith that he is prejudiced and hath sustained damage to the value of twenty pounds, and therefore he produces his suit, &c.

And the said Henry by Laurence Carter his attorney comes and defends the force and injury when, &c. and as to the coming with force and arms saith that he is not guilty thereof as the said Samuel above complains against him, and of this he puts himself upon the country; and the said Samuel doth the like:—And as to the spoiling, breaking, cutting down, and tearing up the walls and hedges aforesaid, the said Henry saith that the said Samuel ought not to have his action aforesaid thereupon against him, because he saith that the said Henry at any time within six years before the day of the suing forth of the original writ of the said Samuel, is not **[89]** guilty thereof as the said Samuel above complains against him, and this he is ready to verify, wherefore he prays judgment if the said Samuel ought to have his action aforesaid thereupon against him, &c. And as to the residue of the trespass aforesaid above supposed to be committed, the said Henry saith that the said Samuel ought not to have his action aforesaid thereupon against him, because he saith that one Oliver Sprigg, the late father of the said Samuel, long before the time in which the trespass aforesaid is supposed to be committed, to wit, upon the 8th day

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cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent, but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisors, signed in the presence of three or more witnesses declaring the same; any former law or usage to the contrary notwithstanding.

of May, in the 13th year of the reign of the Lord Charles the First, late King of England, &c. was seised in his demesne as of fee of and in the said parcel of land commonly called the yard of the said Samuel, appurtenant to and adjoining the said messuage or tenement in the declaration aforesaid above mentioned, and also of and in one close of pasture with the appurtenances, containing by estimation three roods whether more or less, lying and being in L. aforesaid, then called the Kilne-Close, and also of one edifice or barn with the appurtenances adjoining the said close called the Kilne-Close, and of the land upon which the said edifice or barn then stood; and the said Oliver of the said tenements in the form aforesaid being seised, the said Oliver afterwards to wit, upon the said 8th day of May, in the 13th year aforesaid, at L. aforesaid, by his certain indentures sealed with the seal of the said Oliver, which the said Henry produces here in Court, the date of which is the said day and year, &c. as well for and in consideration of the sum of 38l. of the lawful money of England to him in hand by the said Henry paid, as for divers other causes and good considerations him the said Oliver thereto specially moving, and by livery of seisin then made upon the tenements aforesaid in the said deed granted, did grant to the said Henry by the name of Henry Neal, junior, of L. aforesaid, in the county of Leicester aforesaid, cordwainer, his heirs and assigns, the said close of pasture, edifice, or barn, and the land upon which the said edifice or barn then stood with the appurtenances, and by the said deed indented the said Oliver further granted to the said Henry, his heirs and assigns, free liberty in the court and homestead of the said Oliver to thatch the said edifice or barn, and free and common ways and passages, ingress, egress, and regress, to lead or drive any cattle or carriages **[90]** whatsoever, through the court and homestead of the said Oliver to and into the said premisses granted as aforesaid, and to lead or drive any cattle or carriages whatsoever of and from the said premisses granted as aforesaid, as by the said deed more fully appeareth: which court and homestead are the same parcel of land commonly called the yard of the said Samuel; by virtue of which grant the said Henry had and used, and ought and was accustomed to have and use, from time to time and at all times, from thence afterwards at his free will, the liberty in the said parcel of land commonly called the yard of the said Samuel, to thatch the edifice or barn aforesaid, and the free and common way and passage of ingress, egress, and regress to lead or drive any cattle or carriages whatsoever through the court and homestead aforesaid in and into the premisses granted as aforesaid, and to lead or drive any cattle or carriages whatsoever of and from the premisses granted as aforesaid:—And the said Henry further saith that at the said time in which, &c. he the said Henry was about to pass through the way and passage aforesaid, and that a certain gate was erected and affixed across the way and passage aforesaid, so that the said Henry by occasion thereof through the way and passage aforesaid there could not pass; whereupon the said Henry at the said time in which, &c. the said gate so affixed across the way and passage aforesaid, spoiled, broke, cut down, tore up, and prostrated, doing as little damage to the same as he could, that the said Henry by the way and passage aforesaid there might pass, to use the way and passage there, and with the proper cattle of the said Henry into the said close of the said Samuel commonly called the yard of the said Samuel to use the way and passage aforesaid, entered and passed, and the cattle aforesaid then being the proper cattle of the said Henry led, drove, led back and drove back, and in using the way and passage aforesaid the grass aforesaid there lately growing with feet by walking trod down and consumed, and the other grass aforesaid there in like manner lately growing with his cattle aforesaid trod down and consumed, as it was well lawful for him, which cattle in driving by little morsels bit the grass in the way and passage aforesaid then growing, which spoiling, breaking, cutting down, tearing up, and prostrating of the said gate, and the entering into the said parcel of land commonly called the yard of the said Samuel, and the treading down and consuming of the said grass there lately growing with feet by **[91]** walking, and also the biting, treading down, and consuming the other grass aforesaid there in like manner lately growing, with the cattle aforesaid, for the cause and occasion aforesaid, is the same residue of the trespass aforesaid, in the same parcel of land commonly called the close of the said Samuel, whereof the said Samuel above complains against him, and this he is ready to verify, wherefore he prays judgment if the said Samuel ought to have his action aforesaid thereupon against him, &c.

And the said Samuel saith that he by any thing before alledged ought not to be precluded from having his action aforesaid, because as to the said plea of the said Henry as to the spoiling, breaking, cutting down, and tearing up the walls and hedges aforesaid committed as aforesaid, by the said Henry above pleaded in bar, the said Samuel saith that the said Henry is guilty thereof within six years before the day of the suing forth of the original writ of the said Samuel, as he the said Samuel above thereof complains against him, and this he prays may be enquired of by the country, and the said Henry doth the like, &c. And as to the said plea of the said Henry as to the residue of the trespass aforesaid in the declaration aforesaid mentioned, the said Samuel saith that the said spoiling, breaking, cutting down, tearing up, and prostrating of the gate aforesaid, and the entering into the said parcel of land, commonly called the yard of the said Samuel, and the treading down and consuming of the grass aforesaid there as aforesaid growing with feet by walking, and also the biting, treading down, and consuming the other grass aforesaid there in like manner as aforesaid growing with the cattle aforesaid, for the cause and occasion aforesaid, by the plea aforesaid above supposed, is not the same residue of the trespass in the said parcel of land commonly called the yard of the said Samuel, whereof the said Samuel above complains against him, and this he prays may be enquired of by the country.

And the said Henry saith that the said plea of the said Samuel, in the manner and form aforesaid above by replying pleaded, as to the residue of the trespass aforesaid, in the declaration aforesaid mentioned, is not sufficient in law for the said Samuel to have and maintain his action aforesaid against the said Henry, and that he to the said replication in the manner and form aforesaid pleaded, hath no necessity neither is he bound by the law of the land to answer, and this he is ready to verify, wherefore for want of a sufficient replication in this behalf, the said Henry prays judgment, and that the said **[92]** Samuel as to the said residue of the trespass aforesaid, may be precluded from having his action aforesaid against him the said Henry.

And the said Samuel because that he above by replying hath alledged sufficient matter in law to have and maintain his action aforesaid against him the said Henry, as to the residue of the trespass aforesaid, committed as aforesaid, which he is ready to verify, and which matter the said Henry doth not deny nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, as before prays judgment, and his damages aforesaid by occasion of the said residue of the trespass aforesaid to be adjudged to him, &c. and because, &c.

SPRIGG *against* NEAL.

In trespass defendant pleads the gate was put up, &c. *ita quod* he could not pass, good; without saying it was locked, held good. *Post*, 227. 1 Lev. 241. 1 Vent 241. 1 Bulst. 138. 4 Bac. Ab. 89. 5 Bac. Ab. 203.

Trespass for treading his grass, and breaking and pulling down his gate, and for entering his close called *The Yard*, and breaking his hedges. The defendant, *quoad* breaking the hedges, pleaded *non culp.* and as to the residue justifies for a passage *per & trans* The Yard, and that *tempore quo, &c.* a gate was erected upon the passage, so that he could not pass with his beasts, wherefore he broke and pulled down the gate, and in passing *rariter* trod the grass, *quod est' id' residuum.* The plaintiff replied, that it is not the same residue whereof he complained. The defendant demurred: and now it was objected that the defendant cannot justify the pulling down and breaking of the gate, not having shewn that it was either locked or nailed so that he could not pass. *Sed per Curiam;* having pleaded that the gate was put there, so that he could not use the passage, it shall be intended it was *locked or nailed*, or the way thereby so streightened that he could not pass, and the plea good. But the replication that the residue is not *idem residuum*, without shewing some other trespass, is too general, and therefore vain and idle. Judgment *per totam Cur'* for the defendant.

[93] OSBORNE *against* BROOKHOUSE.

Bailiff by warrant arrests before the writ delivered to the sheriff, held good. *Ante* 20, 57. 2 Lev. 19. 2 Saund. 298, 299. 1 Salk. 409. 9 Co. 69. 1 Jo. 375.

Trespass for battery and imprisonment 13 June 33 Car. 2. Defendant pleaded, that on the 16th of March an attachment issued out of Chancery to the sheriff, and that the sheriff after delivery of the writ to him, *scil.* May 27, made a warrant to the defendant his bailiff, whereupon he took him *eodem* 27 *Maii*, and traverses all other times before the warrant, or after the return of the writ. The plaintiff maintains his declaration *absque hoc* that the writ was delivered to the sheriff before the battery and imprisonment. The defendant rejoined, that before the return of the writ it was delivered to the sheriff, *scil.* the said 27th of May, and that before the arrest he had no notice but that it was delivered to the sheriff. The plaintiff sur-rejoined, that before the arrest the writ was not delivered to the sheriff. The plaintiff rebutted *ut supra*, that he had no notice, but that the writ was delivered to the sheriff before the arrest, *& de hoc ponit se, &c.* Thereupon the plaintiff demurred: and now by Pemberton Chief-Justice *& totam Cur'* judgment was given for the defendant. For 1. Whether or no the writ was delivered to the sheriff before the warrant and arrest, so long as in *rei veritate* there was a writ to warrant the arrest, is not material. 2. There being a writ and a warrant thereupon, the bailiff shall not be charged for the execution thereof; for he is not privy, nor hath notice when the writ was delivered to the sheriff; and he hath tendered an issue of *notice*, which the plaintiff hath refused to accept.(1)

GILLAM *against* CLAYTON.

S. C. Ventris 363.

Continuando. Where the trespasses consist of several parts, and some may be continued and some not, the *continuando* refers only to those facts which may be continued. 2 Salk. 639. Sir Tho. Ray. 228, 396.

Trespass for breaking his close, spoiling his grass, turning up his soil, *&* 200 *postes in solo fixas eradication' & abcarriation' continuando transgres. predict'* till such a day. Upon not guilty the jury found for the plaintiff, and **[94]** intire damages, and judgment was entered for the plaintiff in B. R. and now error was brought and assigned that no *continuance* could be as to the posts. *Sed per Curiam;* when the *continuando* is *de transgres. predict'* generally, and the trespasses consist of several parts, whereof some may be continued, some not, the *continuando* refers only to those facts which may be continued, and not to the others. Otherwise if the *continuand'* had been only or particularly of the posts; and judgment was affirmed *per totam Curiam:* and Pemberton now Ch. Justice of this Court said, the case was so adjudged in B. R. upon this difference, he being Chief Justice there.

STRODE *against* DENNISON.

S. C. Skinner 8, 9.

Copyholder for life is attainted of felony; he in reversion for life may enter. 1 Levinz 263. 2 Ventris 38. 5 Co. 117.

In ejectment and a special verdict upon *non culp.* the case was; a copyhold was granted to A. for his life, and after, according to the custom, the reversion was granted to another for life, *immediate post mortem sursumredditionem forisfacturam sive aliam determinationem status predict'*. A. the first tenant was attainted of felony. The lord did not enter, and the King pardoned A. for the felony. He in reversion for

(1) By the British Act the 6th Geo. 1, c. 21, if the sheriff shall make out a warrant before he has the writ, he shall forfeit 10l.

life entered, and in B. R. his entry was adjudged lawful; upon which a writ of error was brought in the Exchequer Chamber, and error assigned in the matter of law; *scil.* that he in reversion for life could not take advantage of the forfeiture, but the lord ought to have entered for the forfeiture, and so have determined the first estate, and that he in reversion for life should have entered upon him. But the whole Court here held according to the opinion of B. R. that the estate for life was determined by the attainder; for in the eye of the law a copyhold is no more than a tenancy at will; and the attainder determines his will; for his attainder disables him to hold an estate, and of this determination he in reversion may take advantage: upon which judgment was affirmed.

[95] HUTCHINSON *against* PULLER IN THE EXCHEQUER-CHAMBER.

S. C. 2 Danvers 756, pl. 18.

A case on the statute for uniting the churches of London. 22 Char. 2, c. 11, § 63.

Error of a judgment in B. R. in ejectment of the Rectory of Bowe *& quodam loco ibidem vocat'* the vestry; and upon *non culp.* a special verdict found: that at the time of the great fire in London Dr. Smalwood was Parson of Bowe, Hutchinson of Honey-Lane, and Dillington of Soper-Lane; all which churches were then burnt down by the fire: and they found the statute 22 Car. 11, whereby these three parishes are united to the church of Bowe only to be rebuilt, and to be the parish church for the three parishes, and that the goods and plate of the other churches not to be rebuilt shall be delivered to the church-wardens of Bowe-Church: and that notwithstanding the union the parishes as to rates, taxes, &c. shall remain distinct, and the patrons of them shall present by turns to the church rebuilt. The first presentment to be by the patron of that church, which is of most yearly value; and that the present incumbent shall not be deprived of the tithes of their respective churches so long as they assist in serving the cure of the church to be re-edified: they farther find the statute of 22, 23 Car. 2, c. 15, for the better settlement and maintenance of the parsons, whereby the maintenance of every parson is reduced to an annual sum certain in lieu of tithes, *scil.* the Parson of Bowe, Honey-Lane, and Soper-Lane, to have 200l. per annum, to be assessed by the aldermen and common council of the ward, and to be levied by the mayor by distress and sale of goods for non-payment. *Provided and enacted, that where any of the parishes have become vacant since the fire, the surviving incumbent of the parish thereto united, and therewith consolidated, shall have like remedy to recover the tithes hereby settled to be paid, as if he had been presented to both parishes since the union.* They find that Dillington Parson of Soper-Lane died on the first of July, 24 Car. 2, that Smalwood Parson of Bowe died 20 Septem. 1679, and that Hutchinson is the survivor. The **[96]** Archbishop of Canterbury, Patron of Bowe, upon the death of Smalwood collated Puller, lessor of the plaintiff, to Bowe, who entered, and Hutchinson ousted him, whereupon he brought this ejectment; and the question in B. R. and also in this Court upon the writ of error was, whether Puller Parson of Bowe should recover the whole rectory in the life of Hutchinson, or whether Hutchinson should not hold the whole as survivor upon the statute? and it was adjudged in B. R. that Puller should recover the whole rectory; and this was assigned for error. *Note*, The verdict does not find that Bowe-Church is of more yearly value than the rest; nor whether upon the death of Dillington there was any presentation to Soper-Lane. But that seems not material; for Puller being admitted is parson in possession; which points seem to be admitted. And it was objected for the plaintiff in error, that the words of stat. 22 & 23, which are, *have become void since the fire*, must not be construed, *have become void before the Act;* so as to exclude the survivor in case of avoidance after the Act, so long as any of those that were parsons before the Act are living: for if so, the survivor shall have nothing, and construction must be made upon both Acts, by which it appears, that no parson alive at the time of the Act is to be left unprovided for during his life. For by the first Act each parson is to have the tithes of his parish so long as he assists in serving the cure: and in the latter Act when the tithes are taken away, and an annuity given in lieu

of them, the proviso is, that the survivor shall hold all, as if he was presented to both; and does not provide that he shall recover part only of the annuity assessed upon his parish; and therefore he ought either to recover all or nothing, and the new presentee to have nothing during the life of the survivor. To this opinion Levinz inclined; but the rest *contra*. They held, that upon construction of both Acts the survivor should recover *pro rata*, according to the value taxed upon his parish, and that the new presentee should have the residue of the 200l. per annum, and shall be parson. Then an exception was moved to the declaration, *scil.* that an ejectment lies not *de quodam loco vocat'* a vestry, for the incertainty in execution, and *Savill's case*, 11 Co. 55, cited, that an ejectment lies not *de uno clauso vocat. Dovecote Close*, without shewing the nature of the land and **[97]** quantity of acres. But to this it was answered and resolved, that the declaration was well enough. *Savill's case* was *undecimo Jac.* and after that Mich. 15 Jac. in *Sparrow's case, quam vid.* Cro Ja. 435, an ejectment of two closes, *vocat. Gabell's upper and nether*, was adjudged good; and Cro. Ja. 654, it is held an ejectment lies *de domo*, though a *præcipe* will not; and a close called by a name, or a vestry, are things more certain to be found or delivered in execution than 100 acres of land lying *sparsim* in a common field: and the judgment was affirmed.

[98] EASTER TERM, IN THE THIRTY-FIFTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

TRIGGE *against* TURNER.

Prescript. for common in forest *omni tempore anni* without excepting the fence-month, good. *Post*, 127. 3 Bulstr. 213. Cro. Ja. 155. 4 Inst. 298. Nel. Lut. 30, 31. 1 Jo. 285. 1 Lev. 253, 268. 2 Lev. 2.

Replevin for two cows *in quodam loco vocat' Alice Holt*. The defendant made conusance as bailiff to the King, as damage-feasant there, being part of a forest *in com' Southampton*, whereof the King is seised in fee. Defendant in bar pleads, that the Bishop of Winchester is seised of the manor of Farnham, and whereof a messuage and lands copyhold are holden, and prescribes in the bishop for him and his tenants for common *omni anno, omni tempore anni*, without excepting the *fence-month*. The plaintiff traverses the prescription, and found for the defendant: and though it was moved in arrest, &c. that without the exception aforesaid the prescription was not good, yet over-ruled, and judgment was given for the defendant. *Note*, A record was produced here this term in a case between *Brabrook and Carter*, and entered there Hill. 33, 34 C. 2, Rot. 637, wherein a verdict was given on the same prescription; and upon consideration the next term after judgment was given as here, that the prescription was good without excepting the fence-month.

[99] BAGE *against* BROMUEL.

[Over-ruled, *Kightly* v. *Birch*, 1814, 2 M. & S. 533.]

Trover and *assumpsit* cannot be joined in one action. 1 Salk. 10. 1 Keble 870. 1 Ventris 365. 2 Lev. 101. Com. Dig. Action, G. 1 Bac. Ab. 30. 1 Term Rep. 276.

Trover and *assumpsit* were joined in the same action; and upon *non culp.* a verdict for the defendant *quoad* the *trover*, and for the plaintiff *quoad* the *assumpsit*. And now it was moved in arrest of judgment, that these two cannot be conjoined in one action; and though the jury hath severed them, yet the declaration being ill *ab initio*, the plaintiff ought not to have judgment; and of this opinion was the whole Court, and gave judgment, *quoad nil capiat per billam*.

WATTS *against* GUYBON.

Lease to commence after A.'s death without issue male, or from the time of his death before the daughter be 16, without issue male ; A. died leaving a son and a daughter then under 16. The son after died without issue, the daughter being above 16. *Quære*, Is she entitled to the term?

In ejectment upon *non culp.* a special verdict. Guybon upon the marriage of his son Fitz-William with Mercy Parker, for provision of portions for the daughters of that marriage, made a lease to commence upon the death of William without issue male, *or from the time that William shall be dead before the daughter or daughters shall or may respectively attain to* 16 *years of age without issue-male of his body by Mercy, which shall first happen, or she being ensient of a daughter, for* 200 *years thence next ensuing.* These are the words, William had issue by Mercy, Thomas and Barbara, and died June the 4th, 1664, Barbara then being under the age of 16. Thomas died without issue Decemb. 4, 1681, Barbara then being above the age of 16 ; and whether this lease should arise, or not? was the question. And the Court seemed to be of opinion upon the first words, that the lease should arise upon the death of William without issue-male, though it be not within the first part of the disjunctive, *sc. or from the time that William shall be dead before the daughter or daughters shall or may respectively attain to* 16 *years of age without issue-male;* for this being a **[100]** provision for daughters' portions, the construction shall be made upon the whole deed, that the intent was, that the daughters should be *provided for*, happen how it would. *Sed partes concordaverunt.*

COOK *against* COOK, &c.

Scire fac. against executor and a stranger that entered, held good. Lutw. 1268. 2 Bac. Ab. 179.

Cook the plaintiff obtained a judgment in ejectment, 33 Car. 2, against Edward Cook, and Edward died: and the plaintiff brought a *scire fac'* upon this judgment against his executors, and also against Metham, who had entered, to have execution of this judgment. The defendants demurred upon the *scire facias;* and judgment for the plaintiff *per totam Curiam* without argument, *sc.* that the *scire facias* lies against the executors and the stranger who had entered.

HILARY, 34 & 35 CHARLES II.

COLE *against* WALTON.

Action of debt by executors upon a bond.

London, to wit.—Thomas Walton, late of London, scrivener, otherwise called Thomas Walton, citizen and salter, of London, was summoned to answer William Cole, Esquire, Richard Rains, Doctor of Laws, and Thomas Robson, Esquire, executors of the testament of Thomas Stretchley, gent. of a plea, that he render to them 100l. which he unjustly detains from them, &c. And whereupon they the said William, Richard, and Thomas Robson, by John Coke their attorney say, that whereas the said Thomas Walton upon the 26th day of January, in the 26th year of the reign of the said lord the now King, at London, in the parish of the Blessed Mary of the Arches, in the ward of Cheap, by his certain writing obligatory had granted that he was holden to the said Thomas Stretchley in his life-time in the said 200l. to be paid to the said Thomas Stretchley when thereto afterwards he should be requested, nevertheless the said Thomas Walton although oftentimes requested the said **[101]** sum of 100l. to the said Thomas Stretchley in his life-time, or to the said William, Richard, and Thomas Robson after the death of the said Thomas Stretchley hath not paid, but the same to them hath refused to pay, and to the said William, Richard, and Thomas Robson as yet doth refuse to pay, and the same from them unjustly detains, whereupon they say that they are prejudiced, and have sustained damage to the value of 20l. and therefore

they produce their suit, &c. and they produce here in Court as well the writing aforesaid, which testifies the debt aforesaid, in the form aforesaid, the date whereof is the day and year aforesaid, &c. as the letters testamentary of the said T. S. whereby it sufficiently appears to the Court here, that the said William, Richard, and Thomas Robson are the executors of the testament aforesaid, and have the administration thereof, &c. &c.

And the said Thomas Walton by Ralph Grainge his attorney comes and defends the force and injury when, &c. and prays oyer of the writing aforesaid, and it is read to him, &c. and he also prays oyer of the condition of the said writing, and it is read to him in these words :—" Whereas the above-named Thomas Stretchley hath the day of the date above-written lent unto John Bridge, citizen and weaver of London, the sum of 50l. of the lawful money of England, upon his obligation bearing date the day of the date hereof, wherein the said John Bridge is, and standeth holden and firmly bounden unto the said T. S. in 100l. of the lawful money of England, with condition for the true payment of 50l. 10s. of the like lawful money to the said T. S. his executors, administrators or assigns, at or in the now dwelling-house of the above bound Thomas Walton, scrivener, situate in Soper-Lane, otherwise New Queen Street, London, on the 27th day of July next ensuing the date of the same obligation as thereby appeareth ; which obligation was so accepted, and the money thereupon lent at and upon the undertaking of the said Thomas Walton, collaterally to secure the same according as is hereunder-mentioned. Now the condition of this obligation is such, that if the said John Bridge, his heirs, executors, administrators, or assigns, shall make default of or in the payment of the said sum of 51l. 10s. at the place and on the day aforesaid unto the said T. S. his executors, administrators, or assigns, then if the said Thomas Walton, his heirs, executors, administrators, or assigns, do or **[102]** shall on the last day of the said month of July now next coming truly pay or cause to be paid to the said T. S. his executors, administrators, or assigns, at the place of payment aforesaid, the said sum of 51l. 10s. in lieu of the said recited obligation, [the said T. S. his executors, administrators, or assigns, upon such payment made by the said T. W. his executors or assigns, delivering up unto the said T. W. his executors or assigns, the said recited obligation safe and uncancelled, and sufficiently assigning over the same unto him the said T. W. his executors or assigns, or unto such other person or persons, as he or they shall in that behalf require the same to be performed by the said T. S. his executors, administrators, or assigns], that then this obligation shall be void and of none effect, or else it shall stand and remain in full force and virtue. Which being read and heard the said Thomas Walton saith that the said William Cole, Richard Rains, and Thomas Robson ought not to have their action aforesaid against him, because he saith that the said John Bridge in the condition aforesaid above-named, did not pay the said 51l. 10s. upon the said 27th day of July next ensuing the date of the writing aforesaid here in Court produced, to the said T. S. then being in full life, and that the said T. W. upon the said last day of July in the condition aforesaid mentioned, for the space of one hour next before the setting of the sun of the said day, went to the mansion-house of the said T. W. to wit, in the said parish of the Blessed Mary of the Arches, in the ward of Cheap aforesaid, and there until after the setting of the sun of the said day remained, and during all that time there was ready to pay the said T. S. then being in full life as aforesaid, the said 51l. 10s. and that neither the said T. S. nor any other person on his behalf was ready to receive from the said T. W. the said 51l. 10s. and upon the payment thereof to deliver to the said T. W. the said obligation by the said John Bridge made as aforesaid, according to the form and effect of the said condition ; and this he is ready to verify, wherefore he prays judgment if the said William Cole, Richard Rains, and Thomas Robson ought to have their action **[103]** aforesaid thereupon against him, &c.

And the said William Cole, Richard Rains, and Thomas Robson say, that the said plea of the said Thomas Walton above in bar pleaded and the matter in the said plea contained are not sufficient in law to preclude them the said William Cole, Richard Rains, and Thomas Robson from having their action aforesaid against the said Thomas Walton, and that they to the said plea in the manner and form aforesaid pleaded have no necessity, neither are they bound by the law of the land to answer, and this they

are ready to verify, wherefore for want of a sufficient answer of the said Thomas Walton in this behalf, they the said William Cole, Richard Rains, and Thomas Robson pray judgment, and their debt aforesaid together with their damages by the occasion of the detention of that debt to be adjudged to them, &c.

And the said Thomas Walton because that he above hath alledged sufficient matter in law to preclude the said William Cole, Richard Rains, and Thomas Robson from having their action aforesaid against him, which he is ready to verify, which matter the said William Cole, Richard Rains, and Thomas Robson do not deny nor to the same in any wise answer, but altogether refuse to admit the verification thereof as before prays judgment, and that they the said William Cole, Richard Rains, and Thomas Robson may be precluded from having their action aforesaid, &c. And because the justices, &c.

COLE *against* WALTON.

Plea, *paratus fuit* to pay his obligation without *obtulit* ill.

Debt upon an obligation against the defendant, by the executors of Stretchley, conditioned, that whereas the plaintiff had lent to Bridge 50l. and took his bond for repayment of 51l. 10s. at the house of Walton, upon the 27th of July next, which he accepted upon the undertaking of Walton, that if Bridge did not pay Walton would secure it as herein is set forth. *Now the* **[104]** *condition is, that if Bridge make default, then if Walton at the said time and place pay the money, Stretchley then delivering Bridge's bond to Walton uncancelled, and assigning it to him, the obligation to be void:* the defendant pleaded that Bridge did not pay the money, whereupon he went to his house the 31st of July following, an hour before sunset, and there staid till the sun was down, *paratus* to pay the money, *sed nec Stretchley*, nor any other for him, was there ready to receive it, or to deliver up Bridge's bond, *& hoc, &c.* The plaintiff demurred generally, and had judgment *per totam Curiam;* for the plea is naught for want of an *obtulit solvere;* for the tender only is traversable, and not the *paratus*, and he is to tender before the other is bound to deliver up the bond.

WOOLTON *against* SALTER AND OTHERS.

Commoner cannot distrain a stranger's cattle without special damage. Keilway 47. 9 Co. 112 b. 4 Term Rep. 72.

Replevin, and avows *damage-feasant* in his common, and makes title to common in the *locus in quo*, and because these beasts were there damage-feasant, he took and impounded them. Hereupon the plaintiff demurred, and the avowry was adjudged naught, because he does not particularly complain of any special damage to himself, nor alledge that he could not have common *in tam amplo modo quo debuit & consuevit;* for without a particular damage he cannot distrain the beasts of a stranger no more than bring an *action upon the case;* and in actions upon the case some special damage is always alledged; and though this being an avowry was objected to be different, and to that purpose were cited two precedents, the one in Rastal, the other in Coke's Entries, without alledging any special damage; but being without argument the Court did not regard them, but held the law to be the very same in avowries as in actions upon the case, and that a commoner could no more distrain than bring an action upon the case, without alledging that he is damnified in his common. Another exception was taken to the avowry, *sc.* that he prescribes *propter communem pasturam*, **[105]** and not *pro communia pasturæ*, as it ought; and upon both exceptions judgment was given against the avowant.

HILARY, 34 CHARLES II.

MANBY *against* LONG AND OTHERS.

Declaration in replevin.

Lincoln, to wit.—Richard Long, John Browne, and Richard Sutton, were attached by the writ of the lord the King of second deliverance, to answer Francis Manby,

Esquire, of a plea, wherefore they took the cattle of the said Francis, and them unjustly detained against gages and pledges until, &c. And whereupon the said Francis by Patrick Shore his attorney complains, that the said Richard, John, and Richard, on the 1st day of July, in the 33d year of the reign of the lord the now King, at Potterhanworth, in a certain place called the North-Fenn, took the cattle, to wit, five mares, and one Colt, of the said Francis, and them unjustly detained against gages and pledges, &c. Whereupon he saith that he is prejudiced, and hath sustained damage to the value of 10l. and therefore he brings his suit, &c.

And the said Richard, John, and Richard, by Timothy Langthorne their attorney, come and defend the force and injury when, &c. and as the bailiffs of the Masters and Governors of the Hospital of Jesus Christ in the City of Lincoln founded by Richard Smith Doctor of Physic well acknowledge the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. because they say that the said place in which the taking of the cattle aforesaid is supposed to be committed, contains and at the said time in which the taking of the cattle aforesaid is supposed to be committed, did contain in itself one thousand acres of marsh with the appurtenances in Potterhanworth aforesaid, and that the master and governors of the said hospital [being a body politic and corporate] long before the time in which, &c. were seised of Potterhanworth with the appurtenances in the county of Lincoln aforesaid, whereof the said place, called the North-Fenn, in which, &c. is and at the said time in which, &c. was **[106]** parcel, in their demesne as of fee in right of the hospital aforesaid, and because the cattle aforesaid at the said time in which, &c. were in the said place called the North-Fenn, the grass in the said place then growing eating up, and doing damage there, they the said Richard, John, and Richard, as the bailiffs of the said masters and governors of the hospital aforesaid, well acknowledge the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. so doing damage there, &c.

And the said Francis saith that the said cognizance of the said Richard, John, and Richard, above in bar pleaded, and the matter in the same contained, are not sufficient in law to preclude him the said Francis from having his action aforesaid against them the said Richard, John, and Richard, and that he to the said cognizance in the manner and form aforesaid made, hath no necessity, neither is he bound by the law of the land to answer; and this he is ready to verify: wherefore he prays judgment and his damages by occasion of the unjust taking and detaining of his cattle aforesaid to be adjudged to him, &c.

And the said Richard, John, and Richard, because that they above have alledged sufficient matter in law in their cognizance aforesaid, to acknowledge the taking of the cattle aforesaid, as the bailiffs of the masters and governors of the said hospital, in the said place in which, &c. to be just, which they are ready to verify, which matter the said Francis doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, pray judgment and the return of the cattle aforesaid, together with their damages, expences, and costs, according to the form of the statute in such case made and provided, to be adjudged to them, &c. And because the justices, &c.

[107] MANBY *against* LONG AND OTHERS.

Conusance as bailiff to a corporation without shewing how incorporate, or that he had a precept in writing.—Good. Com. Dig. Pleader, 3 K. 14. 6 Coke 39, *Bellamy's case.*

Second deliverance for taking his beasts in North Fenne. The defendants made conusance as bailiffs to the *Masters and Governors of Christ's Hospital in Lincoln ex fundatione Richardi Smith;* and say the *master, &c.* are a *corporation*, and seised in fee of the *locus in quo, &c. in jure hospitalis*, and so make *conusance* as bailiffs *damage-feasant* there. The plaintiff demurred generally, and took two exceptions to the *avowry.* 1. That it does not shew how it became a corporation. 2. That he does not say he had a command or precept for so doing, nor that it was in writing, without which the corporation could not make any precept to him. Yet *per Cur'* the avowry was adjudged good; for 1. Their being incorporated is but an inducement to alledge a

seisin in them, and it need not have been shewn. 2. His conusance is good without mentioning their precept, or that it was in writing, for their precepts need not be in writing for such matters as this is.

HOLLET *against* SANDERS.

Baron and feme by settlement before marriage tenants in special tail male, remainder to the husband in tail male, remainder to J. S. the baron only suffers a common recovery, it bars the remainder to J. S. but whether the moiety of the intail to baron and feme only, *dubitatur*. *Sed vide*, 2 Cruise 226, 227.

Ejectment upon *non culp.* and a special verdict, the case was. James Lee seised of the tenements in question, had issue William his first son, James his second son, and Jeremy his third son; and upon the marriage of his youngest son with Jane Searl covenanted to stand seised to the use of himself for life, remainder to Jeremy and Jane and the heirs males of their bodies; remainder to Jeremy and the heirs males of his body; remainder to James the second son and the heirs males of his body; the remainder to William and the heirs males of his body; remainder to the right heirs of James the father. James the father died. Jeremy, Jane living, bargained and sold to Upton in fee, against whom a *præcipe* was brought, and Jeremy only without his wife **[108]** Jane vouched, and a common recovery was suffered; James the second son died without issue; Jeremy and Jane had issue a son James, who died without issue male, leaving only four daughters, Thomas the son of William, after the death of Jeremy and Jane, entered and was seised, and conveyed to the defendant. And the question was, whether this recovery suffered by Jeremy as vouchee solely, without his wife should bar the remainder to William? And it was adjudged that it did bar. 1. It was agreed that the estate tail to Jeremy and Jane was not barred *in toto*, Jane being not vouched, 3 Co. 5 b. *Cuppledike's case*, and *Owen and Morgan's case* there cited. But whether it be barred for a moiety or no, this being a settlement before marriage, which they took by moieties, may be a doubt, as it was in *Cuppledike's case*. But 2dly, the estate to Jeremy and Jane being determined, and Jeremy having a remainder to himself and the heirs males of his body, that remainder was wholly barred by the recovery, and all the remainders over; for the remainder in tail to Jeremy passed by the recovery, and is in supposition of law *in esse*, and precedent to all the subsequent remainders, according to *Capell's case*, Co. 62, and *Benson and Baron's case* lately adjudged in B. R.

DISTER *against* DISTER.

S. C. 2 Danvers 528.

Devise in fee revoked by recovery to the use of the devisor. *Ante* 1, 86. 1 Rol. Ab. 614, 615, 616. Raym. 240, 335, 295. 1 Sid. 90. 3 Mod. 260. Gold. 93, 109. Cro. Car. 24. Dyer 143. 44 Ed. 3, 33. 2 R. 3, 3. 3 Atk. 749. 3 P. Will. 170. Douglas 30. 5 Term Rep. 49, 51, note (*a*) 124, 310.

Ejectment, and upon *non culp.* and a special verdict, the case was: tenant in tail made his will, and devised his land, and after by bargain and sale inrolled, conveyed away the land to make a tenant to the *præcipe*, against whom a common recovery was had with *voucher* of the tenant in tail to the use of himself in fee: and whether by this recovery the will was made good, so as by virtue thereof the devisee shall have the land, or whether the devise be revoked by the recovery? was the question: and by Pemberton Chief Justice and the whole Court it was adjudged upon argument, that this was a revocation; for by the bargain and sale and recovery the whole estate was changed and altered after the making of the will.(1)

(1) A deed intended to operate as an appointment of uses but not sufficient for that purpose, may have the effect of revoking a will if the party appear to have had that intention.—5 Term Rep. 124.

[109] Hilary 34 & 35 Charles II.

Bridgwater *against* Bythway.

Declaration in trespass. *Vi et armis.* Traverse.

Hereford, to wit.—Richard Bythway the elder, late of Lemtwardine, in the county aforesaid, gent. and Richard Bythway the younger of the same, in the county aforesaid, gent. were attached to answer Richard Bridgwater, wherefore with force and arms together with Thomas Jerman and Thomas Betty, upon him the said Richard Bridgwater, at Wigmore they made an assault, and him beat, wounded and ill-treated so that his life was despaired of, and other wrongs to him did, to the great damage of the said Richard Bridgwater, and against the peace of the said lord the now King, &c. and whereupon the said Richard Bridgwater, by Francis Edwards his attorney, complains that the said Richard Bythway the elder, and Richard Bythway the younger, on the 25th day of April, in the 33d year of the reign of the said lord the now King, together with the said Thomas Jerman and Thomas Betty, with force and arms, to wit, with swords, staves, knives, clubs and fists, upon him the said Richard Bridgwater, at Wigmore made an assault, and him did beat, wound and ill treat, so that his life was despaired of, and other wrongs, &c. whereupon he said that he is prejudiced, and hath sustained damage to the value of 50l. and therefore he produces his suit, &c.

And the said Richard Bythway the elder, by the said Richard Bythway the younger, his attorney, comes and defends the force and injury, when, &c. and the said Richard Bythway the younger, in his proper person comes and defends the force and injury, when, &c. and as to the coming with force and arms, or whatever that is against the peace of the said lord the now King; and also the wounding aforesaid, they say that they are not guilty thereof, and of this they put themselves upon the county: and the said Richard Bridgewater doth the like; and as to the residue of the trespass and assault above supposed to be committed, they the said Richard Bythway the elder, and Richard Bythway the younger, say that the said Richard Bridgwater ought not to have his action aforesaid, thereupon against them, because they say that before the said time in which the trespass and assault aforesaid, are supposed to be committed, to wit, in the term of the Holy Trinity, in the 32d year of the reign of the said lord the now King, the said Richard Bythway the elder, in the Court of the said lord the King, of **[110]** the Bench here, to wit, at Westminster, in the county of Middlesex, by the consideration of the said Court, recovered against one Elias Jones, as well a certain debt of 8l. as 40s. which to the said Richard Bythway the elder, in the said Court of the lord the King were adjudged, for his damages which he had sustained by occasion of the detention of that debt, as by the record and proceedings thereupon in the said Court of the said lord the King here remaining, more fully appeareth; upon which judgment the said Richard Bythway the elder, afterwards, to wit, upon the 12th day of February, in the 33d year of the reign of the said lord the now King, and in the term of St. Hilary, in the 32d and 33d years of the reign of the said lord the now King, prosecuted out of the said Court, here a certain writ of the lord the King of *fieri facias*, against the said Elias, to the then Sheriff of Hereford directed; by which writ the said lord the now King the then sheriff commanded, that of the goods and chattels of the said Elias in his bailiwick, he should cause to be made the debt and damages aforesaid, and that he should have that money before the justices of the said lord the King, here from the day of Easter in five weeks then next ensuing, to be paid to the said Richard Bythway the elder, for the debt and damages aforesaid; which writ afterwards, to wit, upon the 12th day of April, in the 33d year of the reign of the said lord the now King, aforesaid, at Wigmore aforesaid, to one John Skippe, Esq. then being Sheriff of the county of Hereford aforesaid, was delivered in the form of law to be executed; by virtue of which writ, and for the execution thereof the said then sheriff afterwards, to wit, upon the said day and year, at Wigmore aforesaid, made his certain warrant in writing, sealed with the seal of his office of sheriff, to Edward Langford, Thomas Jerman and Thomas Betty, bailiffs of the said sheriff directed; by which warrant the

said sheriff to them jointly and severally did command, that they should cause to be made of the goods and chattels of the said Elias, the debt and damages aforesaid, according to the command of the said writ; which warrant afterwards, to wit, upon the said day and year, at Wigmore aforesaid, to the said bailiffs was delivered, in the form of law to be executed. And the said Richard Bythway the elder, and Richard Bythway the younger, further say, that on the said day of delivery of the said writ to the said sheriff, and also at the said time of the making of the said warrant, and at the said time in which, &c. the said Elias had divers goods and chattels, of his own proper goods and chattels, to wit, at Lemtwardine aforesaid, and for this because the said goods and chattels at the said time in which, &c. were in the possession of the said Elias, and then were found within the bailiwick of the said sheriff, the said Thomas Jerman and Thomas Betty at the [111] said time, in which, &c. before the return of the said writ, as the bailiffs of the said John Skippe, Esq. being as aforesaid, Sheriff of the county of Hereford aforesaid, the said goods and chattels by virtue of the warrant aforesaid, at Lemtwardine aforesaid, took and arrested, and the said goods and chattels then and there under the custody of the said sheriff then and there had, and would have led and carried away, to cause to be made the debt and damages aforesaid, according to the command of the said writ, and the said goods and chattels under the custody of the said sheriff in the form aforesaid, and for the cause aforesaid being, the said Richard Bridgewater at the said time in which, &c. and before the return of the said writ, upon them the said Thomas Jerman and Thomas Betty, with force and arms, at Lemtwardine aforesaid, made an assault, and the said goods and chattels out of the custody of the said sheriff, with force and arms then and there would and endeavoured to have taken and rescued; whereupon they the said Richard Bythway the elder, and Richard Bythway the younger, then and there being present, and perceiving that he the said Richard Bridgwater, upon them the said Thomas Jerman and Thomas Betty had made an assault, and would and endeavoured to rescue the goods and chattels aforesaid, out of the custody of the said sheriff; they the said Richard Bythway the elder, and Richard Bythway the younger, in aid of the said bailiffs, and by their command, then and there their hands upon the said Richard Bridgwater gently laid, with intention to hinder the said Richard Bridgwater, lest he might take the goods and chattels aforesaid, out of the hands of the said bailiffs, as they lawfully might; which gentle laying on of the hands the said Richard Bythway the elder, and Richard Bythway the younger, upon the said Richard Bridgwater in aid of the said bailiffs, and by their command in the form aforesaid, and for the cause aforesaid, are the same trespass and assault whereof the said Richard Bridgwater above now complains, and this they are ready to verify; wherefore they pray judgment, if the said Richard Bridgewater ought to have his action aforesaid, against them, &c.

And the said Richard Bridgwater as to the said plea of the said Richard Bythway the elder, and Richard Bythway the younger, as to the said residue of the trespass and assault aforesaid, above pleaded, saith that he by any thing by them the said Richard Bythway the elder, and Richard Bythway the younger, in the same plea above by pleading alledged, ought not to be precluded from having his action aforesaid, because he saith that the said Richard Bythway the elder, and Richard Bythway the younger, together with the said Thomas Jerman and Thomas Betty, with force and arms, of their own proper wrong, at Wigmore aforesaid, upon him the said Richard Bridgwater made an [112] assault and him did beat, wound and ill-treat, as he above complains against them, without this, that the said Richard Bythway the elder, and Richard Bythway the younger, at the time of the trespass and assault aforesaid, in aid of the said bailiffs and by their command, upon him the said Richard Bridgwater gently laid their hands, with intention to hinder him, the said Richard Bridgwater lest he might take the goods and chattels aforesaid, out of the hands of the said bailiffs, as they the said Richard Bythway the elder, and Richard Bythway the younger, above have alledged, and this he is ready to verify; wherefore because the said Richard Bythway the elder, and Richard Bythway the younger, above acknowledge the trespass and assault aforesaid, he prays judgment and his damages by occasion of the trespass and assault aforesaid to be adjudged, &c.

And the said Richard Bythway the elder, and Richard Bythway the younger say,

that the said plea of the said Richard Bridgwater above by replying pleaded, is not sufficient in law to maintain him the said Richard Bridgewater to have his action aforesaid against them the said Richard Bythway the elder, and Richard Bythway the younger, and that they to the said plea in the manner and form aforesaid by replying pleaded have no necessity, neither are they bound by the law of the land to answer, and this they are ready to verify; wherefore for want of a sufficient plea of the said Richard Bridgwater in this behalf, they the said Richard Bythway the elder, and Richard Bythway the younger, as before pray judgment, and that the said Richard Bridgwater may be precluded from having his action aforesaid, &c.

And the said Richard Bridgwater, because that he in his plea aforesaid, above by replying pleaded, hath alledged sufficient matter in law to maintain him the said Richard Bridgwater to have his action aforesaid against them the said Richard Bythway the elder, and Richard Bythway the younger, which he is ready to verify; which matter they the said Richard Bythway the elder, and Richard the younger do not deny, nor to the same in any wise answer, but altogether do refuse to admit the verification thereof, as before prays judgment and his damages, by occasion of the trespass and assault aforesaid to be adjudged to him, &c. And because the justices, &c.

[113] BRIDGWATER *against* BYTHWAY.

Command by a bailiff to prevent a rescue not traversable. *Vide ante* 20, 41, 49, 65, 93. 11 Mod. 112. Salk. 107.

Battery; defendant pleads a judgment obtained by his father against Elias Jones, and an execution thereupon, whereon the goods of Jones were taken in execution, and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon in aid of the bailiffs, and by their command, the defendant *molliter manus imposuit* upon the plaintiff to prevent his rescue of the goods. The plaintiff replied, *de injuria sua propria absque hoc* that the defendant by command of the bailiffs, and in aid of them, to prevent a rescue of the goods, &c. Whereupon the defendant demurred generally, and upon argument it was resolved by the whole Court: 1. That the replication in traversing the command of the bailiffs was not good. *For he might of himself do that, to prevent the rescue*, which is a tort and a breach of the peace. 2. The defendants plea is ill; for the action was brought as for a battery at W. and the defendant justifies at L. in the same county; whereas the bailiffs have authority throughout the whole county, and therefore the cause of justification in the same county not *local*, so that he should have conformed and justified in the same place, being the same county, where the plaintiff declared: and if the place had been material, he ought to have traversed all other places within the same county; and *sic, quacunque via data*, the plea is ill. Whereupon judgment was given for the plaintiff.(1)

BRITTON *against* BATTHURST.

1 Mod. 175. 3 Mod. 115. 1 Ventris 199. 1 Sid. 21. 2 Saunders 49. 1 Saunders 216. 11 Viner Ab. from 285 to 304. Executor confesses judgment *in assumpsit:* if there be debts of a higher nature, he must pay both, tho' his assets will only satisfy the higher debts. 1 Roll. Ab. 931. Moore 752, 358, 399. Cro. Cha. 519, 603. Hobart 265. 1 Mod. 175. 1 Sid. 337. Cro. El. 102, 216. 1 Leon. 188. Styl. 56. 1 Lut. 670. *Post.* 115. *Ante* 29. 3 Term Rep. 689.

Scire facias against the defendant, as administrator of Mary Sachwell, against whom the plaintiff had obtained a judgment for 1700l. Mich. 30 Car. 2, and 5l. damages, **[114]** as administratrix to Henry Sachwell her husband, *de bonis prædict' Henry Sachwell, si tant', &c. & si non tant', &c. de bonis suis propriis;* and suggests, that Mary had goods sufficient from Henry, but that she had wasted them. The defendant pleaded that Mary had fully administered the goods of Henry, and traverses the *devastavit;* and

(1) But although the bar be insufficient, yet if it appears by the replication that the plaintiff has no cause of action, judgment shall be given against him. 8 Coke 265.

quoad the 5l. *pro damnis*, pleads payment to the plaintiff by Mary Sachwell. The plaintiff, *quoad* the first plea, maintains the *waste*, and issue thereupon; and as to the 5l. pleads *non solvit*, and issue thereupon also. As to the last issue, the jury found for the plaintiff, that Mary did not pay the 5l. And as to the first issue for 314l. 11s. 5d. that Mary wasted. And farther they find, that before the marriage between Henry and Mary, *scil.* May 2, 23 Car. 2, Henry covenanted with Henry Norwood to leave Mary at his death 1000l. and entered into an obligation of 2000l. to the said Norwood to pay accordingly: that after the marriage Henry died, indebted to the plaintiff the said 1700l. for money had and received, and that administration of his goods was committed to Mary, and after, *scil.* 23 Octob. 30 Car. 2, the plaintiff sued Mary for the 1700l. and obtained the judgment aforesaid. And that the 1000l. not being paid to Mary, Norwood *eodem* Oct. 23, brought debt upon the bond against Mary, as administratrix to her husband, and recovered a judgment against her for 2000l. upon the bond, *de bonis Hen. si tant'*, *&c.* and that Mary by consent of Norwood had 1000l. left in her hands of the goods of Henry to satisfy the 1000l. due to him. *Sed utrum illa devastavit præd'* 1000l. *necne petunt advisamentum Curiæ.* And farther they find, that after judgment to the plaintiff other goods of Henry, to the value of 63l. came to her hands, which she paid in satisfaction of debts of Henry due upon obligations. *Et utrum* she hath also wasted the 63l. *petunt advisamentum Curiæ.* And upon argument it was resolved by the whole Court, that the defendant must be charged *de bonis* of Mary for the 1000l. left to her for her own use; for she by confessing judgment to the plaintiff hath made herself liable; because she might have pleaded the obligation of 2000l. in bar of the 1700l. being only due upon contract to the plaintiff, which having omitted, she shall be charged therewith notwithstanding the other judgment for her proper debt, as **[115]** if an administrator hath assets to the value of 100l. only, and confess two several judgments to two several persons for 100l. each, he shall be obliged to pay both, as if he had bound himself in two several obligations to pay them so much money. 2. By Pemberton, Wyndham and Charlton, it not being found that at the time of the judgment confessed, she the administratrix had notice of the obligations upon which she paid the 63l. she shall not be charged for the said 63l. nor shall her payment be a *devastavit* in her; for they held, that if an executor pays debts upon contracts, when there are debts by specialty unpaid, but he had no notice of them, his payment of the simple contract debts shall be no *devastavit* for want of notice that there are debts of a higher nature. *Levinz totis viribus contra* in this point. He agreed, that where executors pay debts of equal nature, after action commenced against them for another debt of the same degree, want of notice of the writ shall excuse them. (1) But after an action once commenced against them for a debt of a superior nature, they cannot pay debts of a lower nature; and whether they have notice, or not notice, is not material. Nor was it ever seen, that want of notice of specialties shall excuse the payment of debts upon simple contract by an executor. But the other three Judges being of opinion, *ut supra*, gave judgment accordingly. But Charlton told me afterwards, that he had changed his opinion as to this point.

WALKER *against* HAMMERSLY.

A simoniacal agreement may be *pendente placito*, to present when the church is recovered. *Ante* 16, 82, 83. *Post*, 337. 4 Bac. Ab. 469. Cro. Cha. 331. Com. Dig. Esglise, N. 3. 3 Inst. 153.

Ejectment upon *non culp.* and special verdict, the case was; Thomas Stanton being seised in fee of the advowson of a rectory, and also parson and incumbent of the same, mortgaged the advowson to Barker in fee, and after died; whereby the church became void; and Francis Stanton *usurpando* presented Avenant, who was admitted, &c. Whereupon Barker brought a *quare impedit*, and pending that Constantine Stanton brought his bill in Chancery against Barker to redeem, and it was decreed that he might redeem, and that Barker should permit him to bring a *quare impedit* in

(1) French is, *Mes ils ne poient payer debts d'inferior nature puis brief port pur debt de superior nature, ayont notice del brief ou nemy.*

his name, and recover the church and presentation. *Rebus sic stantibus*, Thomas Hammersly entered into **[116]** articles with Constantine for the purchase of the advowson, by which articles Constantine covenanted to convey the advowson to Tho. Hammersly in fee, and that Constantine should present to this present avoidance, whatever clerk Hammersly should appoint; and Tho. Hammersly covenanted to pay to Constantine 100l. upon his delivery of the title-writings, and 50l. more on the first day of May next after the said delivery; and 50l. more when judgment shall be given for the plaintiff in the *quare impedit*, and 200l. more upon perfecting the conveyance. The jury found that all this was done, to the end that Chamberlain Hammersly the defendant might be presented upon recovery had in the *quare impedit*. The church was recovered by Barker's *quare impedit*, and Avenant removed, and this defendant presented by Barker at the nomination of Tho. Hammersly, and thereupon instituted, and inducted. The conveyance aforesaid was not yet perfected. Afterwards the King presented Lake lessor of the plaintiff, who was instituted and inducted. And upon argument it was resolved *per totam Curiam* that this was simony, that the presentation of Chamberlain Hammersly was void, and that the King had a good title to present; and judgment was given for the plaintiff.

STARR *against* THE MAYOR AND COMMONALTY OF EXETER IN THE EXCHEQUER-CHAMBER.

S. C. 2 Shower 158.

Debt for fine imposed upon one elected to be bailiff, for refusing the oath and declaration necessary by stat. 13 Car. 2, by which the office became void. 2 Saunders 289. 2 Shower 68, 75, 159, 196, 475. 1 Ventris 171. 1 Mod. 81. Tremaine 562. 1 Ld. Ray. 69.

Error of a judgment in B. R. where the mayor and commonalty brought debt against Starr for 60l. by them imposed upon him for refusing to take the oath, and make the declaration required by statute 13 Car. 2, *for the better government of corporations;* and declares that he was elected bailiff of the corporation for a year according to their charter, which gives them a power to fine such as refuse to accept of offices, and that by his refusal their election became void; and avers, that the bailiff usually spends in his office the sum of 60l. and that the defendant for refusal was fined 60l. for which the action is now brought; and upon *nil debet in Banco Regis* verdict and judgment was for the plaintiff: and now it was assigned for *error*, that the **[117]** statute 13 Car. 2, does not enable them to fine, but only makes the office void. *Sed per Curiam*, Refusal of the oath is by a mean a refusal of the office; and so within the power given them by their charter to fine for refusing to accept of offices: and judgment was affirmed.

TURBERVIL AND OTHERS *against* STOKTON IN THE EXCHEQUER-CHAMBER.

Ejectment, and declares of two several leases, one by three lessors, and the other by two of them, held good. *Ante* 67. 9 Viner Ab. 347. 2 Ventris 314.

Error of a judgment in ejectment in B. R. where the plaintiff declared upon a lease 1 Apr. 32 Car. 2, made by A. B. and C. of a messuage, &c. in Corkeham for five years from the 30th of March then last past. *Cumque etiam* the said A. and B. omitting C. *postea scilicet eodem primo die Aprilis* demised to the plaintiff *predict' messuag'* for five years from the said 30th day of March; *virtute quarum quidem dimissionum* he entered, and was possessed till ousted by the defendant. And upon *non culp.* verdict and judgment were for the plaintiff in B. R. and now it was assigned for *error*, that the declaration was double; being founded upon two leases of the same date for the same thing, and for the same term; and he could not enter and be possessed by both leases. *Sed per totam Curiam* judgment was affirmed; for 1. If it be double, it is cured by the verdict. But 2. It is not double; for when all three let the whole, and afterwards two of the same lessors let the same again to the same lessee, this is a surrender of the

first lease as to their two parts, and a new demise *pro tanto;* and the old lease continues as to the third part, the lease of him that did not join in the second lease: and so the lessee entered and was possessed by both leases; *scil. quoad* the third part by title from C. under the first lease, and for the other two parts from A. and B. by virtue of the second lease.

[118] EGGLETON *against* LEWIN IN THE EXCHEQUER-CHAMBER.

S. C. 5 Mod. 13, 14.

Indeb. assump. for money won at play. *Quære?* 3 Keble 671. 2 Ventris 175. 1 Salk. 100.

Error of a judgment *in assumpsit*, where the plaintiff *inter alia* declared in B. R. upon an *indebitatus assumpsit* for 20l. *quas ei solvisse debuisset pro denariis per ipsum ad jocum vocat' chartas pictas de defendente per quer' lucrat' & acquisit':* judgment was for the plaintiff by default, and a writ of enquiry of damages, and entire damages assessed, and judgment entered for the plaintiff: and now *error* being brought, it was assigned, that a general *indebitatus* lies not for money won at play; but a case was cited to be so adjudged in B. R. Mich. 32 Car. 2, where upon a special verdict it was so adjudged; and to this opinion inclined the greater part of the Judges; *sed adjournatur;* for some of the Judges said, they would be cautious of giving encouragement to actions for money won at play more than needs must.(1)

[119] TRINITY TERM, IN THE THIRTY-FIFTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

VINCENT *against* ALPY.

Son of a whore suable in the Spiritual Court. *Post*, 137, 350. Cro. Cha. 339. 1 Sid. 248, 433. 1 Jo. 44. 2 Roll. Ab. 296. 1 Mod. 23. 2 Salk. 692, 693. 4 Bac. Ab. 520.

A prohibition was prayed to the Spiritual Court upon a suit there for calling Vincent *rogue and rascal, and son of a whore* which are only words of heat and passion; for which they cited Rol. 2 Abridg. 296, s. 5, *Lowns* vers. *Herbert*, where a prohibition was granted for calling him *son of a whore, and your mother is a bitch.* But *per totam Curiam* a prohibition was now denied; for the words import, his mother was a *whore*, and he himself a *bastard.* But in the case cited out of Roll. the words being coupled with *thy mother is a bitch* make all insensible; but in this case the words amount *to an ecclesiastical scandal.* And in another suit for the mother for the same words, a *prohibition* was denied, for both the mother and the son were hereby scandalized.

KETTLEBY *against* HALES.

In a *scire facias* upon a judgment payment no plea. *Ante* 55.

Scire facias upon a judgment for 94l. The defendant pleaded, that the sheriff had levied part upon a *fieri facias;* and that after it was agreed between the plaintiff and

(1) But *assumpsit* will lie upon a wager.—5 Burrow 2803. Cowper, 17, 13. But not if it be an incitement to a breach of the peace, or to immorality, or if it affect the feelings of a third person, or expose him to ridicule, or libel him; or if it be against sound policy.—Cowper 729. 1 Term Rep. 57. 2 Term Rep. 610. 3 Term Rep. 693. Wagers void for want of interest, within the English Act the 14th Geo. 3, c. 48.—*Quære?*—2 Term Rep. 616. Either party may recover from a stake-holder the money deposited by him, if the money has not been paid over.—5 Term Rep. 405.

An injunction was granted for stay of proceedings at law for forcibly taking from the defendant money which he had won from the plaintiff at play, though the defendant had by answer denied all the circumstances of fraud charged in the bill. —1 Vernon 489.

defendant, that the defendant should pay the under-sheriff 10l. in full satisfaction for the residue; and that he paid it accordingly. The plaintiff demurred; and *per tot' Cur'* it was resolved, that the plea was insufficient; **[120]** for payment is no plea in debt upon a bill *obligatory*, 8 Co. *Nichols's case; a fortiori* not in *debt* upon a judgment of record, &c. Judgment for the plaintiff.(1)

HALLOWES *against* LUCY.

Three defendants plead the death of the fourth in abatement, how it must be pleaded.

In trespass against four defendants; they appeared; and after divers continuances, at last three of them pleaded the death of the fourth *puis darrein continuance, & petunt judicium de brevi, & quod breve illud cassetur.* The plaintiff demurred, and the plea was adjudged ill in its conclusion, which ought to have been *petunt judic' si Curia ulterius procedere vult*, and not *judicium de brevi & quod breve cassetur;* for it is in fact already abated by the death of the fourth defendant; and therefore a *respondeas ouster* was awarded for insufficiency of the plea.(2)

34 CHARLES II. ROLL 1314.

FIELD *against* JELLICUS.

Declaration in replevin.

Norfolk, to wit.—Samuel Jellicus, Samuel Smythson, William Eden, and Robert Jellicus, were summoned to answer Richard Field, of a plea wherefore they took the cattle of the said Richard, and them unjustly detained, against gages and pledges, &c. and whereupon the said Richard by Cuthbert Brereton his attorney complains, that the said Samuel Jellicus, Samuel Smythson, William and Robert, on the 28th day of July, in the 33d year of the reign of the lord the now King, at Surlingham, in the county aforesaid, in a certain piece of marsh there containing by estimation two acres whether it be more or less, abutting towards the west upon the common of pasture of Surlingham, took the cattle, to wit, two geldings of the said Richard, and them unjustly detained against gages and pledges until, &c. whereupon he saith that he is prejudiced, and hath sustained **[121]** damage to the value of ten pounds, and therefore he produces his suit, &c.

And the said Samuel Jellicus, Samuel Smythson, William Eden, and Robert Jellicus, by John Rolf their attorney come and defend the force and injury when, &c. and say that the said Richard ought not to have his action aforesaid against them, because they say that the said Richard heretofore, to wit, in the term of the Holy Trinity, in the 34th year of the reign of the said lord the now King, in the Court of the said lord the King of the Bench here, to wit, at Westminster, by original writ of the said lord the King prosecuted out of the Chancery of the said lord the King at Westminster aforesaid, and to the Sheriff of the said county of Norfolk directed, and into the Court here returnable and returned, impleaded the said Samuel, Samuel, William and Robert of a plea wherefore with force and arms they had broke the close of the said Richard at S. and his corn and grass to the value of forty shillings there lately growing with certain cattle had depastured, trod down and consumed, and other his grass to the value of twenty shillings there in like manner lately growing with feet

(1) By the English Act the 4th & 5th Anne, c. 10, and the Irish Act 6th Anne, c. 10, where any action of debt shall be brought upon any single bill, or where any action of debt or *scire facias* shall be brought upon any judgment, if the defendant hath paid the money due upon the bill or judgment, such payment may be pleaded in Bar.

(2) By the Irish Act the 9th Wil. 3, c. 10, where there are two or more plaintiffs against two or more defendants, the death of one or more of the plaintiffs or defendants shall not abate the writ, but it may be suggested on the roll.—*Quære*, Doth the corresponding English Act of the 8th & 9th Will. 3, c. 11, run *in totidem verbis?*—If so, doth it extend to a case like the present?

by walking had trod down and consumed, and also other corn to the value of one hundred shillings there lately growing had mowed, cut down, took and carried away, and other his grass there lately growing had mowed, and the hay arising therefrom to the value of one hundred shillings had taken and carried away, and his goods and chattels to the value of sixty shillings there lately found had taken and carried away, and other his goods and chattels to the value of forty shillings there lately found had scattered and spoiled, and the gates and bolts of the said Richard of the said close, and inclosing that close to the value of ten shillings had torn up, broke and spoiled, and the cattle of the said Richard of the price of six pounds there lately found had taken, led away and impounded, and also upon him the said Richard there had made an assault, and him had beat, wounded and ill-treated, so that his life was greatly despaired of, and other wrongs to him hath done, to the great damage of the said Richard, and against the peace of the lord the King; and whereupon the said Richard then by declaring against the said Samuel, Samuel, William and Robert, in the said plea by the said C. B. then his attorney complained that the said Samuel, Samuel, William and Robert, on the 2d day of August, in the 33d year of the reign of the said lord the now King, with force and arms, to wit, with swords, staves **[122]** and knives, the close of the said Richard, to wit, one piece of marsh containing by estimation two acres, whether it be more or less, lying in S. aforesaid, abutting towards the east upon a common rivulet, and one piece of land containing by estimation three roods, whether it be more or less, lying in S. aforesaid, abutting towards the west upon the common highway, and one other piece of land containing by estimation three roods, whether it be more or less, lying in S. aforesaid, and upon the lands of Thomas Whord, gent. at S. aforesaid, had broke, and his corn, to wit, wheat, barley, oats, peas, and vetches, and his grass to the value, &c. there lately growing with certain cattle, to wit, horses, oxen, cows, pigs, and sheep, had depastured, trod down and consumed, and other his grass to the value, &c. there in like manner lately growing with feet by walking had trod down and consumed, and also other corn, to wit, three cart-loads of his wheat to the value, &c. there growing had mowed, cut down, took and carried away, and other his grass there lately growing had mowed, and his hay, to wit, four cart-loads of hay arising therefrom to the value, &c. had taken and carried away, and his other goods and chattels, to wit, two cart-loads of wheat in the straw to the value, &c. there lately found had taken and carried away, and other his goods and chattels, to wit, two cart-loads of wheat in the straw to the value, &c. there lately found had scattered and spoiled, and the gates, to wit, two gates, and the bolts, to wit, two bolts of the said Richard of the said close, and that close inclosing to the value, &c. had opened, broke and spoiled, and the cattle, to wit, two horses and two mares of the said Richard of the price, &c. there lately found had taken, led away and impounded, and also upon the said Richard then and there had made an assault, and him had beat, wounded and ill-treated, so that his life was despaired of, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon he said that he was prejudiced, and had sustained damage to the value of thirty pounds, and thereupon then produced his suit, &c. And thereupon it was in such sort proceeded that afterwards, to wit, in the term of St. Michael, in the 34th year aforesaid, it was considered in the said Court here that the said Richard should recover against the said Samuel, Samuel, William and Robert his damages by occasion of the trespass aforesaid, above his expences and costs by him about his suit **[123]** in that behalf laid out to forty shillings, and for his expences and costs aforesaid to fourteen pounds, and that the said Samuel, Samuel, William and Robert should be taken, as by the record and proceedings thereof in the said Court here remaining more fully appeareth; which judgment as yet remains in its full force and effect, not reversed, annulled, vacated, or satisfied, and the said Samuel, Samuel, William and Robert further say that the said piece of marsh containing two acres of marsh mentioned in the said record of the said judgment above pleaded, and the said piece of marsh containing the said two acres of marsh, in which the taking of the said two geldings was committed, whereof the said Richard above now complains, are one and the same piece of marsh, and not other or different, and that the said two geldings, of whose taking and detention the said Richard now complains, were the said horses and not other nor different. And that the taking, leading away and impounding of the said

two horses, mentioned in the said record of the said judgment above pleaded, and the taking and detention of the said geldings, whereof the said Richard above now complains, are one and the same taking and detention of the said two horses, and not other nor different, and this they are ready to verify; wherefore because the said Richard his damages by occasion of the taking and detention of the said two geldings against the said Samuel, Samuel, William and Robert, in the manner and form aforesaid hath recovered, they pray judgment if the said Richard ought to have again his action aforesaid for the said taking and detention of the said two geldings against them, &c.

And the said Richard saith that the said plea of the said Samuel, Samuel, William and Robert above pleaded, and the matter in the same plea contained, are not sufficient in law to preclude him the said Richard from having his action aforesaid against them the said Samuel, Samuel, William and Robert; and that he the said Richard to the said plea in manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient plea of the said Samuel, Samuel, William and Robert in this behalf, the said **[124]** Richard prays judgment and his damages by occasion of the unjust detention of the cattle aforesaid to be adjudged to him, &c.

And the said Samuel, Samuel, William and Robert, because that they above have alledged sufficient matter in law to preclude the said Richard from having his action aforesaid against them the said Samuel, Samuel, William and Robert, which they are ready to verify, which matter the said Richard doth not deny nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, pray judgment, and that the said Richard may be precluded from having his action aforesaid against them, &c. And because the justices, &c.

FIELD *against* JELLICUS.

In replevin for 2 geldings, defendant pleads a recovery in trespass for taking 2 horses.

Replevin for two geldings taken July 28, 33 Car. 2, in two acres of land, naming them. Defendant pleads that Trin. 34, the plaintiff brought an action of trepass, *quare clausum fregit, & duos equos querentis cepit & abduxit*, and also his grass and corn spoiled, and recovered 40s. damages and 14l. costs; and avers the geldings in the declaration, and the horses in the first action to be the same, and also the taking the same. The plaintiff hereupon demurred generally; and after argument judged *per tot' Cur'* that the averment of the *geldings* in this declaration, and the horses in the former, were the same, was well and consistent, for *equus* is a general term for all horses. 2. It was argued that the recovery in *trespass* shall not be a bar in this action, which is brought for the very cattle themselves, the action of trespass being only for damages, which might be given for the taking and carrying away only, together with the other trespasses, and not for the value of the cattle; and that so it seems in truth to have been; for 40s. cannot well be imagined to be the value of two horses; whereupon judgment was given for the plaintiff. **[125]** *Quære tamen*, for in *Lacon and Bernards' case*, Cro. Cha. 35 in *trover* for 100 sheep, the defendant pleaded in bar another judgment in trespass, *quare cepit & abduxit* 100 *sheep*, and 2d damages; the plaintiff replied, that the 2d damages were only for the caption and abduction, and not for the value of the cattle; and the replication was adjudged good, and judgment given for the plaintiff. But in the case at Bar there is no averment that the damages in the first action were given for the trespass only, nor does it appear for what the 40s. were given, but by supposal and conjecture.

LUXFORD *against* CHEEKE.

[S. C. sub nom. *Brown* v. *Cutter*, Ray. T. 427. Distinguished, *Sheffield* v. *Lord Orrery*, 1745, 3 Atk. 284. Applied, *Meeds* v. *Wood*, 1854, 19 Beav. 221. Explained, *Eastwood* v. *Lockwood*, 1867, L. R. 3 Eq. 492. Discussed, *In re Martin*, 1885, 54 L. J. Ch. 1072. Applied, *In re Dear*, 1889, 58 L. J. Ch. 660; *In re Cane*, 1890, 63 L. T. 746; *In re Tredwell* [1891], 2 Ch. 647.]

Devise to the wife for life, if she does not marry; if she does, that his son shall enter and have the land in tail. She did not marry. This is an estate tail with remainders. 1 Vent. 199. 2 Lev. 61. Raymond 236. Hobart 217. Cro. Ja. 571. 4 Coke 61. Godb. 51. Gouldsb. 109. 2 Bac. Ab. 57. Fearn's Essay, 166. Chan. Prec. 316.

Ejectment upon the demise of Benjamin Cutter and Mary his wife; and upon *not guilty* it was found by *special verdict*, that John Church was seised in fee, and by his wife Isabel had issue four sons; Humphry the first, Robert the second, Anthony the third, John the fourth; and by his will the 6th of March, 1583, devised all to his wife for her life, *if she do not marry, but if she do marry that Humphry presently after her decease enter, have, hold, and enjoy all the land to him and the heirs males of his body; remainder to Robert, and the heirs males of his body; the remainder to Anthony, and the heirs males of his body; remainder to John, and the heirs males of his body; with divers remainders over: that Isabel the wife did not marry;* and they derive title from Humphry to his grandson, and from him to the wife (the lessor) *filiam unicam suam;* and that the title of the defendant was as heir male of the body of Robert the second son. And after argument it was resolved, that the verdict is imperfect as to the plaintiff, for the grandson of Humphry, though he hath no other *daughter*, may nevertheless have a *son*, according to *Gymlett and Sand's case*, Cro. Cha. 391. Whereupon by consent the verdict was mended, and made *filiam unicam & hæredem suam.* And then the question was, whether any estate tail be created by this will? For Isabel the wife never married, and if no intail was created, then the *feme-lessor* hath a good title as heir general. But upon **[126]** argument the Court resolved, that the land was entailed by this will; for by the whole scope of the will it appears plainly, the devisor intended an intail with several remainders over; and rather than this intent shall be defeated, the words shall be read and taken thus; *scil. if she marry, Humphry to enter presently; if she do not marry, then Humphry shall have, hold, and enjoy them to him and the heirs males of his body, with remainder over.* Whereupon judgment was given for the defendant.

HULE *against* COCKERILL.

Covenants to levy a fine before Mich. which shall be to the use, &c. and that he will stand seised, &c. no fine, no use. *Post*, 306.

Ejectment, and upon *not guilty* and special verdict, the case in short was. One Cockerill being seised of the lands by indenture, June 28, 1623, *in consideration of a marriage to be had, covenanted before Whitsontide then following to levy a fine, which fine and all other fine and fines to be had, levied, and executed between the said parties before the said feast shall be; and the said William Cockerill, and his heirs, shall stand and be seised to the use, &c.* No fine was levied, and the question was, whether by the last words it shall enure as a covenant to stand seised, and so to raise the uses. And the Court strongly inclined that it should not be a covenant to stand seised, for then it would amount to a covenant to stand seised presently, and thereby prevent the levying of the fine, as was intended; and it is not like the cases of covenants to levy fines or make feoffments to uses before such a day, and for default thereof, or defect therein, to stand seised; for there is a time left for the levying of the fine, or making the conveyance the way intended; but by this construction the party would immediately by sealing of the indenture be disabled to levy the fine. Time was given to the parties to accommodate the matter if they could, but that was not done; whereupon afterward, Mich. term 35, it was adjudged according to the aforesaid opinions, that no use could arise by the indenture.

[127] BRABROOKE *against* CARTER.

Prescription for common in a forest *per totam annum*, fence-month not excepted.—Good. *Ante* 58.

Replevin for a heifer. The defendant avowed *damage feasant:* the plaintiff prescribed for the common *omni anno omni tempore anni;* and issue was taken upon the prescription, and found for the plaintiff; but farther they found that the *locus in quo est infra regardum foreste de Whittlewood in com' Northampton.* And judgment was hereupon given for the plaintiff that the prescription was good, notwithstanding that the *place where* was forest, and the fence-month is not excepted in the prescription, agreeable to *Trigg and Turner's case*, Pasc. 35 Car. 2, in this Court, *quod vid. ante*, 98.

HEDGER *against* ROWE.

One seised as heir *ex parte matris* devises them for 16 years. Remainder to one that is very heir; he is in by descent. 1 Salk. 234, 241. 2 Mod. 286. 2 Lev. 60, 79. Plowd. 545. Owen 125, 148. Moore 593, 644, 666. Cro. Car. 161. Cro. El. 313. 840. 1 Co. 105. 3 Leon. 26. 1 Blac. Rep. 22. 2 Stra. 127. 2 Bac. Ab. 35, 79. Powel on Devises, 425, 439.

Ejectment; and upon trial before Charlton Justice of C. B. for the poverty of the parties, and to prevent the charge of a special verdict a case was made to have the opinion of the Court, and the point was. One seised of lands *a parte materna* devised them to his executors for payment of his debt for 16 years; and after that to one who was his heir *a parte materna;* and the question was, whether the heir should take as purchaser by the *will*, or by discent as *heir?* Charlton, before whom the cause was tried, inclined that he should take by purchase, being the better for him; for then the heir *a parte paterna* will be inheritable to him before the heir of the mother's side, and so both heirs inheritable to him; and so it was argued at Bar by the counsel of that side. *Contra*, It was argued and so resolved by three Justices, Pemberton, Wyndham and Levinz, that the devise was void, and he should take by discent, and that it is no more than if the devisor had made a lease for 16 years, and then had devised the reversion to his heir; and as for the discent from him to the heir *a parte materna* or *paterna*, it is but a consequent arising from the nature of the estate; and this is not the like case where a man having two daughters devises land to them and **[128]** their heirs; for hereby the quality of the estate is altered in them, and they are now jointenants with a right of survivorship; which had not been, if the land had descended to them as coparceners. According to this opinion of the three Judges, judgment was given.

TRINITY 34TH CHARLES II.

JEFFERSON *against* JEFFERSON.

Declaration. In trespass upon the case. For pulling down a barn upon premises held by copy of court roll; the remainder whereof belonged to the plaintiff. 1 Mallory 201.

York, to wit.—William Jefferson, late of Skidby, in the county aforesaid, yeoman, was attached to answer Samuel Jefferson of a plea of trespass upon the case, &c. And whereupon the said Samuel, by John Robinson his attorney complains, that whereas one William Cocke, now deceased, in his life-time, to wit, upon the 30th day of January, in the year of our Lord 1658, at Skidby was seized of and in one messuage with the appurtenances, situate and being in S. aforesaid, held of the manor of S. in the county aforesaid by copy of the rolls of the said manor in his demesne as of fee at the will of the lord, according to the custom of the said manor; and so being thereof seised, the said William Cocke afterwards to wit, upon the said 30th day of January in the year aforesaid, without the court of the said manor, according to the custom of the said manor [among others] surrendered into the hands of the lord

of the said manor by the hands and acceptance of Thomas Thompson and John Avis, two customary tenants of the said manor, the said messuage with the appurtenances, by the name of one Grass-place, adjoining to the buildings upon the east side of C— in S. aforesaid, to the use of Jane then his wife, for the term of the life of the said Jane, and after the death of the said Jane to the use of the said Samuel Jefferson, his heirs and assigns. And the said William Cocke of the messuage aforesaid, with the appurtenances, in the form aforesaid being seised, the said William afterwards, to wit, upon the 1st day of April, in the year of our Lord 1659, at S. aforesaid died, seised of such his estate therein; after whose death, to wit, at the court baron of William Wrench, gentleman, then lord of the manor of S. aforesaid, holden for the manor of S. aforesaid, at S. aforesaid, the 5th day of April, in the year of our Lord 1659 aforesaid, before Robert Bethel, gent. then steward of the court of the manor aforesaid, the said surrender by the said William Cocke in his life-time made as aforesaid, duly was presented and inrolled, and the said Jane then and there rightly and lawfully was admitted tenant [among others] of the said **[129]** messuage with the appurtenances for the term of the life of the said Jane, the remainder thereof to the said Samuel, his heirs and assigns, in the form aforesaid belonging, by virtue of which surrender and admission aforesaid, the said Jane into the messuage aforesaid with the appurtenances entered, and was thereof seised in her demesne as of freehold, for the term of the life of the said Jane, at the will of the lord, according to the custom of the said manor, the remainder thereof to the said Samuel, his heirs and assigns, as aforesaid belonging, and the said Jane so being thereof seised, the said Jane at Skidby aforesaid took to her husband the said William Jefferson; whereby the said William and Jane were seised of the messuage aforesaid with the appurtenances in their demesne as of freehold in the right of the said Jane, for the term of the life of the said Jane, at the will of the lord, according to the custom of the said manor. And the said William and Jane, so being thereof seised, the remainder thereof after the death of the said Jane, to the said Samuel, his heirs and assigns, in the form aforesaid belonging; nevertheless, the said William Jefferson not being ignorant of the premises, but contriving and fraudulently intending the said Samuel, of the messuage aforesaid, with the appurtenances to disinherit and entirely deprive, and also the estate and interest of the said Samuel, of and in the said messuage, with the appurtenances greatly to injure, diminish and depreciate, he the said William Jefferson, on the 1st day of February, in the 34th year of the reign of the lord the now King, at S. aforesaid, a certain barn, parcel of the messuage aforesaid, to the value of 50l. with force and arms, did pull down and prostrate, and the timber, stones, tiles, and the other materials of the said barn, then and there did take, carry away and sell, and the money therefrom arising did convert and dispose to his own proper use; whereby the said Samuel, not only in his estate and interest aforesaid, of and in his messuage aforesaid, with the appurtenances is very much injured and prejudiced, but also the said Samuel of the said parcel of the said messuage is totally disinherited and deprived, to the damage of the said Samuel of 100l. and therefore he produces his suit, &c.

And the said William, by Alexander Richardson his attorney, comes and defends the force and injury, when, &c. and saith that the said declaration, in the form aforesaid made and declared, and also the matter in the same contained, are not sufficient in law to maintain the said Samuel to have his said action against the said William, and that he to the said declaration, in the manner and form aforesaid made and declared hath no necessity, neither is he bound by the law of the land to answer; and this he is ready to verify: wherefore for want of a sufficient declaration of the said Samuel in this behalf, the said William prays judgment, and that the said Samuel may be precluded from having his action aforesaid against the said William, &c.

[130] And the said Samuel, because that he above hath declared sufficient matter in law to maintain him the said Samuel to have his action aforesaid against the said William, which he is ready to verify; which matter the said William doth not deny, nor to the same in any wise answer, but altogether hath refused to admit the verification thereof, he the said Samuel prays judgment, and his damages by occasion of the premises to be adjudged to him, &c. and because the justices, &c.

JEFFERSON *against* JEFFERSON.

S. C. 2 Danvers 202.

Case by him in remainder against a copyholder for life for waste done by him.

Case, and declares, that William Cocke copyholder in fee of a certain messuage surrendered to the use of the defendant's wife for life, remainder to the plaintiff in fee; that after the surrender the defendant and his wife married, and *ad exheredita-tionem* of the plaintiff had pulled down part of the messuage, and carried off the timber and other materials. Upon this declaration the defendant demurred generally; and two objections were made to the action itself; 1. That no action of this kind lies in this case; for Coke upon the Statute of Gloucester, against waste, says, that at common law he in reversion had no remedy for waste done by a termor; it being his own **[131]** fault and folly that he had not by covenant, &c. secured himself against this mischief. 2. The jury cannot know what damages to give; for how long the tenant for life may live is uncertain, and perhaps the messuage may be repaired by him during his life: for which reasons Wyndham and Charlton were strongly of this opinion now upon the first argument, and continued afterwards of the same mind: Pemberton Chief Justice and Levinz *contra:* they said that Coke was to be understood there according to the subject matter there treated, *scil.* that he in reversion had no remedy by action of *waste;* and Pemberton held, there was no peradventure but that he in reversion may waive his action of *waste* at this day, and take his remedy by action upon the case against his lessee for years for waste done by him, 2 H. 4, 12 a. If trees upon a copyhold are cut down by a stranger, the copyholder may maintain an action of the case, and so may the lord for the same trespass, in respect of the prejudice done to his inheritance: and in Roll. 2 Abr. 551, *lit.* N. *nu.* 4, 5, this is affirmed for good law; and it is there also said, so it would be in the case of tenant for years, 10 H. 4, 3 b. *case* lies for him in reversion in respect of his inheritance for damage done to his house, 19 H. 6, 45. If a stranger enters upon my tenant for years, and builds a house upon the land, *case* lies by him in reversion, Roll. 2 Abr. *nu.* 3. Cro. El. 461, *Jeremy* versus *Lowgar.* Husband seised in fee in right of his wife made a lease for years; lessee burnt the house, and the husband brought an action upon the case; and by two Judges, all that were then in Court, the action lies; and yet it was objected, that no action of waste lies at common law in such case, because he might have secured himself against it by the covenant of the party. Besides in this case the plaintiff was not the lessor himself, but a remainder man by copy of court roll, wherein are no covenants; and if he cannot have remedy this way, he is without remedy: and as for staying 'till the wife's death, because he may repair it in the mean time, it is unreasonable; for in the mean time the plaintiff or defendant may die, and then the action itself being founded only upon a personal tort must die too. Again, as to the incertainty of the damages, and that the jury cannot assess them; the jury may as well assess or ascertain them in this case, as where a man purchases in fee, and takes a covenant against incumbrances, and an estate for life is evicted; but the other **[132]** two Judges continuing strongly in their opinions, the case was to be adjourned into the Exchequer-Chamber the last day of the term; but the Chief Justice being then sick, it was not adjourned; and I suppose the parties agreed it, for I heard no more of it.

EDWARDS *against* HAMMOND.

S. C. 2 Danvers 16, pl. 12.

[Applied, *Bromfield* v. *Crowder*, 1805, 1 B. & P. (N. R.) 325; *Doe d. Hunt* v. *Moore*, 1811, 14 East, 604. Referred to, *Phipps* v. *Williams*, 1831, 5 Sim. 63. Considered, *Phipps* v. *Ackers*, 1842, 9 Cl. & Fin. 596. Referred to, *Price* v. *Hall*, 1868, L. R. 5 Eq. 402. Explained and not applied, *Pearks* v. *Moseley*, 1880, 5 App. Cas. 721. Referred to, *Ferguson* v. *Ferguson*, 1885, 17 L. R. Ir. 559.]

Devise to A. and his heirs, if he live to 21; but if he die before 21, to another and his heirs; the condition is subsequent. 2 Show. 398. 1 Rol. Ab. 411 to 416.

2 Saunders 111, 156. 2 Leon. 38. 1 Leon. 229. Cro. El. 219, 454. 1 Lut. 797. 1 Sid. 445. Cro. Ja. 56. 2 Ld. Raym. 765. Douglas 63. Cowper 40. Prec. in Chan. 316. 1 Wilson 105. Fearne's Essay 173, 201. 1 Vesey 420.

Ejectment upon *not guilty*, and special verdict, the case was. A copyholder of land, burrough English, surrendered to the use of himself for life, and *after to the use of his eldest son and his heirs, if he live to the age of* 21 *years: provided, and upon condition, that if he die before* 21, *that then it shall remain to the surrenderer and his heirs.* The surrenderer died, the youngest son entered; and the eldest son being 17 brought an *ejectment;* and the sole question was, whether the devise to the eldest son be upon condition *precedent*, or if the condition be *subsequent? scil.* that the estate in fee shall vest immediately upon the death of the father, to be divested if he die before 21. For the defendant it was argued, that the condition was *precedent*, and that the estate should descend to the youngest son in the mean time, or at least shall be in contingency and in *abeyance* 'till the first son shall attain to one and twenty; and so the eldest son has no title now, being no more than 17. On the other side it was argued, and so agreed by the Court; that though by the first words this may seem to be a condition *precedent*, yet, taking all the words together, this was not a condition *precedent*, but a present devise to the eldest son, subject to and defeasible by this condition subsequent, *scil.* his not attaining the age of 21; and they resembled this to the case of *Spring and Cæsar* reported by Jones Justice and abridged by Roll. 1 Abr. 415, *nu.* 12. A fine to the use of B. and his heirs if C. pays him not 20s. upon Septemb. 10, and if C. does pay, to the use of B. for life, remainder to C. and his heirs, where the word *si* does not create a condition precedent, but the estate in fee vests presently in C. to be divested by payment afterwards; so here: accordingly this case was adjudged in Mich. term next following.

[133] NULMES *against* HOBLETHWAYTE.

S. C. 3 Mod. 48, 49, 50. 1 Shower 64.

Case for diverting a water-course. Carth. 84. Shower 64. 3 Mod. 41. Skin. 65. Pl. 10, 175. Pl. 5. Palmer 200. 4 Coke 87. 4 Bac. Ab. 15. 3 Term Rep. 147, 265. 4 Term Rep. 718. *Post*, 266.

Case, and declares, that the defendant *injuste & malitiose magnam partem cujusdam antiquæ molis super rivum de Darwent, fregit, divertit & prostravit & perinde magnam partem aquæ rivi ab antiquo & solito cursu suo ad molendinum* of the plaintiff *per rivum predictum divortit per quod* the plaintiff lost the profit of his mill for so long, *ad damnum* 100*l.* To this the defendant put in a plea, which was agreed *ill.* The plaintiff by replication maintains his declaration. The defendant rejoined, but ill; and the plaintiff demurred. And the sole question was upon the declaration, whether that was good? For it was objected; 1. That the mill is not shown to be ancient. 2. It is not said, that the (1) defendant had time out of mind repaired the dam, but only that it was *antiquam molem.* 3. He does not shew that the water hath time out of mind run this way; but only that the defendant had now turned it *ab antiquo & solito cursu suo;* and upon these exceptions the case hung for some time. North Chief Justice held the declaration was well enough; and Levinz inclined to the same opinion, *sed hæsitanter.* Wyndham and Charlton *contra.* Afterwards North being made Lord Keeper, being here succeeded by Pemberton Chief Justice, he also held the declaration good; and Wyndham *nunc mutata opinione* concurred; and Levinz *ut antea hæsitanter.* Charlton *totis viribus* still *contra.* Thus it hung 'till Mich. *prox. sequent'* and then judgment was given for the plaintiff: upon which error was brought immediately in B. R. where I heard the judgment was affirmed. *Vid.* 3 Mod. Rep. 48, the judgment affirmed.

(1) The defendant pleaded that he repaired the dam. *Vide* 3 Mod. 48.

[134] MICHAELMAS TERM, IN THE THIRTY-FIFTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

TRAVELL *against* CARTERET.

The King being possessed of a chattel interest in lands by an extent grants in fee, this grant is void, and the King is in possession of his former estate, and the Court holding that the debt upon which the extent issued was not pardoned by the Act of general pardon, the 12th Cha. 2, c. 11, the plaintiff could not recover. Co. Lit. 27 a. 4 Bac. Ab. 214. 17 Viner Ab. 103, pl. 22.

Ejectment upon the demise of Wolstenholme, and upon a special verdict, the case was; Sir James Bagge 10 July, 1 Car. 1, being seised of the lands in question, became collector to the new impost; and Febr. 28, 9 Car. 1, acknowledged a statute to Sir Paul Pinder for 10,000l. and Septemb. 29, 11 Car. 1, was upon account, arrear in the King's debt 22,500l. and so indebted died. After the death of Sir James Bagge, Octob. 4, 14 Car. 1, the tenements in question were extended and seised into the King's hands, *tenend' quousq;* the King should be satisfied of the said debt of 22,500l. The King being thus possessed, 23 Apr. 20 Car. 1. granted the tenements in question to Cary and his heirs in trust for Robert Bagge, the heir of Sir James. The Act of general pardon, 13 Car. 2, *pardoned all sums of money* and other things that the King could pardon, as by the fifth section of the Act appears. But in the tenth section of the Act are excepted all accounts of *receivers, collectors, &c.* who have received any subsidies, new impost, or any rents of King Charles I. the archbishops or bishops sequestered estates since the 30th day of January, 1642. And in the 11th section of the Act it is *provided*, that heirs, executors, &c. of accomptants for any thing contained in the last exception, except such sums as remain upon accounts **[135]** *already stated and determined.* In Trin. 13 Car. 2, George Bagge by fine &c. conveyed the inheritance of the premisses to Sir George Carteret; whereupon Cary the trustee also conveyed to him. In Trin. 14 Car. 2, George Bagge pleaded the pardon in the Exchequer in discharge of the said 22,500l. due to the King; and the plea was confessed by the Attorney-General, and judgment given thereupon to discharge the estate. 4 Octob. 20 Car. 2, Sir George Carteret by his *will* devised the tenements to the defendant his wife, who entered and continued till now possessed; 17 June, 30 Car. 2, Wolstenholme, executor of Pindar, sued execution of the statute, and had the tenements in question delivered to him; whereupon he demised to the plaintiff; and if for the plaintiff, for the plaintiff, and if not, for the defendant. After divers arguments in this case, the points hereafter following were resolved *per totam Curiam:* 1. By the whole Court it was agreed, *scil.* Jones Ch. Just. Wyndham, Charlton and Levinz, that the King having no more than a chattel by the extent, his grant to Cary in fee was void, the King being deceived according to 1 Co. 52 a. and the case of H. 7 there cited, and Mod. Rep. fol. 415. 2. It was resolved by all, that by the King's grant of the lands to Cary, the debt due unto the King did not pass, though the grant were good as to the lands; for though the King may grant *a chose in action*, yet that cannot be without special words; and therefore the King may still release, grant, or pardon the debt, notwithstanding the grant of the land, according to Cro. Cha. *Flower* v. *Elgar*, and *ibid.* 503-5. *Middlemore* versus *Goodale*, that a common person may release a debt or covenant, notwithstanding his assignment of the land. 3. It was agreed by all, that by the *fifth section of the Act*, debts and sums of money, though not concerning the wars, are pardoned and discharged; but as for *acts* and *actions* of subjects they are not discharged by the Act of Pardon unless they concern the war. 4. It was resolved that by the *exception* of *accounts*, the sum or sums due upon accounts *stated* is not an *account*, nor within the words *merchants accompts* in stat. 21 Jac. 1, of Limitations, as has been resolved; yet here *sum stated* is within the exception of *accounts* in this statute: and this appears by the 11th section, that heirs, executors, &c. shall not be charged for accounts, but **[136]** only *accounts stated.* The fifth point was, whether in this case the *account stated* and the sum due upon balance be pardoned or excepted? Which doubt grew from the words in the end of the tenth *section, scilicet* after the 30th of January, 1642; and here the money was and

received and the account stated before 1642, *scil.* in October, 14 Car. 1, which was in 1638. But notwithstanding this, Jones, Wyndham and Charlton held this to be excepted, and not pardoned; and they divided the tenth section in such manner, as that the words (after Jan. 30, 1642) should refer only to the words, *or any of the rents, &c. of any of the late King, &c.* and so the first part of this section they would have to be taken absolutely, *scil.* concerning accounts, &c. without limitation or stint of time: and this they held reasonable for two causes; 1. Because at the time, *scil.* 1642, the usurpers began their sequestration of rents belonging to the King, the archbishops, and bishops, &c. 2. The section itself consists of several distinctions, and the words, *or since the 30th of January*, 1642, shall be referred only to the last, which concerns the King's rents, the archbishops and bishops, received after the said 30th of January, 1642. But Levinz held, that the words, *since* 1642, should be referred to all the disjunctives before in the same *section*, and that it should be taken *literally*, and that to take it any otherwise is but to make an uncertain and doubtful construction. And by the eighth section of this Act it is enacted that the Act in all points shall be taken most beneficially for the subject, whereas by this construction of a matter doubtful the Act is taken most beneficially for the King. But by the other three justices it was resolved, that this *stated debt* was not pardoned by the Act; and so notwithstanding the allowance and discharge thereof in the Exchequer, which is always with a *salvo jure* to the King, *si, &c.* the debt remains due to the King, and the land continues in him by the extent and seisure, and was not conveyed to Cary; and then although the defendant hath no title, yet forasmuch as the plaintiff hath none neither, but the title is in the King, judgment ought to be given for the defendant; and so it was accordingly.

[137] SNELL *against* BISHOP.

You were Bishop's whore before he married you; suable in Spiritual Court. *Ante*, 119.

A prohibition was prayed to the Spiritual Court to stay a suit there for these words, *You were Bishop's whore before he married you;* suggesting, that the plaintiff in the Spiritual Court gave him provoking words; *scil. You are a rogue and a rascal, not fit to be drunk with;* and cited Roll. Prohib. 295, & *ibid.* 277, cases of this kind. But the *prohibition* was denied; for this sounds only in mitigation of damages at common law, and not in bar of the action.

STANLEY *against* FEARNE.

Obligation conditioned to account or render himself to prison; the obligor hath election. Condition to render himself 28 Nov. upon any action commenced does not oblige him to render to an action commenced after. 2 Jo. 95. Lutw. 688, 689. Poph. 98. Cro. El. 396, 398, 864. 5 Cok. 22. 6 Mod. 357, 615. Nel. Lut. 214, 215. *Ante* 21, 74. 2 Danv. 78, pl. 1. 2 Mod. 201. Cro. El. 396, 539, 718.

Debt upon obligation, conditioned; *if the defendant shall give the plaintiff a true account of all sums of money by him received as bailiff of his manor by the 28th day of November then next ensuing, or otherwise render his body to prison at the plaintiff's suit in any action he shall then commence against him;* the obligation to be void. The defendant pleaded, always *paratus* to render an account; but farther, that the plaintiff *ad vel ante* 28 *Nov. predict'* had not commenced any action wherein he could render himself to prison: the plaintiff replied that 300l. were due to him upon account, and that thereupon the plaintiff after the said 28th of November, *scil.* April 12, afterwards sued out an original in *account*, and for want of appearance thereto by the defendant sued out a *capias* likewise, whereof he gave the defendant notice, and required him to render himself according to the *condition aforesaid; quod facere* the defendant *neglexit & non curavit:* hereupon the defendant demurred; and after two arguments at Bar on both sides, judgment was given *per totam Curiam* for the defendant. For 1. The defendant, who is to do the act, hath election either **[138]** to give the plaintiff a true account, or render himself upon an action commenced. Secondly, The breach is not well assigned in the replication; for the defendant is not obliged to render himself to an action that is not sued 28 Novemb. for the words *then commenced*

in the condition, is not to be taken or construed *then, or at any time thenceforth;* that would be to give the plaintiff a liberty of commencing his suit at any time during his life: and conditions are always for the advantage and in favour of the obligor, not of the obligee; wherefore judgment was given for the defendant.

GILBY *against* COPLEY.

Deeds, whether indented or not, made between *parties*, are suable and releasable by the parties only, and not by strangers, though made to the use of strangers. *Quære?* 1 Levinz. 235.

Debt, and declares that the defendant *per quoddam factum suum promisisset solvere* 210*l.* upon the 16th of June next following for 448 sheep to the plaintiff, as executor of his father *spectan' ac vendit'* to the Defendant by Thomas Wawen *ex parte* of the plaintiff, *prout per scriptum predict' apparet*, and that he had not paid. The defendant craved oyer of the indenture, which was entered *in hæc verba: articles of agreement made between Thomas Wawen, who is fully authorized on the behalf of Elizabeth Gilby*, (the plaintiff) *executrix to her father; as also on the behalf of William Savile, who is trustee on behalf of the children of the plaintiff's father on the one part; and Lionel Copley* (*the defendant*) *on the other part*, 16 *May*, 1682. *Imprimis Thomas Wawen covenants for the consideration after mentioned, that the defendant shall enjoy the close called the Sunke, for eight years from Lady-Day last past, the lessors to be at the charge of repairing the banks. Item, the said Thomas Wawen hath sold to the said Lionel Copley* 448 *sheep belonging to the said Elizabeth Gilby, as executrix to her father, being now upon the Sunke. In consideration whereof the said Lionel Copley hath paid in hand one shilling to the said Wawen, and doth covenant to pay* 70*l. rent for the Sunke for the first year, and for the second year* 100*l. at two equal payments, and the lessors shall have liberty to imbank the Sunke; and the said Elizabeth may sell the bricks, unless she agree to sell* **[139]** *them to Copley. And further, the said Lionel Copley doth promise* (not said to whom) *to pay to Elizabeth Gilby* 210*l. for the said* 448 *sheep on the* 16*th of June next following.* The defendant demurs upon the declaration. And now it was argued by Pemberton, Serjeant, for the defendant, that the action ought to be brought in the name of Wawen, and not in the name of Elizabeth Gilby; for the articles being made *inter* parties, and she no party, she cannot sue for, nor release any thing which is in the articles, as she might if the deed were *poll*, or not between the parties; and cited Co. 2 Instit. 673, *Scudamer's case*. Serjeant Bigland argued *contra:* The contract being on the behalf only of Elizabeth Gilby, as to the sale of the sheep, and the promise being general, and not to any person certain, she *pro cujus beneficio* it was made may sue upon it: he cited *Dutton and Pool's case* lately adjudged in B. R. where the son promised the father to pay 1000*l.* to the sister in consideration the father promised to forbear selling certain timber growing upon the land; and though the action was brought by the sister, it was held well brought *per totam Curiam;* of which opinion were Jones and Charlton now upon the first argument, and Wyndham also inclined to concur with them, the bargain being made on the behalf and for the benefit of Elizabeth, she might bring the action, and the deed not being *indented* shall be no impediment or *estoppel*. Levinz Just. *contra:* He said, that the indenting or not indenting of the deed is not material, but the matter is his being *party*, or not *party;* for it is common erudition, that one not party to a deed made *inter partes* cannot take by the deed, unless by way of *remainder;* and he cited a case *inter Cooker and Child* adjudged by Hale and *totam Curiam*, Hill. 24, 25 Car. 2, B. R. *sed intrat.* Trin. 24, Rot. 663, where an action is brought upon a *charter-party*, which was in this manner: *This indented charter-party witnesseth that Binly master and part-owner of the ship, with consent of Cooker the other part-owner hath let the ship to Child for such a voyage, and Child covenants with Binly necnon with Cooker to pay* 300*l.* Cooker brings the action, and the defendant Child pleads, that only he and Binly were the parties to and sealed the indenture; whereupon the plaintiff demurred, and *per totam Curiam;* though the deed be *indented*, yet not being *inter partes*, there may be a **[140]** covenant with a stranger, as if it were a deed *poll*, or in the *first* person: *Know ye, that I, &c.* Otherwise where the deed is between parties, then no one that is a stranger can take advantage thereof by way of

action; and in this case the authority of Co. 2 Inst. was cited at Bar by Sir William Jones, and affirmed *per totam Curiam* to be good law. Farther, the deed here could not be made in execution barely of an *authority;* for then it must have been made, sealed, and subscribed in the name of the principal: and as to the case of *Dutton and Poole*, that was an *assumpsit* upon a verbal promise, not founded as this is upon a *deed:* he also cited the case of *Offly and Ward* in B. R. Hill. 19 & 20 Car. 2, debt by A. upon a single bill made to A. by the defendant to the use of A. & B. A. brought the action, whereunto the defendant pleaded a release by B. and it was adjudged no bar; for he being a stranger to the bill cannot release it, though made to his use; and the book of Edw. 4, which says, that if a bill or bond be made to A. to the use of B. that B. may maintain an action upon it was denied for law. But Cro. Eliz. 729, *Shaw* versus *Sherwood* was allowed to be good law: that case was, a bill sealed in this manner; *Received of A. to the use of B. and C. equally to be divided, to be repaid at such time as shall be most for the profit of B. and C.* each may sue for his 20l. for the deed is not made to either. But if this had been an obligation to A. for the payment of 20l. apiece to B. and C. neither of them could have sued for it, but the suit must be in the name of A. which said case was affirmed upon a writ of *error*, as appears in Yelv. 23. But in the principal case *Curia advisare vult;* and I suppose the parties agreed, for I never heard more on it.

[141] JONES *against* MOLDRIN.

Judgment in Inferior Courts cannot be pleaded without shewing by what authority the Court is held. Cro. El. 489. Cro. Ja. 184, 493. 2 Ld. Ray. 1310. *Post*, 234, 243. Cowper, 21. 1 Salk. 265. 1 Term Rep. 151.

Debt upon an obligation against an executor, who pleads, *quod in Cur' dom' Regis de recordo tent' quarto die Novemb. Anno regni domini Regis nunc tricesimo quarto apud Guildhall' civitat' Norwich coram A. & B. Vicecom' ejusdem civitat'* one Lilly brought debt against him upon an obligation for 500l. and recovered, and pleaded *plene administravit, præter ad valenc', &c. quæ non sufficiunt* to satisfy the said 500l. Hereupon the plaintiff demurred, and now upon the first argument judgment was given *per totam Curiam* for the plaintiff, for that the defendant does not show by what authority the Court was held, *scil.* by prescription, grant, or otherwise, according to the resolution in *Turner's case*, 8 Co. 264.

TRINITY, 35 CHARLES II.

FREEMAN *against* BOOTH.

Declaration in Replevin. Cognizance.

Gloucester, to wit.—Edward Booth was summoned to answer Timothy Freeman of a plea whereof he took the cattle of the said Timothy, and them unjustly detained against gages and pledges, &c. And whereupon the said Timothy by Stephen Baldwin his attorney complains that the said Edward, on the 9th day of November, in the 34th year of the reign of the lord the now King, at Prescot, in a certain place there called Viccaridge, took the cattle, to wit, two cows of the said Timothy, and them unjustly detained against gages and pledges until, &c. whereupon he saith that he is prejudiced, and hath sustained damage to the value of 50l. and therefore he produces his suit, &c.

And the said Edward by Thomas Harris his attorney comes and defends the force and injury when, &c. And as the bailiff of Thomas Meeres Knight well acknowledges the taking of the cattle aforesaid **[142]** in the said place in which, &c. and justly, &c. because he saith that the said place in which the taking of the cattle aforesaid is supposed to be committed contains, and at the said time in which the taking of the cattle aforesaid is supposed to be committed did contain in itself ten acres of land with the appurtenances in Prescot aforesaid, and that long before the said time in which the taking of the cattle aforesaid is supposed to be committed, George Lord Coventry Baron of Aylesborough was seized of one messuage, forty acres of land, ten acres of meadow, and twenty acres of pasture, with the appurtenances, in Prescot

aforesaid, whereof the said place in which, &c. and also from the time whereof the memory of man is not to the contrary, was parcel; in his demesne as of fee; and then held of the said Thomas as of his manor of Prescot in the county aforesaid by fealty, and by the rent of three pounds, eight shillings and eight pence yearly, to be paid by equal portions every year at the Feasts of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, and also by the service of doing suit at the court of the said Thomas of his manor aforesaid, to be held from three weeks to three weeks at the manor aforesaid, of which services the said Thomas was seized by the hands of the said George Lord Coventry as by the hands of his very tenant, to wit, of the fealty and suit of the Court aforesaid as of fee, and of the rent aforesaid in his demesne as of fee, and the said George Lord Coventry of the said tenements with the appurtenances being seized as aforesaid, he the said George Lord Coventry afterwards and before the time in which, &c. at Prescot aforesaid died, seized of such his estate therein after the death of which George Lord Coventry, the tenements aforesaid with the appurtenances whereof, &c. descended to John now Lord Coventry as the son and heir of the said George Lord Coventry, whereby the said John Lord Coventry before the said time in which, &c. entered and was and as yet is seized thereof in his demesne as of fee, and because three pounds, eight shillings and eight pence of the rent aforesaid for one whole year ended at the Feast of St. Michael the Archangel, in the 34th year of the reign of the said lord the now King, and other three pounds, eight shillings and eight pence for the relief of the said John Lord Coventry after the death of the said George Lord Coventry to the said Thomas Meeres at the said time in which, &c. were in arrear and unpaid, he **[143]** the said Edward, as the bailiff of the said Thomas Meeres, as well for the said three pounds, eight shillings and eight pence for the rent aforesaid so being in arrear, as for the said three pounds, eight shillings and eight pence for the relief of the said John Lord Coventry so being in arrear, well acknowledges the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. as being parcel of the tenements aforesaid with the appurtenances of the said Thomas Meeres in the form aforesaid held and being within his fee and seignory.

And the said Timothy saith that the said Edward as the bailiff of the said Thomas Meeres by reason of any thing before alledged ought not to acknowledge the taking of the cattle aforesaid in the said place in which, &c. to be just: because as to three pounds, eight shillings and eight pence of the rent aforesaid upon the said Feast of St. Michael the Archangel being in arrear, he saith that he the said Timothy in and upon the Feast of St. Michael the Archangel, in the 34th year aforesaid, upon the said ten acres of land with the appurtenances in which, &c. was ready and offered to pay to the said Thomas Meeres the said rent of three pounds, eight shillings and eight pence payable at the said feast, and that he the said Thomas Meeres, or any other on his behalf, was not ready there to receive the said three pounds, eight shillings and eight pence from the said Timothy, and that he the said Timothy afterwards and before the taking of the cattle aforesaid, to wit, upon the said 9th day of November, at Prescot aforesaid, was ready and offered to pay to the said Thomas the said three pounds, eight shillings and eight pence, but the same to receive the said Thomas then and there totally refused, and this he is ready to verify, &c. and as to the said other three pounds, eight shillings and eight pence for the relief after the death of the said George Lord Coventry supposed to be in arrear, the said Timothy saith that the cognizance of the said Edward is not sufficient in law to maintain him the said Edward to acknowledge the taking of the cattle aforesaid in the said place in which, &c. to be just, and that he to the said cognizance in the manner and form aforesaid made hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient cognizance in this behalf, the said Timothy prays judgment and his damages by occasion of the taking and unjust detention of his cattle aforesaid to be adjudged to him, &c. And for cause of **[144]** demurrer in law in this behalf, the said Timothy according to the form of the statute in such case made and provided shews the following cause, to wit, that it doth not appear by the plea and cognizance of the said Edward, that the said Thomas Meeres hath any title to have relief for the tenements in the plea and cognizance aforesaid mentioned, and that the said plea and cognizance is uncertain and wants form, &c.

And the said Edward as to the said plea of the said Timothy as to the said three

pounds, eight shillings and eight pence, for the rent aforesaid being in arrear upon the said Feast of St. Michael the Archangel, saith that the said Thomas Meeres always was ready to receive the said three pounds, eight shillings and eight pence from the said Timothy; without this that the said Timothy before the taking of the cattle aforesaid, offered to pay the said rent of three pounds, eight shillings and eight pence to the said Thomas Meeres, as the said Timothy in bar of the cognizance aforesaid hath alledged, and this he is ready to verify; wherefore he prays judgment and a return of the cattle aforesaid, together with his damages, &c. And as to the said plea of the said Timothy as to the said other three pounds, eight shillings and eight pence for the relief being in arrear after the death of the said George Lord Coventry, the said Edward, because that he above hath alledged sufficient matter in law in his cognizance aforesaid to maintain him the said Edward as the bailiff of the said Thomas Meeres, to acknowledge the taking of the cattle aforesaid in the said place in which, &c. for the said three pounds, eight shillings and eight pence for the relief aforesaid being in arrear, to be just, which he is ready to verify, which matter the said Timothy doth not deny nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, prays judgment and a return of the cattle aforesaid together with his damages, &c. to him to be adjudged, &c.

And the said Timothy as to the said plea of the said Edward above by replying pleaded, as to the said three pounds, eight shillings and eight pence for the rent aforesaid, as aforesaid supposed to be in arrear, as before saith that the said Timothy before the taking of the cattle aforesaid, offered the said rent of three pounds, eight shillings and eight pence to the said Thomas Meeres, as the said Timothy above in bar of the cognizance aforesaid hath alledged, and he prays that this **[145]** may be enquired of by the country; and the said Edward doth the like. Therefore as to the trial of the said issue, the sheriff is commanded that he cause to come here from the day of the Holy Trinity in three weeks, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. And as to the said three pounds, eight shillings and eight pence for the relief aforesaid, above supposed to be in arrear, because the justices here will advise themselves of and upon the premises before they give their judgment thereupon, day is given to the parties aforesaid here from the day of St. Michael in three weeks, to hear their judgment thereupon, because that the said justices here thereupon not as yet, &c.

FREEMAN *against* BOOTH.

Avowry for relief upon tenure by socage, without special title to the relief, held good, for it is a flower incident to the tenure. Littleton, § 112. Co. Lit. 83 a. and note 1, 2, 3, & 4. Co. Lit. 76 a. Com. Dig. Copyhold K. 11, Pleader, 3 K. 17.

Replevin. The defendant made conusance as bailiff to Sir Thomas Meeres, for that George Lord Coventry held the *place where, &c.* of Sir Thomas Meeres *ut de manerio suo de Prescot per fidelitat' reddit' trium librarum octo solid' & sectam Curiæ;* of which services he was seised by the hands of the said George Lord Coventry, and that he died, and the tenements descended to John now Lord Coventry, and for 3l. 8s. and 8d. *pro relevio pred. Johan' Coventry post mortem pred' Georgii* he makes conusance. The plaintiff demurred specially, *quia non apparet* that Sir Thomas had any title to the relief. The defendant joined in demurrer; and upon argument at Bar it was now resolved *per totam Curiam*, that it need not, for relief, though it is not a parcel of the tenure, is a *flower* incident to every tenure in soccage; and though it may be released, as it was objected, or there may upon the tenure be a special reservation without relief, yet such matter shall not be intended, but must be shown of the other part, because of common right it is incident, though separated by release or special reservation, as Co. 2 Inst. 232; *sed ad ea quæ frequentius accidunt jura adaptantur.* And judgment was given for the conusant.

[146] HEATH *against* VERMEDEN.

In debt for rent upon an indenture, *nil habuit in tenementis, &c.* no plea. Co. Lit. 352 a. Com. Dig. Estoppel, E. 8, 9, 10. 1 Salk. 277. 2 Ld. Ray. 1154, 1550. 1 Term Rep. 95. *Post*, 193. 6 Term Rep. 63.

Debt for rent reserved upon a lease indented. Defendant pleads *nil habuit in tenementis tempore dimissionis prædict'*. The plaintiff demurred generally; and now upon first arguing it was adjudged for the plaintiff *per totam Cur'*; for this is no plea against an estoppel by indenture.(1)

EASTER 35TH CHARLES II.

JOHNSON *against* MAY.

Declaration *in assumpsit* for use and occupation. 1st. Count upon an express promise.

York, to wit.—John May, late of Preston, in the said county, yeoman, was attached to answer Richard Johnson, gent. of a plea of trespass upon the case, &c. And whereupon the said Richard, by William Freeman his attorney, complains that whereas the said John and Frances his wife, on the 10th day of August, in the 33d year of the reign of the lord the now King, at Preston aforesaid, had sold, and afterwards, to wit, on the said 10th day of August, in the 33d year aforesaid, at Preston aforesaid, before the deputy steward of the court of the manor of Bursowick, had surrendered into the hands of the then lord of the manor aforesaid, part of one messuage and one boone, to the said part of the messuage belonging, then in the occupation of the said John, and Frances his wife, in Preston aforesaid, of the annual rent to the lord of the manor aforesaid of sixteen-pence, to the use and behoof of the said Richard, his heirs and assigns, without impeachment of waste, according to the custom of the manor aforesaid for ever. She the said Frances, then and there alone and in secret being examined and confessed before the deputy steward aforesaid. And which surrender afterwards at the court of the said manor, held the said 10th day of August, in the 33d year of the **[147]** reign of the said lord the now King aforesaid, at B. aforesaid, was presented. And the said Richard then and there was admitted tenant to the said part of the said messuage, and to the said boone. And whereas the said Richard by reason thereof, afterwards had and claimed right and interest in the said part of the messuage and boone aforesaid, and the said Richard so having and claiming the said right and interest in the said part of the messuage and boone aforesaid; the said John afterwards, to wit, on the said 10th day of August, in the 33d year of the reign of the said lord the now King aforesaid, at Preston aforesaid, in consideration that he the said Richard, at the special instance and request of the said John, would permit him the said John to occupy and possess the said part of the messuage aforesaid, and the boone aforesaid, until the first day of May from that time next ensuing, upon himself assumed, and to the said Richard faithfully promised, that he the said John fifty shillings, of the lawful money of England, to him the said Richard, upon the said first day of May well and faithfully would pay and content; and the said Richard in fact saith, that he the Richard, confiding in the said promise and assumption, at the said special instance and request of the said John, did permit him the said John to occupy and possess the said part of the said messuage, and the boone aforesaid, for the term aforesaid. And whereas also, the said John and Frances his wife, on the 10th day of August, in the 33d year aforesaid, at Preston aforesaid, before the deputy steward of the court of the manor of B. aforesaid, had surrendered into the hands of the then lord of the manor aforesaid, a certain other part of a messuage, and one other boone to the said part of the messuage last mentioned belonging, then in the occupation of the said John and Frances his wife, in Preston aforesaid, of the annual rent to the lord of the said manor, of sixteen pence, to the use and behoof of the said

(1) But if there be a demise by indenture and the tenant plead *nil habuit, &c.* and the plaintiff will not rely upon the estoppel, but plead *habuit, &c.* he waives the estoppel and the jury shall find the truth. 1 Salk. 277.

Richard, his heirs and assigns, without impeachment of waste, according to the custom of the manor aforesaid, for ever. She the said Frances, then and there alone, and in secret being examined and confessed before the deputy steward aforesaid; and which surrender afterwards, to wit, at the court of the said manor, held the said 10th day of August, in the 33d year aforesaid, at B. aforesaid was presented; and the said Richard then and there was admitted tenant to the said part of the messuage [148] aforesaid last mentioned, and to the said boone last mentioned; and whereas the said Richard by the reason thereof, afterwards had and claimed right and interest in the said part of the messuage, and boone aforesaid, last mentioned; and the said Richard, so having and claiming the right and interest in the said part of the messuage and boone last mentioned; the said John afterwards, to wit, on the said 10th day of August, in the 33d year aforesaid, at Preston aforesaid, in consideration that he the said Richard, at the special instance and request of the said John, would permit him the said John to occupy and possess the said parcel of the messuage, and the boone aforesaid last mentioned, as long as the said John should please; the said John afterwards, to wit, upon the said 10th day of August, in the 33d year aforesaid, at Preston aforesaid, upon himself assumed, and to the said Richard, then and there faithfully promised, that he the said John so much money as the said Richard therefore from the said John reasonably deserved to have to the said Richard, when thereto he should be requested would well and faithfully pay and content. And the said Richard in fact saith, that he the said Richard confiding in the promise and assumption to the said Richard last made as aforesaid, at the said special instance and request of the said John last mentioned, did permit him the said John to occupy and possess the said part of the messuage aforesaid, and the boone aforesaid last mentioned, as long as the said John would please, to wit from the said 10th day of August, in the 33d year aforesaid, until the 1st day of May from that time next ensuing; and further the said Richard, in fact saith, that he the said Richard, therefore from the said John, reasonably deserved to have one hundred shillings, of the lawful money of England; nevertheless the said John, his several promises and assumptions aforesaid to the said Richard in the form aforesaid made, not regarding, but contriving and fraudulently intending the said Richard in this behalf, craftily and subtilly to deceive and defraud, the said several sums of money, in the whole amounting to seven pounds, ten shillings to the said Richard, according to his several promises and assumptions aforesaid, as yet hath not paid, or in any wise contented; although to do this the said John afterwards, to wit, upon the 10th day of June, in the 34th year of the reign of the said lord the now King, at Preston aforesaid, by the said Richard was requested, but the same hitherto to him to pay or [149] content altogether hath refused, and still doth refuse, to the damage of the said Richard of 20l. and therefore he produces his suit, &c.

And the said John, by John Robinson his attorney comes and defends the force and injury, when, &c. and as to the last promise and assumption aforesaid, in the declaration aforesaid, above specified, the said John May saith, that he did not assume upon himself in manner and form as the said Richard above complains against him, and of this he puts himself upon the country, and the said Richard doth the like. And as to the first promise and assumption aforesaid, in the declaration aforesaid above specified, the said John May saith, that the matter in the declaration aforesaid, above specified, is not sufficient in law to maintain him the said Richard to have his action aforesaid against him the said John, and that he to the said matter in the manner and form aforesaid declared hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of sufficient matter in the said declaration specified, as to the said first promise and assumption aforesaid, the said John May prays judgment, and that the said Richard may be precluded from having his action aforesaid against him.

And the said Richard, because that he above hath declared sufficient matter in law in his declaration aforesaid to maintain him to have his action aforesaid, as to the first promise and assumption aforesaid against him the said John, which he is ready to verify; which matter the said John doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, prays judgment and his damages by occasion of the non performance of the said first promise and

assumption, to be adjudged to him, &c. And because the justices here will advise themselves of and upon the premises, whereof the parties aforesaid, above have put themselves upon the judgment of the Court before that they give their judgment thereupon, day is given to the parties aforesaid here, until the morrow of the Holy Trinity to hear their judgment, because that the said justices here thereupon, not as yet, &c. And as to the trial of the issue aforesaid, between the parties aforesaid, above joined by the country to be tried, the sheriff is commanded that he cause to come here at the said term, twelve, &c.

[150] JOHNSON *against* MAY.

Assumpsit for money for enjoyment of land lies upon a special promise. 1 Lev. 179. 1 Sid. 150, 279, 323. 2 Keble 8. 1 Danvers 29, 7, 31. 3 Mod. 73. Hardress 336. 1 Term Rep. 178.

Assumpsit, in consideration the defendant having surrendered a copyhold estate, and a boone *adinde spectan'* to the plaintiff, which the plaintiff should permit the defendant to enjoy from the 10th of Aug. *anno* 33 *Regis nunc* till the first of May next following, that he promised to pay the plaintiff 50s. and shews, that he permitted, and the defendant had not paid the 50s. Also he declares upon a *quantum meruit* for the same. As to the *quantum meruit*, the defendant pleaded *non assumpsit;* and as to the other part demurs. The case was argued in Trin. term, when Pemberton was Chief Justice, and now again this term, Jones being Ch. Justice. For the defendant it was urged that here is a term for years, and a rent reserved, for which debt lies and not this action; for which was cited 1 Roll. Abr. 7, divers cases to this purpose; Cro. Cha. 343, *Brett and Read*, and 2 Lev. 204, *Chapman* vers. *Southwick*, 1 Sid. 279, *Norton* vers. *Grobhamhow*, 1 Roll. Abr. 9, and that Hale Chief-Justice was always of this opinion. On the other side for the plaintiff were cited Cro. Eliz. 118, *Hunt* versus *Sone*, Cro. Ja. 598, *Dartnall* versus *Morgan*, Cro. Cha. 114, *Acton* versus *Simon*, and *Mansell's case* cited in *Brett and Read's case*, Litt. Rep. 68, *Wentworth* versus *Abraham*. Cro. Eliz. 859, *Clerk* versus *Palludy*. And because this had been *vexata quæstio*, the Court took time to deliver their opinions; and accordingly it was so done by all the four justices, who all agreed that the action lay. For 1. An express promise shall be intended, and not a bare promise in law arising upon the contract, which all agree will not lie; and if *non assumpsit* had been pleaded, there must have been proof of an *express* promise. 2. There being an express promise it is collateral, and *quasi* a special agreement to pay the rent, of the same effect as an express covenant in a lease by deed. And as to the objection, *non constat* what a boon is, and therefore neither debt, nor *assumpsit*, nor *ejectment* will lie upon a lease thereof, it was answered, that be it what it will, it is belonging to the land, and that will support an action of debt, as where there is a lease of land and the stock of sheep. And judgment was given for the plaintiff.(1)

[151] HILARY TERM, IN THE THIRTY-FIFTH AND THIRTY-SIXTH YEARS OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

SANDERS *against* TOOTHE.

Plea upon stat. 30 Car. 2, for discharging of poor prisoners. *Post*, 190.

Debt upon an obligation dated 5 May, 31 Car. 2. The defendant confessed the action *quoad terras, tenementa, & bona & catalla, wearing apparel, &c.* excepted; but

(1) By the Irish Act 23 & 24 Geo. 3, c. 46, s. 8, it is enacted, that it shall be lawful for all landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, &c. in an action on the case for use and occupation; and if on evidence on the trial of such action any parol demise, or any agreement not being by deed whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof in evidence of the quantum of damages to be recovered.—The corresponding British Act is the 11 Geo. 2, c. 19.

pleads stat. 30 Car. 2, for relief of poor prisoners, which enacts, that all persons in prison, 29 May 30 Car. 2, for *debt, damages, account, trespass upon the case*, that have taken the oaths in the Act mentioned, shall be discharged *secundum priorem actum inde fact'*, from imprisonment, and any debt &c. contracted before their *discharge*, giving notice to the creditors according to the statute, and that he was in prison the said 29th of May, and sued a certificate, and gave notice according to the statute, and was discharged Octob. 18, 31 Car. 2. Hereupon the plaintiff demurred: and 1. It was objected, that the debt was not within the statute, for it was not a debt at the time of stat. 30 Car. 2, but after, *scil.* 5 May 31. *Sed non allocatur*, for it was a debt before the discharge, and the statute discharges him of all debts, &c. contracted before the discharge. 2. The plea does not set forth why he was imprisoned; and it may be for a fine to the King, or some other thing, which the statute does not extend to; for the statute is not general to discharge all imprisonments, let the causes be what they will, but only where it was for the particulars in the Act mentioned; and it was said, that the defendant was never actually a prisoner, but obtained a certificate **[152]** fraudulently. The Court held this exception to the cause or matter for which he was imprisoned very material; but being assured by his affirmation that he was in prison the 29th of May, and for debt only, the Court gave him time to satisfy them herein, intending if they were satisfied to give him leave to amend his plea. *Similis materia Trin.* 36, *inter Houghton and Shelcross. Post*, 190.

DELVES *against* FENSHAW.

Bail plead render, &c. *& hoc paratus est verificare. Post*, 311. 5 Mod. 8. *This is but a cause of special demurrer—by the British stat.* 4 *&* 5 *Anne, c.* 16, *and the Irish stat.* 6 *Anne, c.* 10.

Scire facias against the bail. They pleaded, that after the second *scire facias*, and before return, the principal *reddidit se in exoneration' manucaptorum, & hoc paratus est verificare.* The plaintiff demurred and had judgment, because he concluded not with *prout patet per recordem.*

RESCOUS *against* WILLIAMS.

One that lays a wager, when to be admitted a witness. *Vide ante* 118. 3 Term Rep. 31.

Assumpsit for 20l. had and received to his use, upon *non assumpsit* was tried by Nisi Prius before Jones Ch. Justice; and the case was: the plaintiff and one Ball were to play a fencing prize with several weapons, and the stakes, being 10l. apiece, were deposited in the defendant's hands, the *winner* to take all. The plaintiff having won brought this action against the defendant, who kept the stakes. The defendant produced one Bond a witness to prove that the plaintiff did not win. The plaintiff excepted against him, that he had laid a wager of 10l. with one Hicks, that THE DEFENDANT would win the prize. To this it was answered, that Hicks had acknowledged the wager *lost*, and had paid the money. Whereupon the plaintiff demurred; and now the whole matter being returned upon the *postea*, it was argued by George Strode for the plaintiff, that he who thus bets a wager cannot be a witness for the party on **[153]** whose side he lays. 2. That he is not to be admitted as evidence, though he confess the loss of the wager, and actually pay it; for if this trial should go contrary to his confession and payment, he may recover his money back again. Jones Chief Justice held, that laying a wager, or being a better, did not destroy the testimony of the witness, but went only to the credit of it. But the other three Judges *contra:* it is constant practice to set aside and not suffer bettors to be witnesses. But here, for as much as the party hath confessed the loss of his wager, and paid it, it shall be intended to be duly paid, and therefore he ought to have been admitted a witness; and because he was not admitted, judgment was given for the defendant.

HOLLAND *against* HELWIS.

Award to pay *in vel ad domum* of a stranger. 2 Lev. 6. 1 Salk. 74. Kyd on Awards 126.

Debt upon obligation, conditioned to perform an award. The defendant pleaded no award. The plaintiff replied, and set forth an award, that in or at the *mansion* of J. S. in College-Street in Bury the defendant should pay the plaintiff so much. The defendant demurred, and judgment was given for the plaintiff; for although J. S. be a stranger, the words being only to pay *in or at the house, &c.* he may go to the door of the house, and there pay it without being a trespasser, if he cannot prevail upon J. S. to give him leave to pay the money *in* the house.

[154] EASTER TERM, IN THE THIRTY-SIXTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

BEELY *against* PARRY.

Tenant for years makes a lease for part of the term with covenants, and then grants his reversion; whether the covenants pass to the grantee, or remain with the grantor?

Covenant, and declares of a lease made by him to the defendant, November 1, 29 Car. 2, for sixteen years; and that the defendant covenanted not to build upon a certain parcel of the ground demised to him; and assigns for breach his building upon the said parcel. The defendant pleads, that the plaintiff was possessed by virtue of a term for more than thirty years, made to him by the Mayor and Commonalty of London, and being so possessed demised to the defendant; and that after, but before the breach assigned, the plaintiff granted the reversion to J. S. to which grant he the defendant attorned: hereupon the plaintiff demurred generally; and the points intended were, 1. Whether the covenant pass by the grant of the reversion to the grantee; for then the action will not lie for the grantor, in whose name it is brought? or whether the covenant remain not with the assignor, and a right of action to sue thereupon only passes to the grantee by assignment, by virtue of the statute of Hen. 8, which is only in the affirmative, *scil.* that the grantee shall have an action upon the covenants; for if so, an action may be brought either by the assignor with whom the covenant remains, or by the assignee, to whom an action is given by the statute? But that both could not, was agreed; for a recovery by one shall bar the other, and the assignee shall not be *twice* charged: and it was said, that this being an *express* covenant, the party, to whom it is made, **[155]** may sue thereupon after assignment, as *Batchelor and Gage's case*, Cro. Car. 188, and *Middlemore and Goodale's case*, Cro. Car. 503. 2. Whether this covenant be not transferred with the land by the assignment at common law, as appurtenant to the estate, it being a covenant concerning the estate; and for this was cited a case between *Harper and Burroughs*, Mich. 29 Car. 2, 2 Lev. 206, where in covenant for non-payment of rent in the name of the grantee the Court would intend the action brought upon the *reddendum*, which is a covenant in law, and by the grant passes with the estate to the grantee at common law; and it was said that it would be inconvenient if such a covenant remained in the grantor after assignment, for then after assignment he may release it, as it was done in *Middlemore and Goodale's case*. For the defendant it was said, that though the words of the statute of Hen. 8, are *affirmative* only, that the grantee shall have an action upon the covenant, yet this in reason ought to imply a *negative*, that the granter shall not have an action thereupon; and not to subject the lessee to two actions by the assignment. But the Court delivered no opinion as to these points, because the assignment of the reversion being not pleaded to be by *deed*, it was void for that reason, notwithstanding the *attornment*. For this reason judgment was given for the plaintiff without regard to the other matters.(1)

(1) *Quære de hoc.*—For a term for years may be created and assigned by writing without deeds.—*Vide* the Statute of Frauds and Perjuries, and 2 Wilson 27, 49, and may

[156] HILARY 34 AND 35 CHARLES II.

THE MAYOR AND COMMONALTY OF LINN REGIS *against* TAYLOR.

Declaration. In trespass, *quare clausum fregerunt, &c.*

Norfolk, to wit.—James Taylor, late of Linn-Regis in the county aforesaid, labourer, John Julian, late of Linn-Regis, in the county aforesaid, labourer, Robert Pynner, late of Linn-Regis, in the county aforesaid, labourer, John Wilson, late of Linn-Regis, in the county aforesaid, labourer, and Ezekiel Goddard, late of Linn-Regis, in the county aforesaid, grocer, were attached to answer the Mayor and Burgesses of Linn-Regis, commonly called King's Linn, in the county aforesaid, of a plea wherefore with force and arms, the close of them the said mayor and burgesses at Linn-Regis they broke, and dug in their soil there, and the gravel cast thereout to the value of forty shillings, took and carried away, and other wrongs to them did, to the great damage of the said mayor and burgesses, and against the peace of the lord the now King, &c. And whereupon they the said mayor and burgesses, by Charles Turner and Edward Rolfe their attornies, complain that the said John, George, Robert, John and Ezekiel, on the 10th day of April, in the 34th year of the reign of the lord the now King, with force and arms, &c. the close of them the said mayor and burgesses, to wit, one piece of land called the Shoar, abutting towards the west upon the great river called Linn Haven, at Linn-Regis broke, and in their soil, to wit, ten perches of earth there dug, and the gravel cast thereout, to wit, sixty tons of their gravel, to the value of twenty shillings, took and carried away ; and also that the said John, George, Robert, John, and Ezekiel, on the 10th day of May, in the 34th year of the reign of the lord the now King aforesaid, with force and arms, &c. the said close of the said mayor and burgesses, at Linn-Regis aforesaid broke, and in other soil, to wit, other ten perches of their earth there dug, and the gravel cast thereout, to wit, other sixty tons of their gravel, to the value of other twenty shillings, took and carried away, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon they say that they are prejudiced and have sustained damage to the value of one hundred shillings, and therefore they produce their suit, &c. &c.

[157] And the said John Taylor, George Julian, Robert Pyner, John Wilson, and Ezekiel Goddard, by George Wilson their attorney, come and defend the force and injury, when, &c. And as to the coming with force and arms, say that they are not guilty thereof, and of this they put themselves upon the country ; and as to the residue of the trespass aforesaid, above supposed to be committed, they the said John, George, Robert, John and Ezekiel say, that the said mayor and burgesses, ought not to have their action aforesaid against them, because they say that the borough of Linn-Regis aforesaid is, and from the time whereof the memory of man is not to the contrary, hath been an antient borough, and that the Mayor and Burgesses of Linn-Regis aforesaid, for all that time were and as yet are one body corporate, and that within the said borough of Linn-Regis for the whole time aforesaid, there were and now are, sundry inhabitants and freemen of the said borough, who were as well proprietors as masters of ships, and that the said place called the Shoar, in which the trespass aforesaid, is supposed to be committed, is and for the whole time aforesaid, was a common place within the said borough, and within the haven, within the flux and reflux of the sea, there, and where for the whole time aforesaid, ballast for the necessary use of the ships coming there hath been used to be dug up and taken, and that by the digging up, taking and carrying away of the ballast aforesaid, from the place aforesaid, the said port is preserved and rendered more navigable and convenient for the reception and approach of ships there. And they the said John, George, Robert, John and Ezekiel further say, that within the said borough there is, and is had, and from the time whereof the memory of man is not to the contrary, there was

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be so pleaded. 3 Viner 159. 6 Coke 39—and in Cro. El. 373, 436, per Popham C.J. There is a difference where a covenant is annexed to a thing which of its nature cannot pass at the first without deed, and where not. For in the first case the assignee ought to be in by deed, but not in the second.—*Sed quære.*

and was had, a certain *custom* there used and approved, to wit, that every freeman of the said borough, and being proprietor or master of any ship or vessel, being or floating in the said port, by himself or his servants, for the whole time aforesaid, from time to time, and at all times hath been used and accustomed to have, dig and take in the said place in which, &c. so much ballast as hath been necessary for ballasting his ship or vessel so as aforesaid being or floating in the port aforesaid, and the ballast so for the use aforesaid, dug up and taken into such ship for the ballasting of the said ship to carry away, without paying any thing therefore to the said mayor and burgesses; and they the said John, George, Robert, John and Ezekiel **[158]** further say, that the said Ezekiel Goddard, long before the said times in which, &c. and also at the said several times in which, &c. and always afterwards hitherto was, and as yet is a freeman of the borough of Linn-Regis aforesaid, and proprietor of a certain ship called The Expectation, in the said port of Linn-Regis at the said several times in which, &c. being and wanting ballast; whereupon he the said Ezekiel Goddard being as aforesaid a freeman of the said borough in his own proper right, and the said John, George, Robert and John, as the servants of the said Ezekiel, and by his command at the said several times in which, &c. into the said place in which, &c. entered, and in the soil there for ballast, for the necessary ballasting of the ship of the said Ezekiel aforesaid dug, and the gravel aforesaid cast thereout being ballast, took, and in the ship aforesaid, for the necessary ballasting thereof carried away, as they lawfully might; which are the same trespass whereof the said mayor and burgesses above now complain; and this they are ready to verify: wherefore they pray judgment, if the said mayor and burgesses ought to have their action aforesaid against them, &c.

And the said mayor and burgesses say that they by any thing before alledged, ought not to be precluded from having their action aforesaid: because they say that the said place in which the trespass aforesaid is alledged to have been committed, is and from the time whereof the memory of man is not to the contrary, hath been parcel of the manor of Linn-Regis, commonly called King's-Linn, and that the Lord Philip and the Lady Mary, late King and Queen of England, in the right of the said Queen, long before the said several times in which, &c. were seized of the manor aforesaid, in their demesne as of fee, and so being seised thereof, the said King and Queen by their letters patent under their Great Seal of England, bearing date at Westminster, the 2d day of October, in the 4th year of their reign, for the consideration in the said letters patent specified, for themselves and the heirs of the said Queen, gave and granted among other things to the said mayor and burgesses, and to their successors, the manor aforesaid, with the appurtenances to have, hold, and enjoy the manor aforesaid, with the appurtenances, to the said mayor and burgesses and their successors for ever; as by the said letters patent produced here in Court, among other things more fully appeareth; by virtue of which grant, they the said mayor and burgesses, long before the said several times **[159]** in which, &c. and also at the said several times in which, &c. were and as yet are seised of the manor aforesaid, with the appurtenances, whereof the said place, in which, &c. so as aforesaid was and is parcel, in their demesne as of fee; and that they the said mayor and burgesses so as aforesaid, of the manor aforesaid, with the appurtenances, whereof the said place in which, &c. was and is parcel as aforesaid, being seised, they the said mayor and burgesses at sundry times after the grant aforesaid, so as aforesaid made, permitted and suffered sundry freemen of the borough aforesaid to dig up and take ballast in the said place in which, &c. for the necessary ballasting of their ships being in the port of Linn-Regis aforesaid; and this they are ready to verify: wherefore they pray judgment, and their damages to be adjudged to them, &c.

And the said John, George, Robert, John and Ezekiel say, that the said plea of the said Mayor and Burgesses of the borough of Linn-Regis aforesaid, above by replying pleaded, and the matter in the same contained, are not sufficient in law to maintain them the said Mayor and Burgesses of the borough of Linn-Regis aforesaid, to have their action aforesaid, against them the said John, George, Robert, John and Ezekiel, and that they to the said plea in the manner and form aforesaid pleaded have no necessity, neither are they bound by the law of the land to answer; and this they are ready to verify: wherefore for want of a sufficient plea of the Mayor and Burgesses

of Linn-Regis aforesaid, in this behalf, the said John, George, Robert, John and Ezekiel as before pray judgment, and that the said Mayor and Burgesses of the borough of Linn-Regis aforesaid, may be precluded from having their action aforesaid against them, the said John, George, Robert, John and Ezekiel, &c.

And the said mayor and burgesses, because that they above have alledged sufficient matter in law in their plea aforesaid, above by replying pleaded, to maintain them to have their action aforesaid against them, the said John, George, Robert, John and Ezekiel, which they the said mayor and burgesses are ready to verify; which matter they the said John, George, Robert John and Ezekiel do not deny, nor to the same in any wise answer, but altogether refuse to admit the verification thereof, as before pray judgment and their damages by occasion of the trespass aforesaid, to be adjudged to them, &c. And because the justices here will advise themselves of and upon the premises, whereof the parties aforesaid, have put themselves **[160]** upon the judgment of the Court before they give their judgment thereupon, day is given to the parties aforesaid here, until from the day of Easter in fifteen days, to hear their judgment thereupon, because that the said justices here thereupon not as yet, &c.

MAYOR AND COMMONALTY OF LINN-REGIS *against* TAYLOR.

Custom for freemen and proprietors of ships to dig ballast, good; though no corporation. *Ante* 85. *Post*, 190, 424, 425. Doug. 126, *Cocksedge* v. *Funshaw*. 4 Term Rep. 717.

Trespass for entering their close called the Shoar, and for digging and taking and carrying away their gravel there: the defendants justify for that Linn-Regis is an antient borough, time out of mind, &c. incorporated by the name of mayor and burgesses: and that there has been time out of mind, &c. divers freemen and proprietors of ships there, and a custom for every freeman and proprietor of a ship to dig gravel in the place where, being a common shoar, for the ballast of their ships, and thereby the shoar and the port have been meliorated; and that the defendant, being a freeman and proprietor of a ship did dig the gravel, and therewith ballasted his ship: the plaintiff replies, that the place where is, and time out of mind had been, parcel of the manor of Linn-Regis, whereof King Philip and Queen Mary being seised granted it to the mayor and burgesses; since which they have at their pleasure permitted divers freemen and proprietors of ships to dig gravel there for ballasting of their ships. To which the defendant demurs: and now it was argued, that the custom is laid in freemen and proprietors, who not being a corporation, or members thereof, nor persons of perpetual existence, the custom cannot be good, as the case in Dyer of *Islebrewer's Park, a prescription in keepers for life* is not; and so 6 Co. *Gateward's case*, for inhabitants to have common. But by the whole Court the custom here is good, it being for the maintenance of navigation, and so *pro bono publico;* and a custom is *lex loci*, and inherent in the soil whereto it is fixed for the service of every one that is qualified to use it; whereas prescription is (fixed) in the person, and therefore ought always to be laid in persons or estates of perpetual existence; but it is otherwise of customs, as the custom for fishermen to dry their nets on another's soil, and the custom of the hundred of Wicksworth in Derbyshire, to dig for lead in another's soil so far as the party can throw his mattock; whereupon judgment was given *for* the plaintiff.

[161] HILARY, 35 & 36 CHARLES II.

SEAL *against* CROWE.

Declaration in debt upon a writing obligatory.

Worcester, to wit.—John Crowe late of Bromsgrove in the county aforesaid yeoman, otherwise called John Crow of Bromsgrove in the county of Worcester yeoman, was summoned to answer William Seal of a plea that he render to him forty pounds which he owes to him and unjustly detains, &c. And whereupon the said William by John Harris his attorney saith, that whereas the said John Crowe, on the 23d day of January, in the 34th year of the reign of the lord the now King, at Bromsgrove in

the county aforesaid, by his certain writing obligatory had granted that he was holden to the said William Seal in the said forty pounds, to be paid to the said William when he should be thereto requested, nevertheless the said John Crowe although oftentimes requested the said forty pounds to the said William hath not yet paid, but the same to him hitherto to pay hath refused and still doth refuse, whereupon he saith that he is prejudiced and hath sustained damage to the value of twenty pounds, and therefore he produces his suit, &c. and produces here in Court the writing aforesaid, which testifies the debt aforesaid, in the form aforesaid, the date of which is the day and year aforesaid, &c.

And the said John Crowe by William Bell his attorney comes and defends the force and injury when, &c. And prays oyer of the writing aforesaid and it is read to him, &c. also he prays oyer of the condition of the said writing, and it is read to him in these words:—The condition of this obligation is such, that if the above-bounden John Crowe, his heirs and every of them, for his and their parts and behalfs, shall and do in all things well and truly stand to, abide, observe and perform, fulfil and keep the award, order, rule, judgment and final determination of Obadiah Orford, of Bromsgrove aforesaid, gent. and Thomas Holliocke of Redditch, in the said parish of Tardebigg, gent. arbitrators indifferently elected and chosen as well on the part and behalf **[162]** of the above-bounden John Crowe, as on the part and behalf of the above-bounden William Seal, to arbitrate, award, order, judge, and finally determine of, in, and upon all and all manner of action and actions, cause and causes of action, suits, bonds, bills, quarrels, variances, trespasses, batteries, dues, debts, reckonings, accounts and demands whatsoever, at any time heretofore had, moved, committed and depending between the said parties, or either of them, so as the said arbitrators do make and declare their award in the premisses on this side, or before the 10th day of February next ensuing the date hereof; and if the said arbitrators cannot agree, nor any award shall make in the premisses, then if the said above-bounden John Crowe, his heirs, executors and administrators, and every of them, do well and truly stand to, perform, abide, fulfil and keep the award, umpirage and final determination of William Smith, of Boresley, in the parish of Allechurch, in the county aforesaid, gent. an umpire indifferently elected and chosen by the mutual consent of both parties, to arbitrate, award and finally determine of, in and upon all and all manner of actions, suits, bonds, bills, quarrels, differences, trespasses, batteries, dues, debts, reckonings, accounts and demands whatsoever, at any time heretofore had, moved, stirred or depending between the said parties, or either of them, so as the said umpire do make or declare his award in the premisses on this side, or before the 18th day of February next ensuing the date hereof, that then this present obligation to be void, and of none effect, or else to stand and abide in full force and virtue. Which being read and heard the said John Crowe saith, that the said William Seal ought not to have his action aforesaid against him, because he saith that the arbitrators aforesaid in the condition aforesaid mentioned after the making of the writing obligatory aforesaid, and upon or before the said 10th day of February in the condition aforesaid above specified did not make any award, order, rule, judgment or final determination between the said John Crowe and the said William Seal, of and upon the premises in the condition aforesaid above specified according to the form and effect of that condition; and the said John further saith that the said William Smith the umpire in the condition aforesaid **[163]** specified, and before the said 18th day of February in the said condition mentioned, to wit, upon the 16th day of February, in the 35th year of the reign of the lord the now King, at Bromsgrove aforesaid, took upon himself the burthen of the umpirage aforesaid, and there did arbitrate, order and adjudge between the parties aforesaid, of and upon the premisses in the condition aforesaid specified, to wit, that the said John Crowe, his executors, administrators or assigns should pay to the said William Seal, his executors, administrators or assigns, the sum of 12l. 10s. of the good and lawful money of England, upon or before the 13th day of March then next ensuing; and the said John Crowe in fact saith that the said John Crowe after the making of the umpirage aforesaid, to wit, upon the said 13th day of March, in the umpirage aforesaid mentioned, at Bromsgrove aforesaid, offered to the said William Seal the said 12l. 10s. which the said William Seal from the said John then and there refused to receive, and this he is ready to verify;

wherefore he prays judgment if the said William Seal ought to have his action aforesaid against him, &c. E. BYRCHE.

And the said William saith that he by any thing by the said John Crowe above in pleading alledged ought not to be precluded from having his action aforesaid against him the said John, because he saith that well and true it is that the said William Smith did arbitrate, order and adjudge that the said John Crowe, his executors, administrators or assigns should pay to the said William Seal, his executors, administrators or assigns the sum of 12l. 10s. of the good and lawful money of England, upon or before the 13th day of March then next ensuing, in full satisfaction of all differences between the said William Seal and the said John Crowe, but the said William Seal further saith that the said John Crowe did not offer to the said William Seal the said 12l. 10s. in the manner and form as he the said John above by pleading hath alledged, and he prays that this may be enquired of by the country, &c. &c.
FR. PEMBERTON.

[164] And the said John saith, that the said plea of the said William Seal above by replying pleaded, and the matter in same contained are not sufficient in law to maintain the said William to have his action aforesaid against him, and that he to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient replication of the said William in this behalf, the said John prays judgment, and that the said William Seal may be precluded from having his action aforesaid, &c. E. BYRCHE.

And the said William, because that he above by replying hath alledged sufficient matter in law to have his action aforesaid against the said John, which he the said William is ready to verify, which matter the said John doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit or receive the verification thereof, he the said William prays judgment and his debt aforesaid, together with his damages, to be adjudged to him, &c. FR. PEMBERTON.

SEAL *against* CROWE.

Defendant pleads an umpirage, tender and refusal; plaintiff replies and shews the umpirage was in satisfaction of all controversies, and joins issue on the tender; the defendant demurs and argues that the replication ought to have concluded with an averment. *Quære?* 1 Danvers 556, 557. *Ante* 17, 28. *Post*, 293, 413. 1 Mod. 274. 1 Salk. 69, 70, 72. 1 Saunders 326, 327. 2 Keble 567. 1 Lutw. 281, 451, 525, 539, 540. Nels. Lutw. 166, 167. 2 Ventris 222. Kyd on Awards 210. 2 Wilson 8, 66. Comyns Dig. Pleader, E. 33.

Debt on obligation conditioned to perform an award. The defendant pleads, that the arbitrators made no award, but that the umpire made an umpirage that the defendant should pay the plaintiff such a sum at such a day and place, and that he tendered it accordingly, and the plaintiff refused to accept it. The plaintiff replies, that the umpire awarded it in **[165]** satisfaction of all controversies, and that the defendant *non obtulit solvere, & hoc petit quod inquiratur per patriam.* The defendant demurs: and now it was argued for the defendant, that the plaintiff ought not to have concluded to the country, he having alledged new matter; viz. that the sum awarded was in satisfaction of all controversies, without saying the award was void, and by this means the defendant is deprived of the opportunity of his traverse thereto; and therefore the plaintiff cannot have judgment, because it does not appear to the Court upon this pleading, whether the award be good or void; and of this opinion were Jones Ch. Just. and Charlton after two arguments at the Bar. But Wyndham and Levinz on the contrary held, that the defendant had admitted the award to be good, by undertaking to plead performance thereof; and when the plaintiff has shewn such matter as proves the award to be good, the defendant shall not be admitted by traversing it to prove the award ill and void; but if the truth be, that the award was

not in satisfaction of all controversies, and so an award of one side only, the defendant ought at first to have pleaded no award, but when he has pleaded it as a good award, and by the replication it appears to be so, he shall not afterwards be admitted to a traverse to prove it no award, for that would be a departure from his plea, and is as much as if he had pleaded, that there was an award made, and yet in his rejoinder should say there was no award; and so the matter hung, two Judges being against two.

SOLME *against* BULLOCK.

Turbary granted to a house passes by a grant of the house *cum pertinentiis.* 4 Coke 37. 8 Coke 47, 48, 50. 1 Sid. 354. 1 Lev. 231. 2 Keble 290, 312. 5 Coke 17. Plowden 381. *Post*, 305.

Trespass for digging turfs in his soil. The defendant justifies by a grant of the former lord of the manor to J. S. for digging turfs there by J. S. and his heirs to be burned in his house and that J. S. granted the said house *cum pertinentiis* to the defendant and his heirs; and on long special pleadings it was questioned, whether the turbary passed by the words *cum pertinentiis* without being specially named; and Cro. Ja. 189, *Beaudley* versus *Brooke* was cited for an opinion that it should not pass; but by the whole Court, as common appurtenant may at this day be granted, so may it pass by the word appurtenances with the land to which it is appurtenant.

[166] WALTER *against* BEAVER.

Words, *clipper*, *&c.* *Post*, 171. 2 Jo. 235. Cro. Ja. 255, 276. 1 Lev. 155. 1 Sid. 386. *Post*, 394, 395. Salk. 696, 697.

Case for these words, *Thou art a clipper, and shalt be hanged for it*, adjudged actionable on a motion in arrest of judgment after a verdict; for it shall not be intended a clipper of clothes, &c. as was objected, but a clipper of such a thing for which he ought to be hanged, and that is only money.

NADEN *against* MICOCKE.

Words, *clipper*, *&c.* *Post*, 395.

Case for these words, *Thou art a clipper, and thy neck shall pay for it*, adjudged actionable; for by the subsequent words it cannot be understood of any other clipper than of money.

GURNETH *against* DERRY.

Words, *Thou tookest a false oath, &c.* 4 Bac. Ab. 484.

Case for saying, *Thou art a forsworn man, and didst take a false oath against me before Justice Scawen, innuendo* John Scawen a justice of peace; and after verdict for the plaintiff judgment was stayed: for by the whole Court, though to say, that one is *forsworn before a justice of peace* is actionable, yet here it does not appear that Scawen was a justice of peace, except by the *innuendo* which is not sufficient, 4 Co. 17, *Rutliche's case;* and it may be the name of a man is Justice Scawen.

[167] TRINITY TERM, IN THE THIRTY-SIXTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

KIDDER *against* WEST.

The lessor of a house and garden, &c. cannot build on the garden.

Covenant, and declares on a demise of a messuage to the plaintiff, together with a garden, and *latrinam, Anglice*, an house of office, at the further end thereof; and that the defendant covenanted that the plaintiff should enjoy the premisses so demised;

assigns a breach, that the defendant had erected on part of the garden a mansion-house, whereby the plaintiff could not have the use of the garden aforesaid, according to the form and effect of the demise aforesaid. The defendant pleads, that notwithstanding the building aforesaid the plaintiff could have the use of the garden aforesaid, according to the true intent of the demise aforesaid. *Absque hoc* that the building aforesaid did any way hinder the plaintiff from the use of the said garden, *according to the true intent of the indenture aforesaid.* The plaintiff demurs: and by the whole Court, the use of the garden is the use of all the garden, and not the use only to pass to the house of office, as was pretended by the defendant; and the traverse contains more than is alledged in the breach, viz. *according to the true intent of the indenture aforesaid;* and the Court cannot understand the true intent of the indenture, but only by the words of the indenture; and therefore they gave judgment for the plaintiff.(1)

TRINITY, 36 CHARLES II.

[168] WHELPDALE *against* WHELPDALE.

Count in dower. Protestation.

Cumberland, to wit.—Sarah Whelpdale, widow, who was the wife of John Whelpdale, Esquire, by Richard Grange her attorney demandeth against Andrew Whelpdale, Esquire, three messuages, one hundred and fifty acres of land, fifty acres of meadow, and eighty acres of pasture with the appurtenances in Penrith, as her dower of the endowment of the said John heretofore her husband, &c.

And the said Andrew by William Derisley his attorney comes and prays a view of the tenements aforesaid, with the appurtenances, &c.

And the said Sarah saith the said Andrew ought not to have a view of the tenements aforesaid with the appurtenances whereof, &c. because she saith the said John heretofore the husband of the said Sarah died seized of the tenements aforesaid with the appurtenances whereof, &c. in his demesne as of fee, and this she is ready to verify; wherefore she prays judgment and her dower of the tenements aforesaid to be adjudged to her, &c.

And the said Andrew protesting that the said John, heretofore the husband of the said Sarah, did not die seized of any lands or tenements in Penrith aforesaid, as the said Sarah above hath alledged; saith that the said plea of the said Sarah above in the form aforesaid pleaded, and the matter in the same contained, are not sufficient in law to repel him the said Andrew from having a view of the tenements aforesaid with the appurtenances whereof, &c. and that he to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient plea of the said Sarah in this behalf, the said Andrew prays judgment and a view of the tenements aforesaid with the appurtenances whereof, &c. to be adjudged to him, &c. And for cause of demurrer in law upon the said plea in this behalf, the said Andrew according to the form of the statute in such case made and provided, shews to the Court here the cause following, to wit, that the said plea is badly concluded, and wants form in the conclusion thereof, not agreeing with the beginning thereof, to wit, **[169]** where it is said in the said conclusion, *wherefore she prays judgment and her dower of the tenements aforesaid with the appurtenances to be adjudged to her*, it ought to be said there, *wherefore she prays judgment if the said Andrew ought to have a view of the tenements aforesaid with the appurtenances whereof, &c.*

And the said Sarah because that she above by pleading hath alledged sufficient matter in law to repel the said Andrew from having a view of the tenements aforesaid with the appurtenances whereof, &c. which she is ready to verify, which matter the said Andrew doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, as before prays judgment and her tenements aforesaid to be adjudged to her, &c.

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(1) *Quære de hoc.*—For the law will rather do violence to the words than break through the intent of the parties.—3 Bac. Ab. 419. 5 Term Rep. 163.

WHELPDALE *against* WHELPDALE.

Dower, and demands 3 messuages, where it should be the third part thereof. Counterplea of view how to conclude. 1 Lev. 117. *Post* 220. Stat. of West. 2, c. 48. 2 Inst. 481. Amendment after argument on a special demurrer. *Ante* 152.

Dower, and demands three messuages and fifty acres of land, &c. The tenant demands the view. The demandant counterpleads the view, because the husband died seised; *& hoc parat' est verificare, & proinde petit judicium & dotem suum de tenementis predictis sibi adjudicari.* The tenant by a *protestando* that the husband did not die seised, demurs, and shews for cause, that the counterplea is ill concluded: and now upon argument, Jones Chief-Just. being absent, Wyndham and Charlton held the counterplea good, nowithstanding the special demurrer; and Wyndham cited Rast. Entr. 239, and Old Entr. 109, two precedents, that the plea concluded as here. Levinz said, that an issue is there taken upon the counterplea without insisting on the conclusion, whereas here it is shewn for special cause of the demurrer; and the form is, *petit judicium*, and that the tenant *de visu excludatur*, as appears 14 H. 4, 33 b. and the counterplea is only a dilatory plea, and therefore it ought not to conclude peremptorily for a final judgment: also the said two justices ruled, the count should be amended; but Levinz to the contrary, that it ought not to be amended; for it is a meer ignorance of the clerk to demand the three entire messuages, where he ought to demand the third part only, and such ignorance is not amendable 8 Co. 159 a. by any of the old statutes, nor by any of the later statutes, it not being after a verdict.

[170] TYNDAL *against* HUTCHINSON.

Covenant for rent on an indenture; *nil debet* no plea. Com. Dig. Pleader. 2 V. 6. *Ante* 146. *Post*, 193.

Covenant on an indenture of lease, and assigns a breach in the nonpayment of rent, according to the covenant therein. The defendant pleads *nil debet;* and the plaintiff demurs generally; and on the first opening of the case it was adjudged, that *nil debet* is no plea in this case on the indenture, and judgment was given for the plaintiff.

PROCTER *against* BURDET.

Breach of covenants assigned as generally as the words of the covenant. 3 Mod. 69. Com. Dig. Pleader. C. 45. 1 Bac. Ab. 546.

Covenant brought by an apprentice against his master, and declares on the custom of London, whereby every apprentice is obliged by his covenants of apprenticeship, be he within age or of full age, and that he by indenture was put apprentice to the defendant, who covenanted to instruct him in his trade, and to find him meat, drink, lodging and apparel, and *other necessaries;* and that the defendant, being a woollen-draper, did on such a day depart from his house, and did not instruct the apprentice in his trade, nor find him meat, drink, and other necessaries. The defendant demurs generally, and now insisted that the breach was not well laid, for *other necessaries* is too general and uncertain. But the Court on the contrary held the breach to be certain, being in the very words of the covenant, and that by *other necessaries* is intended all small matters, as trimming, washing, &c. which would be too prolix to have been inserted; and the greater things being particularly assigned, he need not assign the small things so particularly, especially it being here assigned in the very words of the covenant; wherefore judgment was given for the plaintiff.

[171] WILLIAMS *against* LEWIS.

Words, *I have a man will prove, &c. Ante* 166.

Case for these words, *I have an honest man in Langattock, who will prove that Williams said he had killed a man in Ireland, and buried him in the sands:* and the plaintiff avers,

that he never said so: after verdict for the plaintiff on *not guilty*, it was moved in arrest of judgment, that the declaration was insufficient, for that it is not averred that the plaintiff did not kill a man in Ireland, nor that there is any man in Langattock who would prove that the plaintiff so said. But *non allocatur;* for the words are not laid as spoken from the report of another person; for then it ought to be averred, that such other person did not so report; but here is alledged an undertaking by the defendant himself, that he had a man in Langattock who would prove that the plaintiff did say so, viz. *That he had killed a man in Ireland, and buried him in the sands;* and so there is a diversity: whereupon judgment was for the plaintiff.

MICHAELMAS 35TH CHARLES II.

BARWELL *against* KENSEY AND OTHERS.

Declaration. In trespass upon the case for the digging in the foundation of a house so near the plaintiff's messuage that the plaintiff's messuage fell down, &c. &c. 1 Mallory 195. 13 Ed. 1, c. 30.

London, to wit.—Thomas Kensey, late of London, vintner, Robert Fenwick, late of London, vintner, John Howard, late of London, carpenter, and John Fitch, late of London, bricklayer, were attached to answer Henry Barwell, Esq. of a plea of trespass on the case, &c. And whereupon the said Henry Barwell, by Samuel Moore his attorney complains, that whereas the said Henry on the 24th day of April, in the 34th year of the reign of the Lord Charles II. now King of England, &c. and long before, at London, to wit, in the parish of St. Dunstan in the West, in the ward of Farringdon Without, London, in a certain messuage, situate and lying in the parish and ward aforesaid, with his family lawfully did dwell, and his art and trade of a sadler, in the messuage aforesaid, and in the shop, parcel of the said messuage, then did use and exercise, and his habitation and the exercise of his art and trade of a **[172]** sadler in the said messuage and shop, parcel of the said messuage for the space of one year then next ensuing had prepared and intended to exercise, use and continue: he the said Henry Barwell then having lawful right and title to continue and inhabit in the messuage and shop aforesaid with his family, and there to use and exercise his art and trade for the whole time aforesaid, for the better support and maintenance of himself and his family by the exercise of his art and trade aforesaid. Nevertheless the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch, not ignorant of the premises, but contriving and maliciously intending him the said Henry Barwell of the habitation of himself and his family in the messuage aforesaid, and also of the exercise of his art aforesaid, in the messuage and shop aforesaid, of the said Henry Barwell to hinder and deprive, upon the 24th day of April in the year aforesaid, at London aforesaid, in the parish and ward aforesaid, the foundation of a certain house lying next to the messuage of the said Henry Barwell aforesaid, situate in the parish and ward aforesaid, did pull down and prostrate, and dug in the soil and foundation there lying contiguous to the messuage of the said Henry Barwell, so much and so near the foundation of the messuage aforesaid of the said Henry Barwell, and so much cast out the earth coming thereout, that by digging the soil and foundation aforesaid, and by the casting out of the earth coming thereout, great part of the messuage aforesaid of the said Henry Barwell, then and there fell to the ground, and the residue of the said messuage became disjoined, waste and spoiled, by reason whereof he the said Henry Barwell from his habitation aforesaid, with his family out of the messuage aforesaid, was compelled to depart, and from that time for the space of eleven months then next ensuing, out of the messuage aforesaid was compelled to continue, and sundry great sums of money, as well in and about the obtaining and providing another habitation for himself and his family for the whole time aforesaid, and the removal of him the said Henry Barwell and his family, and their goods and merchandizes as for the payment of the rent of the messuage aforesaid, so as aforesaid pulled down, for the eleven months aforesaid, was forced and compelled to lay out and expend: and also he the said Henry Barwell the whole use and exercise of his art and trade aforesaid, in the messuage and shop aforesaid, [being a shop **[173]**

best known and to which sundry great men, and other subjects of the said lord the King were accustomed to repair to purchase saddles and other goods and merchandizes belonging to the said art and trade of the said Henry Barwell,] for the whole time aforesaid, entirely lost and was deprived of, to wit, at London aforesaid, in the parish and ward aforesaid: whereupon the said Henry saith that he is prejudiced, and hath sustained damage to the value of 300l. and therefore he produces his suit, &c.

And the said Thomas Kensey and Robert Fenwick, by Robert Bird their attorney, and the said John Howard and John Fitch, by Thomas Pargiter their attorney, come and defend the force and injury, when, &c. and say that the said Henry ought not to have his action aforesaid against them; because they say that heretofore before the day of the suing forth of the said original writ of the said Henry, to wit, in the term of St. Michael last past, the said Henry and one Susannah Barwell, spinster, impleaded the said Robert Bird, and them the said Thomas Kinsey, Robert Fenwick, John Howard and John Fitch, and one John Stephens [now deceased] in his life-time, by the names of Robert Bird, late of London, vintner, Robert Fenwick, late of London, vintner, John Fitch, late of London, bricklayer, John Howard, late of London, carpenter, and John Stephens, late of London, &c. in the Court of the said King of the Bench here in a certain plea of trespass, upon which plea the said Henry and Susannah in the said term of St. Michael last past, by declaring against the said Robert Bird, and them the said Thomas Kensey, Robert Fenwick, John Howard, John Fitch, and the said John Stephens in the said Court of the said lord the King of the Bench here by the said Samuel Moore their attorney, complained that the said Robert Bird, Thomas Kensey, Robert Fenwick, John Fitch, John Howard and John Stephens, upon the 24th day of April, in the 34th year of the reign of the Lord Charles II. now King of England, &c. with force and arms, &c. in the soil of them the said Henry and Susannah, under the foundation of the house of them the said Henry and Susannah, situate in the parish of St. Dunstan in the West, in the ward of Farringdon Without, London, dug and the earth coming thereout cast out, by which digging of the soil and foundation aforesaid, under the foundation of the house aforesaid, and by casting out the earth coming thereout, **[174]** great part of the house of them the said Henry and Susannah fell to the ground, and the residue of the said house became disjoined, waste and spoiled, by reason whereof the said Henry and Susannah, not only the whole entire profit, advantage and benefit of the house aforesaid, for a great time, to wit, from the said 24th day of April, in the year aforesaid, until the day of the obtaining of the original writ of the said Henry and Susannah entirely lost and were deprived of, but also sundry goods and chattels of the said Henry and Susannah, to wit, one hundred and fifty saddles to the value of one hundred and fifty pounds; twenty dozen of bridles to the value of fifteen pounds; ten dozens of halters to the value of five pounds; five dozen of bits to the value of thirty shillings; five dozen of stirrups to the value of four pounds; five dozen of girths to the value of three pounds; five dozen of circingles to the value of five pounds, thirty pair of holsters to the value of three pounds; four yards of point lace to the value of four pounds; one bolster to the value of twenty shillings; thirty pounds weight of tin to the value of thirty shillings; four shirts to the value of fifty shillings; six ounces of silver to the value of thirty shillings; four dozen of glass bottles to the value of ten shillings; four hundred pound weight of iron to the value of forty shillings; four dozen of glasses to the value of thirty shillings; and four chairs to the value of forty shillings, by the fall of the house aforesaid, were broken, spoiled, and destroyed and became of no value to the said Henry and Susannah, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon they the said Henry and Susannah, said that they were prejudiced and had sustained damage to the value of five hundred pounds; and therefore then produced their suit, &c. And the said Robert Bird in his proper person, and the said Thomas Kensey and Robert Fenwick, by Theodore Walpole their attorney, and the said John Fitch, John Howard and John Stephens, by the said Thomas Pargiter their attorney, then came and defended the force and injury, when, &c. and said that they were not guilty of the trespass aforesaid, as the said Henry and Susannah above complained **[175]** against them; and of this they put themselves upon the country, and the said Henry and Susannah

did the like: therefore the sheriff was commanded that he should cause to come here from the day of St. Martin in fifteen days, twelve, &c. by whom, &c. and who neither, &c. to recognise, &c. because as well, &c. at which day here came the parties, &c. and the sheriff did not send his writ; therefore as before, the sheriff was commanded that he should cause to come here on the octave of St. Hilary, twelve, &c. to recognize in the form aforesaid, &c. at which day the jury between the parties aforesaid, for the plea aforesaid, was respited until the octave of the Purification of the Blessed Virgin Mary, then next ensuing, unless Francis Pemberton, Knight, Chief Justice of the lord the King of the Bench here assigned by the form of the statute, &c. on Saturday, the 3d day of February then next ensuing, had first come to the Guildhall of the City of London: and upon the said octave of the Purification of the Blessed Virgin Mary, came as well the said Henry Barwell and Susannah Barwell, by their attorney aforesaid, as the said Robert Bird in his proper person, and, &c. and the said Chief Justice before whom, &c. then sent here his record *in these words:*—Afterwards at the day and place within contained, before Francis Pemberton, Knight, Chief Justice of the lord the King of the Bench, Adam Baynes, gent. being associated to him according to the form of the statute, &c. came as well the within named Henry Barwell, Esq. and Susannah Barwell, spinster, as the within written Robert Bird, Thomas Kensey, Robert Fenwick, John Fitch, John Howard and John Stephens by their attorneys within contained; and the jurors of the jury whereof mention is within made, being called, certain of them, to wit, John Mallary, Samuel Hoyle, Anthony Spencer, Roger Duncombe, Thomas Yates, Richard Elborough, Richard Chaplin and Hugh Norton, come and are sworn upon that jury, and because the residue of the jurors of that jury do not appear, therefore others of the bye-standers by the Sheriffs of London within written chosen for this purpose, at the prayer of the said Henry and Susannah, and by the command of the Chief Justice are newly appointed, whose names are affiled in the panel within written, according to the form of the statute in such case lately made and provided; and the jurors so newly appointed, to wit, Thomas Anger, John Harrison, Thomas Isles and John Warfield, being called, come; who being elected, tried and sworn to speak the truth of the matters within contained, together with the other jurors aforesaid, first impannelled and sworn, say upon their oath aforesaid, that the said Thomas Kensey, Robert Fenwick, John Fitch, John Howard and John Stephens are guilty of the trespass within written, in the manner and form as the said Henry Barwell **[176]** and Susannah Barwell within complain against them; and they assess the damages of the said Henry and Susannah, by the occasion within written, besides their expences and costs by them about their suit in this behalf laid out to one hundred and twenty-one pounds, and for those expences and costs to fifty-three shillings and four pence; and the jurors aforesaid, upon their oath aforesaid, further say, that the said Robert Bird is not guilty of the trespass aforesaid, as the said Robert Bird within for himself by pleading hath alledged; therefore it was considered that the said Henry Barwell and Susannah Barwell, should recover against the said Thomas Kensey, Robert Fenwick, John Fitch, John Howard and John Stephens, their damages aforesaid, to one hundred and twenty-three pounds, thirteen shillings and four pence, by the jury aforesaid, in the form aforesaid assessed; and also sixteen pounds, six shillings and eight pence to the said Henry Barwell and Susannah Barwell at their request, for their expences and costs aforesaid, by the Court here of increase adjudged; which said damages in the whole amount to one hundred and forty pounds; and that the said Thomas Kensey, Robert Fenwick, John Fitch, John Howard and John Stephens, should be taken, &c. And that the said Henry and Susannah should be in mercy for their false clamour against the said Robert Bird; because that the said Robert Bird of the trespass aforesaid, by the jury aforesaid above was acquitted, and that the said Robert Bird should go thereof without day, &c. Afterwards, to wit, upon the 19th day of June, in the 35th year of the reign of the said lord the now King, came into Court here, the said Henry and Susannah, by John Hargrave their attorney, by special warrant to him in that behalf made, and acknowledge that they are satisfied of the damages aforesaid: therefore the said Thomas Kensey, Robert Fenwick, John Fitch, John Howard and John Stephens, of the damages aforesaid should be quit, &c. as by the record and proceedings thereof in

the said Court of the said lord the King of the Bench of Record remaining manifestly appeareth; and the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch say, that the said house in the record of recovery mentioned to be the house of the said Henry and Susannah, and the messuage aforesaid in the declaration of the said Henry above specified to be the messuage of the said Henry, are one and the same messuage and house and not another nor different, and that the said digging in the soil under the foundation of the house of the said Henry and Susannah, and the casting out of the earth coming thereout, by which digging of the soil and foundation, under the foundation of the said house, and the casting out of the earth coming thereout [177] great part of that house fell to the ground, and the residue of the said house became entirely disjoined, waste and spoiled in the record of recovery aforesaid mentioned; and the said pulling down and prostrating of the foundation lying next the messuage of the said Henry, and the digging of the soil and foundation there lying contiguous to the messuage of the said Henry, there so much and so near the foundation of the messuage of the said Henry, and the casting out of the earth coming thereout so much, that by the digging of the soil and foundation aforesaid, and by casting out of the earth coming thereout, great part of the messuage aforesaid of the said Henry fell to the ground, and the residue of the said messuage became entirely disjoined, waste and spoiled, whereof the said Henry above now complains are the same digging and casting out of the earth, and the same trespass, thing and matter, and not other nor different; and that the said fall to the ground of a great part of the said house, in the said record of recovery aforesaid mentioned, and the said fall to the ground of a great part of the said messuage, and the entirely disjoining, wasting and spoiling the residue of the said messuage, whereof the said Henry above now complains are the same fall, disjoining, wasting and spoiling, and not other nor different; and that the said Henry Barwell in the record of recovery aforesaid named, and the said Henry Barwell in like manner named in the writ and declaration now sued are one and the same person and not other nor different; and that the said Thomas Kensey, Richard Fenwick, John Howard and John Fitch, in the record of recovery aforesaid in like manner named, and the said Thomas Kensey, Richard Fenwick, John Fitch and John Howard, in the writ and declaration of the said Henry now sued and named are one and the same persons, and not other nor different; and that the damages aforesaid in the said first action above assessed and recovered, were in full satisfaction of all damages by the said Henry Barwell sustained by the occasion aforesaid in the declaration of his said last action mentioned, to wit, at London aforesaid, in the parish and ward aforesaid; and this they are ready to verify: wherefore they pray judgment if the said Henry ought to have his action aforesaid against them, &c.

And the said Henry saith, that he by any thing by the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch, above by pleading alledged, ought not to be precluded from [178] having his action aforesaid against them the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch; because he saith that the said plea by them the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch, in the manner and form aforesaid pleaded, and the matter in the same contained are not sufficient in law to preclude him from having his action aforesaid thereupon against them the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch, to which he the said Henry hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient answer in this behalf, the said Henry prays judgment and his damages by occasion of the premises aforesaid to be adjudged to him, &c. And for cause of demurrer in law to the said plea, the said Henry according to the form of the statute in such case lately made and provided, sets down and to the Court here shews the causes following, to wit, this that the said plea doth not answer directly but evasively to the matters aforesaid, above charged against the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch by the declaration of the said Henry; and it wants form.

And the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch, because that they have alledged sufficient matter in law in their plea aforesaid above in bar pleaded, to preclude him the said Henry from having his action aforesaid

against them the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch, which they are ready to verify, which matter the said Henry doth not deny nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, as before pray judgment, and that the said Henry may be precluded from having his action aforesaid against them, the said Thomas Kensey, Robert Fenwick, John Howard and John Fitch, &c. And because the justices, &c.

[179] BARWELL *against* KENSEY AND OTHERS.

A recovery in a former action by A. and B. pleaded to an action brought by A. alone, with some small variance. *Ante* 424. 3 Wils. 308. 6 Coke 7. Cro. El. 668. 4 Coke 94. 1 Salk 10, 11. *Post*, 248. Cro. El. 240.

Case, and declares, that whereas the plaintiff the 24th of April, 34 Car. 2, and long before, had with his family inhabited a messuage, and exercised his trade of a *sadler* therein, and had also designed and prepared to have exercised his said trade therein for one year then next following, for the better support of himself and his family, he having a legal right so to do, yet the defendants, being not ignorant of the premisses, but maliciously intending unjustly to hinder and deprive the plaintiff of his habitation, and also from the exercise of his said art in the said messuage, did on the said 24th of April, dig, &c. the soil and the ground lying contiguous to the said messuage so very much, and so near the substruction, *Anglice* the foundation, of the said messuage, that thereby a great part of the said messuage fell to the ground, and the residue thereof was spoiled and became wasted; whereby the plaintiff was compelled to leave the said messuage for 11 months then next ensuing, and to expend divers great sums for the procuring another messuage, and was deprived of and lost the entire use of his trade in the said messuage, being a good accustomed shop, to his damage 300l. during the said 11 months. The defendants plead, that in Mich. term last past the plaintiff and one Susan Barwell, spinster, prosecuted a former action against the defendants, and declared, that the defendants, April 24, 34 Car. 2, *did with force and arms dig in the plaintiff's soil under the foundation of their house, by which digging great part of the same house fell to the ground, and the residue thereof became spoiled and wasted; and by reason thereof the plaintiffs not only were deprived of and lost the whole profit, commodity and advantages of the aforesaid house, from the aforesaid 24th day of April, 'till the suing out of the writ, but also divers of the plaintiffs goods, &c.* here particularizing them, (being goods and wares of the *sadler's* trade) were broken and spoiled to the damage of 500l. and that thereupon the plaintiffs had a verdict and judgment for 140l. and satisfaction acknowledged thereupon, and the defendants aver, that the messuage and digging in the former declaration and in this declaration are all one, and **[180]** that the fall, spoil and wasting, both in that action and in this are all one; and that the now plaintiff is one of the plaintiffs in the former action, and the defendants in this and that action are the same persons, and that the damages given in the former action were given in full satisfaction of all the damages mentioned in this action; whereupon the plaintiff demurred, and the case was twice argued at the Bar, viz. in the last and the present term; and Jones Chief Justice held, that the recovery in the former action is no bar of this action for three causes, viz. 1. That the trespass in the former action and in this are not the same, and then the averment is repugnant and void; for in the former action the digging is laid to be in the plaintiff's *soil* and *under the foundation of* their house, but in this action it is laid to be so *near* the foundation of the plaintiff's messuage. 2. The former action was brought by two plaintiffs, and also for the throwing down of their messuage and spoiling their goods, and this is brought for one of them only and for the loss of his trade for 11 months, and in the other action the whole time does not extend above 6 or 7 months at most. 3. The averment that the damages in the first action were given in full satisfaction of all the damages demanded in this action is also repugnant and void. But Wyndham, Charlton and Levinz, held the contrary; and as to the first they said, this action is not only said *tam prope*, but *in tantum, & tam prope substructionem effodit*, and that *in tantum substructionem effodit* is a *digging* of the foundation itself, and that *digging the foundation* itself is without question the principal matter in both; for the messuage

did not fall 'till the foundation itself was dug; for if it had sunk by digging near it, there would have been no time (opportunity) to dig the foundation itself, and that digging the foundation, and digging *so much* and so near the foundation are but several ways of expressing the same thing. As to the second they said, that in the first action the plaintiffs called the messuage *their messuage*, and in this action the plaintiff calls it *his messuage*, and yet it is but one and the same messuage, and so it is averred: and therefore it ought to be intended that they were jointenants, and that the former action was for spoiling their goods; and therefore although the plaintiff calls them his goods, yet they shall be intended goods in partnership in trade, and that the trade was joint. As to the third they said, that the averment of the damages in the **[181]** other action to be given in satisfaction of all damages in this action is not repugnant; for the words, *quod perdidit totum commodum & proficuum* of the messuage, include the trade therein, for by the falling thereof no trade could be used therein, and then he must of necessity provide another messuage both for his habitation and his trade, and so it is within the words *totum proficuum & advantagium;* also the jury in the other action might and must be presumed to have given damages for *all* that is laid in this action, viz. want of habitation and loss of trade in the messuage, as necessary consequents of the falling of the messuage; as in battery the jury always give damages for the cure, pain, loss of time, &c. as necessary consequents of the battery without special damages laid in the declaration. But suppose the jury ought not to have given damages for the loss of the trade in this messuage, yet since they have done it, and it is so averred, and judgment given thereon, the same is a bar in this action until it be reversed by attaint; and so it was in *Palmer and Lawson's case* in B. R. *in assumpsit* against an executor he pleads a judgment in debt against him on simple contract; though debt did not lie in that case, yet it was held, that the judgment was a bar of the *assumpsit* until it was reversed: and they said, it would be very mischievous to permit multiplying of actions on such niceties of varying from the former action. It is true, in the former the time does not exceed 7 months, and in this it is laid to be 11 months; but by the same reason he may bring a new action for 12 months more for the loss of his trade, &c. and so *in infinitum*, though all this matter was before the jury in the former action, and was without doubt considered of by them. But the Chief Justice strongly adhering to his opinion, no judgment was given until Pasch. 1 Jac. 2. And then Wyndham Justice being dead, and Street who succeeded in his place being of the same opinion as Wyndham was judgment was given for the defendant.

[182] NORTH *against* HOYLE.

Defence not necessary in a plea of antient demesne. *Post*, 240, 405. 1 Shower 386. *But it is a cause of special demurrer.* 1 Salk. 217. 4 Bac. Ab. 31.

In ejectment. The defendant *venit & dicit*, that the tenements are antient demesne tenements of the manor of Streiton. The plaintiff demurs generally: and now it was argued, that the plea was insufficient for default of a defence, Co. Lit. 127. The defendant cannot plead any plea before defence made; and divers precedents were shewn, that in pleas of antient demesne defence was made; but Rast. Entr. 58 and other precedents were shewn, where antient demesne was pleaded without defence, and particularly in Hill. 43 El. in C. B. Rot. 1807, and in a *scire facias* a defence is never made. Whereupon the Court said, that Co. Lit. is not absolutely to be so intended; for the precedents where antient demesne is pleaded, being sometimes with defence and sometimes without it, prove only that it may be pleaded with defence, but do not prove that it cannot be pleaded without it; and thereupon they ruled the plea good without defence.

[183] MICHAELMAS TERM, IN THE THIRTY-SIXTH YEAR OF THE REIGN OF CHARLES II. IN THE COMMON PLEAS.

TRINITY 36TH CHARLES II.

ROBINET *against* COBB.

Bill in the Common Pleas against an attorney. Imparlance. No award.

Heretofore as appears in the term of Easter last past, Roll 112, it is thus contained; be it remembered, that on the 16th day of April in this same term, came here into Court James Robinet, by Robert Bird his attorney, and exhibited to the justices here his certain bill against Thomas Cobb, gent. one of the attornies of the Court of the lord the King of the Bench here present here in Court in his proper person of a plea of debt, the tenor of which bill follows in these words, to wit: To the Justices of the lord the King of the Bench. London, to wit. James Robinet by Robert Bird his attorney, complains of Thomas Cobb, gent. one of the attorneys of the Court of the lord the King of the Bench present here in Court in his proper person, for this that the said Thomas unjustly detains and hath not paid to the said James one hundred pounds which he owes to him, for this to wit, that whereas the said Thomas on the first day of December, in the 35th year of the reign of the lord the now King, at London in the parish of the Blessed Mary of the Arches, in the ward of Cheap, by the name of Thomas Cobb of Saffron-Walden, in the county of Essex, gent. by his certain writing obligatory, acknowledged himself to be holden to the said James in the said 100l. to be paid to the said James when thereto afterwards he should be requested; nevertheless the said Thomas, although oftentimes requested, hath not yet paid the said 100l. to the said James, but the same to him hitherto to pay altogether hath refused, and still doth refuse; whereupon he saith that he is prejudiced, and **[184]** hath sustained damage to the value of 10l. and therefore he prays remedy, &c. And he produces here in Court the said writing, which testifies the debt aforesaid, in the form aforesaid. Pledges to prosecute John Doe and Richard Roe.

And the said Thomas Cobb in his proper person comes and defends the force and injury when, &c. and prays oyer of the condition of the said writing, and it is read to him in these words: The condition of this obligation is such, that if the above bounden Thomas Cobb, his heirs, executors and administrators for their parts and behalfs, do and shall in all things well and truly stand to, obey, abide, perform, fulfil and keep the award, arbitrament, final end and determination of Sir James Astrey, Knight, one of the Masters of the High Court of Chancery, arbitrator indifferently elected and named, as well on the part and behalf of the above bounden Thomas Cobb, as of the above named James Robinet, to arbitrate, award, order, judge and determine, of and concerning all, and all manner of action and actions, cause and causes of actions, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time heretofore had, made, moved, brought, commenced and prosecuted, done, suffered, committed or depending, by and between the said parties, or either of them, so as the said award be made in writing, and ready to be delivered to the parties in difference, or such of them as shall desire the same, on or before the last day of Hilary term next; then this obligation to be void, or else to remain in full force and virtue: which being read and heard, the said Thomas prays leave to impart thereto here, until Friday next after the morrow of the Holy Trinity, and he hath, &c. the same day is given to the said James Robinet here, &c. And now here at this day, to wit, on the said Friday next after the said morrow of the Holy Trinity, here comes as well the said James Robinet by his attorney aforesaid, as the said Thomas in his proper person; and the said James prays that the said Thomas answer his bill aforesaid, &c. and the said Thomas as before defends the force and injury, when, &c. and saith that the said James Robinet ought not to have his action aforesaid against him, because he saith that the said James Astrey made no award, **[185]** order, arbitrament, final end or determination, between the parties aforesaid, of and concerning the premises in the condition aforesaid, above mentioned, before or upon the said last day of the said term of St. Hilary, next ensuing the date of the obligation aforesaid, and this he is ready to verify;

whereupon he prays judgment if the said James ought to have his action aforesaid thereupon against him, &c.

And the said James Robinet saith that he by any thing before alledged ought not to be precluded from having his action aforesaid against the said Thomas, because he saith that the term of St. Hilary in the condition aforesaid above mentioned, began the 23d day of January in the year of our Lord 1683, and ended the 12th day of February then next ensuing, and that the said James Astrey the arbitrator aforesaid in the condition aforesaid named, having taken upon himself the burthen of the award, order, arbitrament, final end and determination of and upon the premises in the condition aforesaid above specified, after the making of the said writing obligatory, and before the said last day of the said term of St. Hilary next ensuing the date of the writing obligatory aforesaid, to wit, upon the 8th day of February, in the year of our Lord 1683, aforesaid, at London aforesaid, in the parish and ward aforesaid, made his award in writing of and upon the premises in the condition aforesaid of the writing obligatory aforesaid, above specified ready to be delivered to each of the parties aforesaid, which signed with the hand of the said James Astrey, the said James Robinet, produces here in Court, the date of which is the said 8th day of February, in the year of our Lord 1683 aforesaid, in the manner and form following, to wit. Whereas there have been several suits depending in the High Court of Chancery and at common law between the said Thomas Cobb and the said James Robinet, both of Saffron-Walden, in the county of Essex, gentlemen, and whereas also the said Thomas Cobb and James Robinet did refer the matters aforesaid, and all other matters in difference between them to the award and arbitrament of the said James Astrey, and did enter in bonds each to the other in the penalty of 100l. to stand to and perform such award, arbitrament and determination as the said James Astrey should make thereupon; and all matters in difference between the parties aforesaid being fully heard and deliberated upon before the said James Astrey by the **[186]** parties aforesaid and their friends, the said James Astrey by the writing aforesaid, did order and award that the said Thomas Cobb within one week next after the date of this award should pay to the said James Robinet, or to his order, the sum of 7l. 10s. of the lawful money of England, in full satisfaction of all demands whatsoever, and that upon the payment thereof each of them should seal and execute to the other of them a general release, as by the said writing of award more fully appeareth; and the said James Robinet saith that the said Thomas, although often requested hath not paid to the said James Robinet, or to his order the said 7l. 10s. or any part thereof, within one week next after date of the writing of award aforesaid, or afterwards hitherto according to the form and effect of the writing of award aforesaid; and the said James Robinet further saith, that after the date of the writing obligatory aforesaid, and before the end of one week next after the date of the writing of award aforesaid, no new cause of action did arise, was or happened between the said Thomas Cobb and James Robinet for any matter whatsoever; and this he is ready to verify: wherefore he prays judgment and his debt aforesaid, together with his damages by occasion of the detention of that debt to be adjudged to him, &c.

And the said Thomas saith, that well and true it is that the said James Astrey, the arbitrator in the condition aforesaid above named, after the date of the writing obligatory aforesaid, and before the said last day of the said term of St. Hilary next ensuing the date of the said writing obligatory, to wit, upon the said 8th day of February, in the year of our Lord 1683 aforesaid, at London aforesaid, in the parish and ward aforesaid, made his award in the manner and form aforesaid, as the said James Robinet above hath alledged; and further the said Thomas saith, that after the date of the writing obligatory aforesaid, and before the making of the writ of award aforesaid, to wit, upon the 6th day of February, in the year of our Lord 1683, at Walden in the county of Essex aforesaid, a new cause of action did arise, was and happened between them the said Thomas **[187]** and James, for this that the said Thomas on the 6th day of February, in the year of our Lord 1683 aforesaid, at Walden in the county of Essex, the said close of the said James Robinet did break and enter, and his grass to the value of ten shillings there lately growing with feet in walking, and with cattle did tread down and consume, and so the said Thomas saith that the said James Astrey the arbitrator aforesaid, made no award, order, final end

or determination between the parties aforesaid, of and concerning the premises in the condition aforesaid above mentioned, before or upon the said last day of the said term of St. Hilary, next ensuing the date of the obligation aforesaid, according to the form and effect of the submission in the said condition specified, but the authority in the said submission in the said condition aforesaid contained did exceed; and this he is ready to verify; whereupon he prays judgment if the said James Robinet ought to have his action aforesaid, thereupon against him, &c.

And the said James Robinet saith that the said plea of the said Thomas above by replying pleaded, and the matter in the same contained, are not sufficient in law to preclude him the said James Robinet from having his action aforesaid against the said Thomas, and that he to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer; and this he is ready to verify: whereupon the said James Robinet as before prays judgment, and his damages by occasion of the detention of his said debt to be adjudged to him, &c.

And the said Thomas because that the said matter by him above by rejoining alledged; [which he is ready to verify:] is sufficient in law to preclude the said James Robinet from having his action aforesaid against him the said Thomas, which matter the said James doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, prays judgment, and that the said James be precluded from having his action aforesaid, &c. &c.

[188] ROBINET *against* COBB.

Award of a release of all demands in general, intended of demands till the submission, is good; but of all demands to the time of the award is void. *Post* 273, 274, 344, 239. 1 Roll. Ab. 263, 264. 2 Saunders 242, 294. 1 Lev. 58, 133. 1 Salk. 75. 3 Mod. 246. 6 Mod. 590. Lutw. 545. 10 Mod. 201. 6 Mod. 33, 35. 1 Ld. Ray. 116. 2 Ld. Ray. 965. Kyd on Awards 164. 2 Term Rep. 645. *Jesques le agard.*

Debt upon an obligation dated 1° Decemb. 35 Car. 2, conditioned to perform an award, so that it be made &c. before the last day of Hilary term next ensuing. The defendant pleads no award. The plaintiff replies and shews an award made before the last day of the said Hilary term, viz. the 8th day of February *de & super premissis*, that the defendant within a week after the date of the award should pay to the plaintiff 7l. 10s. in satisfaction of all demands whatsoever; *and that upon payment thereof each of the parties should release to the other all demands:* and avers, that no new controversy or cause of action did arise within the week after the said award. The defendant rejoins, *quod bene & verum est* that the arbitrators made an award *prout*, but further said, that after the submission and before the award, viz. the 6th of February, a new cause of action arose to the plaintiff against the defendant, for that the defendant on the same 6th of February did *break and enter* the close of the plaintiff called Blew, whereof the arbitrators had notice, and so they made no award; whereon the plaintiff demurred. And now it was objected that the award was void; 1. Because it is for the payment of money in satisfaction of all demands generally, which extends to the time of the award made, and so it is beyond (or out of) the submission: and 2. That the release being general, refers to the time of the release given, and consequently shall release the last cause of action, which was not within the submission, and shall also release even the bond of submission. But upon argument it was resolved by the whole Court, that the award was good; and a difference was taken where the award is for a satisfaction *till the award*, or for a release till the award, this is ill; but when the award is general without being limited to any time, and the same is made *de & super premissis* (as here) this shall be intended till the time of the submission; and a release of all demands, &c. till the submission, shall be a good performance of the award: and for the first part of this difference were cited Cro. Ja. 352, *Slainy* against *Wild.* 10 Co. *Moss* against *Beadle* cited **[189]** in *Osborn's case* in 10 Co. 130, and 2 Roll. *Mawe* against *Samuel.* And for the other part of the difference, 1 Roll. Abr. 256.

Let. M. *nu.* 1 Hutt. 29, *Allaboyer* against *Clifford.* Cro. Eliz. 861, *Goodman* against *Fountain.* Whereupon judgment was given for the plaintiff.(1)

RUSSEL *against* RUSSEL.

A concord not pleadable, except executed on both sides. 9 Coke 78, 79. 1 Saunders 236, 298. Cro. Cha. 193. 6 Mod. 35. 1 Bac. Ab. 24. 1 Stra. 573.

Covenant brought upon an indenture, whereby the defendant covenanted to permit the plaintiff to receive 100l. per annum rent; whereof 60l. per annum was to be for payment of a debt; and the residue to be paid to the defendant, and assigns a breach in a disturbance by the defendant from the receipt of the rent. The defendant pleads a concord between the plaintiff and the defendant, that each of them should deliver his part of the indenture to the other to be cancelled into the hands of a third person; and that each party should be discharged of all actions upon the said indenture; and avers, that he the defendant did deliver his part to such third person, &c. The plaintiff demurred, and judgment for him; for concord is no plea if it be not executed on both sides.

DAVIES *against* CHURCHMAN.

Debt against the heir; no plea that the executor has assets. 1 Lev. 13, 26, 92, 232.

Debt on an obligation against the defendant as heir, who pleads, that administration to his ancestor was committed to J. S. who had taken administration, and had assets. The plaintiff demurred, and upon argument he had judgment; for the plaintiff hath election to sue the one or the other.(2)

[190] HAUGHTON *against* SHELCROSS.

A plea on the Statute for Discharge of Poor Prisoners. *Vide ante* 151. "*Mes.*"

Assumpsit was brought, and the defendant pleaded the Statutes for Poor Prisoners, both of them briefly, and confounded them together, taking only the substance of each, and also pleads a summons and discharge by the justices, and demands judgment if against his person or necessary goods, &c. the plaintiff ought to have execution, *or* only against his lands and his other goods. The plaintiff demurs, and divers exceptions were taken to the plea, but all of them were over-ruled except one, viz. that where he pleads his imprisonment on the day mentioned in the statutes, he does not shew for what cause he was imprisoned, and may be it was for a fine to the King, or contempt, &c. which are not within the statutes; and although the cause of the imprisonment be shewn in the certificate, that is not sufficient, for it is not traversable, but it ought to have been shewn in the plea; and for this single cause judgment was given for the plaintiff generally. *See the like matter before, page* 151, *Sanders* against *Tooth.*

CHAFIN *against* BETSWORTH.

Custom of the manor not extended out of the manor. *Ante* 160. *Post* 424, 425.

Trespass for breaking his close called the *Market-place*, and erecting a stall there. The defendant justifies by the custom of the manor for all tenants to erect *stalls* there

(1) Per Lord Mansfield. 1 Burrow 277.—Awards are now considered with great latitude and less strictness than they were formerly, and it is right that they should be liberally construed, because they are made by Judges of the parties own choosing; and he declared against critical niceties in scanning awards made by Judges of the parties own choosing.

(2) By the English stat. 3 & 4 W. & M. c. 14, and the Irish stat. 4 Ann. c. 5, the heir is made liable for the value of the land sold before action brought.

to sell their goods, and that the defendant being a tenant and a *butcher*, erected a stall to sell *flesh;* on which the plaintiff demurs. And 1. It was objected, that the plea was ill, because it is not said that the Market-place is within the manor, and then the custom of the manor cannot extend thereto; but hereto it was answered and allowed by the Court, that seeing it is said the custom of the manor is to erect stalls *in pred' loco in quo, &c.* this is a sufficient averment that the *locus in quo* is within the manor. 2. Objected, that the custom is to erect *stalls* **[191]** for selling their goods, and the plea is, that he erected a *stall* to sell *flesh*, and does not say *his flesh:* and it may be a stranger's flesh, as in Cro. Ja. 46, *Burser* against *Martin*, trespass for *taking a horse* from the person of the plaintiff; and because it was not said, *his horse*, judgment was given for the defendant. And so it was ruled to be done in this case. But (*note*) it seeming to be a hard case, the Court recommended it to the parties to agree to amend the plea, and to go to trial on the merits of the cause, which they accordingly did.

PHILIPS *against* THOMPSON.

S. C. *Ante* 69.

A bankrupt's goods not bound by the delivery of the writ to the sheriff on the new statute till the writ actually executed as to the commissioners, *aliter* as to the bankrupt. *Ante* 58, 59, 69. 1 Sid. 173. 2 Sid. 115. 2 Jo. 196. 1 Jo. 438. 1 Ventris 360, 137. 1 Lev. 13, 14, 17, 178. 2 Shower 103, 238.

Assumpsit as assignee of commissioners of bankrupt; and upon issue *non assumpsit* and special verdict, the case was thus; Watkins a tradesman was indebted to Thompson, and in Easter term, 28 Car. 2, Thompson obtained a judgment against him for 600l. and in a *scire fac.* thereupon, in Mich. 29 Car. 2, has the judgment revived, and 30 Sept. 30 Car. 2 a *fieri fa.* thereupon was delivered to the sheriff, and endorsed according to the new(1) statute in the morning of that day; and afterwards the same day in the evening Watkins having notice thereof leaves his house, and becomes bankrupt; and after that, viz. 10 Octob. in the same year the sheriff seized Watkins's goods, and sold them for 400l. and delivered the money to Thompson in execution for his debt, and after such delivery the commissioners assign the money to the plaintiff, and for it this action was brought: and two points were argued three times at the Bar, viz. once when North was Ch. Just. and twice afterward when Jones was Ch. Just. 1. Whether the goods were so bound(2) by their being delivered to the sheriff, that they could not be liable to the commissioners of bankrupt by Watkins's becoming afterwards a bankrupt. 2. Admitting they are liable, whether this action will lie for the money, or only trover for the goods? And at the first argument it was strongly urged at the Bar, that the goods were bound to answer the defendant's debt by the delivery of the *fieri fac'* according to the new stat'. For this is in a manner an execution served and executed within the stat. of 21 Jac. c. 19. And for this were cited Dy. 67 b. *Stringfellow's case*, Cro. Cha. 148, *Audley* v. *Halsey*, and *Baily and Bunning's case*, 1 Levinz 173. And of **[192]** this opinion were at first Wyndham and Charlton Justices: but afterwards all the Judges, viz. Jones Ch. Just. Charlton and Levinz, and also Street, (made a Judge in Wyndham's place, who was then dead) held, that the goods were subject to the commissioners of bankrupt, and were well sold by them even since the new statute as well as before, for that statute makes no difference in this case. But whereas before that statute the goods were bound to the plaintiff in the action from the *teste* of the writ, now they are not bound till the delivery of the writ to the sheriff; but how are they (then) bound? Why only so as the bankrupt himself cannot dispose of them, but not so but that the commissioners may dispose of them for the benefit of creditors by the express words of the statute of 21 Jac. c. 19, *no execution of them being served and executed;* and the delivery of the writ to the sheriff is not any *execution* thereof, admitting that it is thereby *served;* for the words of the statute 21 Jac. are *served and executed;* and so this case differs from *Stringfellow's case*, and from *Audley and Halseys case;* for there the extents

(1) English, 29 Charles 2, c. 3. Irish, 7 Wil. 3, c. 12.
(2) *Per le delivery des biens—but* brief *must be intended.*

were executed, though the execution was not compleated till the delivery: and the case of *Baily and Bunning* was resolved only in excuse of the bailiff, that he should be excused for executing the writ, and not that the goods were bound by the delivery of the writ. And as to the second point all the justices, except Levinz, held clearly, that the commissioners could not assign this money; for they had to do only with the bankrupt's goods, and this money, for which the goods were sold, was never the bankrupt's money, nor could he bring any action for it. But Levinz said, he believed that such actions had been brought for the money, and, as he remembered, it had been so in *Bateman's case* about 14 or 15 years since in the King's Bench, where trover was brought as well for the money as the goods. But he thought the action for the money could hardly be maintained in reason; and he consented with the others, that judgment should be for the defendant in this case, and so it was.

[193] AYLET *against* WILLIAMS.

In debt or covenant for rent on a deed not indented, *nil habuit* pleaded. Ante 146. Co. Lit. 47 b. Com. Dig. Pleader. 2 V. 14. 2 W. 48. Reply. *Habuit*, not shewing what estate, is ill. Cro. Ja. 315. 2 Salk. 562. 2 Ventris 252, 271, 1 Wilson 314. 3 Wilson 72.

Covenant upon a deed not indented, and declares on a lease of certain land to the defendant, rendering rent, with a covenant to pay it, and assigns a breach in non-payment of the rent. The defendant by *protestation*, that he did not enter nor occupy the land as the plaintiff had supposed, for plea says, that the plaintiff *nil habuit in tenementis tempore dimissionis*. The plaintiff replies, that *habuit bonum titulum unde potuit dimittere*. The defendant demurs generally; and on the first argument the Court held the replication ill for not shewing what title he had, according to *Gyll* v. *Glass*, Cro. Ja. 312, and this, though the deed was not by indenture: but then it was said, that the case of *Gylls and Glass* was in debt for rent, but this is in covenant, and collateral to the reservation of the rent; whereas in *Gyll and Glass's case* if no lease had been, no reservation could be: but there may be a collateral covenant to pay (as here) though no lease is made: but by the Court, it is all one; for if there be no rent, there cannot be any covenant to pay it, for the one must depend on the other; and so it was remembered to be adjudged in *Caponhurst's and Caponhurst's case*, 1 Lev. 45. Mich. 13 Car. 2, B. R. But the plaintiff perceiving the opinion of the Court to be against him prayed leave to discontinue, so that he might not lose his rent by this mispleading in the replication, but might bring a new action for it; which was granted him on payment of costs.(1)

[194] TRINITY, 35 Charles II.

CANNON *against* SMALLWOOD.

Declaration in trespass *vi et armis* for taking plaintiff's cattle and impounding them until payment of a fine.

Cumberland, to wit.—Alan Smallwood, late of Graystock in the county aforesaid doctor in divinity, John Robson late of the same in the county aforesaid gent. Adam Bird late of Penruddock in the county aforesaid yeoman, and John Harrison late of Graystock in the county aforesaid yeoman, were attached to answer John Cannon of a plea wherefore with force and arms the cattle of the said John at Graystock lately found without any reasonable cause they took and impounded, and them there so impounded until the said John had made a fine of three pounds and seven shillings with the said Alan Smallwood, John Robson, Adam Bird, and John Harrison, for the delivery of his cattle aforesaid, did detain and other wrongs to him did, to the great damage of the said John Cannon, and against the peace of the lord

(1) But *nihil habuit in tenementis* is no plea to an *assumpsit* for use and occupation. —1 Wilson 314.

the now King, &c. And whereupon the said John Cannon by Lancelot Simpson his attorney complains that the said Alan Smallwood, John Robson, Adam Bird, and John Harrison, on the first day of April, in the 35th year of the reign of the lord the now King, with force and arms, &c. at Graystock aforesaid, in the county aforesaid, a certain mare of the said John Cannon of the price of five pounds, and a certain gelding of the said John of the price of three pounds there found without any reasonable cause took and impounded, and them so impounded, until the said John Cannon had made a certain fine of three pounds and seven shillings with the said Alan Smallwood, John Robson, Adam Bird, and John Harrison, for the delivery of his cattle aforesaid, did detain and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon he saith that he is prejudiced, and hath sustained damage to the value of ten pounds, and therefore he produces his suit, &c.

And the said Alan Smallwood, John Robson, Adam Bird, and John Harrison by John Mounsey their attorney come and defend the force and injury when, &c. and as to the coming with force and arms, and also to the whole trespass aforesaid, except the taking and impounding of the cattle aforesaid, and the detaining of the said cattle in pound, until the said John Cannon had paid sixty-two shillings and two pence, parcel of the said three pounds and seven **[195]** shillings, above supposed to have been committed, they say that they are not guilty thereof, and of this they put themselves upon the country; and the said John Cannon doth the like, &c. And as to the taking and impounding of the cattle aforesaid, and the detaining of them in pound, until the said John Cannon paid the said sixty-two shillings and two pence parcel of the said three pounds and seven shillings above supposed to have been committed, they the said Alan Smallwood, John Robson, Adam Bird, and John Harrison say that the said John Cannon ought not to have his action aforesaid thereupon against them, because they say that before the said time in which the trespass aforesaid is supposed to have been committed, to wit, upon the 25th day of October, in the 34th year of the reign of the said lord the now King, the said Alan at the County Court of one Leonard Dykes, Esquire, then being Sheriff of Cumberland aforesaid, held at Turpenhow, in the county aforesaid, before William Winder and John Brownrigg free suitors of the said Court, levied a certain plaint against one Benjamin Grainger, gent. the said John Cannon and one Robert Edmundson for the taking of the cattle of the said Alan, and the unjust detention of the said cattle against gages and pledges, and there then were pledges of prosecuting his plaint aforesaid, to wit, John Doe and Richard Roe, whereupon at that County Court aforesaid, held at Turpenhow aforesaid, in the county aforesaid, before the suitors aforesaid, on the said day and year at the prayer of the said Alan,(1) it was given in charge to all and singular the bailiffs of the said sheriff by the said Court, that they should summon or that one of them should summon the said Benjamin Granger, John Cannon, and Robert Edmundson, that they should be at the next County Court of the county aforesaid, to be held at Turpenhow aforesaid, in the county aforesaid, on the 15th day of November then next ensuing, to answer the said Alan of the plea aforesaid, and that they should have there that precept, and the same day was given to the said Alan there, &c. whereupon the said Alan then and there put in his place John Featam his attorney against them the said Benjamin Granger, John Cannon, and Robert Edmundson in the plea aforesaid; by virtue of which precept one Thomas Grisdale, then one of the bailiffs of the said sheriff at the next County Court aforesaid, in the county of Cumberland aforesaid, before the suitors aforesaid, afterwards, to wit, upon the said 15th day of November, in the said year last aforesaid, [the said Alan then and there in his proper person appearing, and in the due form of law presenting himself against the said Benjamin Granger, **[196]** John Cannon, and Robert Edmundson] returned the precept aforesaid to him in the form aforesaid directed in all things served and executed; and thereupon at the County Court aforesaid the said Benjamin Granger, John Cannon, and Robert Edmundson, according to the warning to them made, in their proper persons appeared, and then and there in the County Court aforesaid put in their places Thomas Jackson their attorney in the plea aforesaid; and thereupon then and there

(1) By a certain precept, *seem wanting here.*

the said Alan Smallwood at the said Court in the plea aforesaid against them the said Benjamin Granger, John Cannon, and Robert Edmundson, by declaring did say that the said Benjamin Granger, John Cannon, and Robert Edmundson, upon the 27th day of October, in the 34th year of the reign of the said lord the now King, at the parish of Graystock, in the county of Cumberland, within the jurisdiction of the Court aforesaid, in a certain place there called Halling, took the cattle of the said Alan, to wit, eight oxen, four cows, one steer, and five heifers of a black colour, of the price of fifty-five pounds, and them unjustly detained against gages and pledges, whereupon he said that he was prejudiced, and had sustained damage to the value of thirty-nine shillings, and therefore he produced his suit, &c. and John Doe and Richard Roe were pledges for prosecuting, whereupon afterwards, to wit, at the said County Court of Leonard Dykes, Esquire, then being sheriff of the said county as aforesaid, before the suitors aforesaid, the said Benjamin Granger, John Cannon, and Robert Edmundson had leave to imparl to the declaration aforesaid, until the next County Court of the county aforesaid, to be held at Turpenhow aforesaid, in the county aforesaid, on the 6th day of December from thence next ensuing, and then there to answer, &c. the same day then was given to the said Alan there, &c. at which next County Court aforesaid, being the first County Court of one Edward Hatsell, Esquire, then sheriff of the county aforesaid, held at Turpenhow aforesaid, in the county aforesaid, before the suitors aforesaid, on the said 6th day of December came as well the said Alan, as the said Benjamin, John and Robert by their attorney aforesaid, and the said Benjamin Granger, John Cannon and Robert Edmundson in the said Court before the suitors aforesaid, then and there by their attorney aforesaid, defended the force and injury when, &c. and as the bailiffs of the most noble Henry Earl of Arundel well acknowledged the taking of the cattle aforesaid in the said place in which, &c. because they said that **[197]** the said place in which the taking of the cattle aforesaid was supposed to have been committed at the said time in which, &c. was the soil and freehold of the said most noble Henry Earl of Arundel, and because the cattle aforesaid at the said time in which, &c. were in the said place in which, &c. eating the grass of the said Henry Earl of Arundel then growing there, and doing damage there, they the said Benjamin, John and Robert as the bailiffs of the said Henry Earl of Arundel well acknowledged the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. so doing damage there, &c. whereupon afterwards, to wit, at the said County Court aforesaid last mentioned, before the suitors aforesaid, the said Alan had leave to reply to the said plea until the next County Court of the county aforesaid, to be held at Turpenhow aforesaid, in the county aforesaid, upon the 3d day of January from that time next ensuing, and the same day then was given to the said Benjamin, John and Robert there; at which next County Court aforesaid, being the second County Court of the last mentioned sheriff of the county aforesaid, held at Turpenhow aforesaid, in the county aforesaid, before the suitors aforesaid, on the said third day of January, came as well the said Alan, as the said Benjamin, John and Robert by their attorneys aforesaid, and the said Alan in the said Court before the suitors aforesaid, then and there to the plea aforesaid, by replying said that the said Benjamin, John and Robert, as the bailiffs of the said Henry Earl of Arundel, ought not to acknowledge the taking of the cattle aforesaid in the said plea in which, &c. to be just; because the said Alan then said that the said Henry Earl of Arundel and all those whose estate the said earl had in the close aforesaid in which, &c. the fences in and about the close aforesaid have repaired, and have been accustomed and ought to keep in repair, from the time whereof the memory of man is not to the contrary; and the said Alan further said that the fences aforesaid in and about the close aforesaid, at the said time of the taking of the cattle aforesaid, were broken, ruinous, and in decay for default of repair, whereby the cattle aforesaid into the close aforesaid in which, &c. at the said time in which, &c. for default of repair of the fences aforesaid escaped, and entered and were in the said place in which, &c. eating the grass growing therein, and there doing damage, and this he was ready to verify; wherefore he prayed judgment and **[198]** his damages by occasion of the taking and unjust detaining of his cattle aforesaid to be adjudged to him, &c. whereupon afterwards, to wit, at the said County Court aforesaid last mentioned, held before the suitors aforesaid, the said Benjamin, John and Robert had leave to rejoin to the said

replication until the next County Court of the county aforesaid, to be held at Turpenhow aforesaid, in the county aforesaid, on the 31st day of January from that time next ensuing; and the same day was given to the said Alan there, &c. At which next County Court being the third County Court of the said Edward Hatsell, Esquire, then being sheriff of the county aforesaid, held at Turpenhow aforesaid, in the county aforesaid, before the suitors aforesaid, on the said 31st day of January came as well the said Alan, as the said Benjamin, John and Robert by their attornies aforesaid; and the said Benjamin, John and Robert in the said Court before the suitors aforesaid, then and there by rejoining said that the fences in and about the said close in which, &c. at the said time in which, &c. were well and sufficiently repaired, without this that the fences in and about the said close in which, &c. were broken, ruinous, and in decay for default of repair, in the manner and form as the said Alan above by replying had alledged, and of this they put themselves upon the country, and the said Alan did the like; therefore at the prayer of the said Alan (1) it was given in charge by the said Court there to the said Adam Bird, then one of the bailiffs of the said Edward Hatsell, then sheriff of the county aforesaid, that he should cause to come there, to wit, at the next County Court, &c. to be held there, to wit, at Turpenhow aforesaid, upon the 28th day of February then next ensuing, twelve good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and who neither to the said Alan, nor to the said Benjamin, John or Robert had any affinity, to make a certain jury of the country between the parties aforesaid of the plea aforesaid, because as well the said Alan, as the said Benjamin, John and Robert, between whom the contention was, had put themselves upon that jury; and that he should have then there at the said next Court the names of the jury aforesaid and that precept, the same day was given to the parties aforesaid there by the said Court, &c. At which next County Court aforesaid, being the fourth County Court of the said Edward Hatsell, Esquire, then sheriff of the county aforesaid, **[199]** held at Turpenhow aforesaid, before the suitors aforesaid, the Judges of the said Court, upon the said 28th day of January, in the 35th year of the reign of the said lord the now King, came as well the said Alan, as the said Benjamin, John and Robert by their attornies aforesaid. And the said Adam Bird, then bailiff of the said sheriff of the county aforesaid, did not return the precept to him thereupon directed, nor did any thing thereupon, therefore at the prayer of the said Alan (1) it was given in charge as before by the said Court to the said Adam Bird, then one of the bailiffs of the said Edward Hatsell, then being sheriff of the county aforesaid, that he should cause to come at the next County Court of the said Edward Hatsell, Esquire, then sheriff of the county aforesaid, to be held there, to wit, at Turpenhow aforesaid, upon the 28th day of March then next ensuing, twelve good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and who neither to the said Alan, nor to the said Benjamin, John or Robert had any affinity, to make a certain jury of the country between the parties aforesaid of the plea aforesaid, because as well the said Alan as the said Benjamin, John and Robert, between whom, &c. and that he should have there at the said next Court the names, &c. and that precept. At which next County Court aforesaid, being the fifth County Court of the said Edward Hatsell, then being sheriff of the county aforesaid, held at Turpenhow aforesaid, before the suitors aforesaid, the Judges of the said Court, upon the 28th day of March, in the 35th year aforesaid, came as well the said Alan, as the said Benjamin, John and Robert, by their attorneys aforesaid, and the said Adam Bird, then bailiff of the said Edward Hatsell, then sheriff of the county aforesaid, at the said Court there returned the precept aforesaid to him thereupon directed in all things served and executed, together with the names of twenty-four good and lawful men of the county aforesaid, named in a certain panel to the said precept annexed, and certain of them, to wit, Thomas Thompson, John Jack, John Parker, Thomas Wilkinson, William Jack, John **[200]** Birkett, William Birkett, William Bank, John Jack, Leonard Fell, William Haskengh, and Thomas Strickett, being called in like manner came, who to speak the truth upon the premises aforesaid being elected, tried and sworn, said upon their oath that the said fences in and about the close aforesaid, in which the taking of the cattle

(1) By a certain precept, *seem wanting here.*

aforesaid was supposed to be committed at the said time in which, &c. were broken, ruinous and in decay for want of repair, in the manner and form as the said Alan above by replying hath alledged, and they assessed the damages of the said Alan by occasion of the premises aforesaid, above his expences and costs by him about his suit in that behalf laid out,(1) and for those expences and costs to thirty-nine shillings. Therefore it was considered by the said Court, that the said Alan should recover against the said Benjamin, John and Robert his damages to twenty-three shillings and two pence by the jury aforesaid in the form aforesaid assessed; and (2) also to the said Alan at his request for his expences and costs aforesaid by the Court there of increase adjudged, which damages in the whole did amount to sixty two shillings and two pence, and that the said Benjamin, John and Robert should be in mercy, &c. upon which judgment afterwards and before the said time in which, &c. to wit, upon the 28th day of March, in the 35th year aforesaid, at Graystock aforesaid, at the prosecution of the said Alan, a certain precept in the nature of the writ of the lord the King of *levari facias* issued out of the said Court, sealed under the seal of the office of the said Edward Hatsell, sheriff of the county aforesaid, and to the said Adam Bird his bailiff of and within the county aforesaid directed, by which precept the said sheriff to the said Adam his bailiff gave in charge, that without delay he should cause to be levied of the proper goods and chattels of the said Benjamin, John and Robert sixty-two shillings and two pence, which were adjudged for the damages and costs which the said Alan Smallwood in the said action had recovered against them in the county aforesaid, which precept of *levari facias* in the form aforesaid made, afterwards and before the next County Court of the county aforesaid, to wit, upon the last day of March, in the 35th year aforesaid, at Graystock **[201]** aforesaid, on the behalf of the said Alan to the said Adam Bird then being one of the bailiffs of the said sheriff was delivered in the form of law to be executed, by virtue of which precept the said Adam as and being the bailiff of the said sheriff as aforesaid, and the said John Robson and John Harrison as the servants of the said Adam, and in his aid and by the direction of the said Alan, afterwards, to wit, at the said time in which, &c. to levy the damages aforesaid the cattle of the said John Cannon aforesaid took and impounded, and them there so impounded did detain until the said John Cannon the said sixty-two shillings and two pence in the form aforesaid recovered, to the said Adam the bailiff of the said Edward Hatsell, sheriff of the county aforesaid, for the use of the said Alan paid in satisfaction of the damages aforesaid, to have delivery of his cattle aforesaid, which sixty-two shillings and two pence the said John (3) Cannon afterwards and before the said next County Court aforesaid, to wit, upon the said first day of April, in the 35th year aforesaid, at Graystock aforesaid, paid to the said Alan for and in satisfaction of his damages aforesaid, which taking and impounding and detaining in pound of the cattle aforesaid, until the said John Cannon paid the said sixty-two shillings and two pence, are the same taking and impounding and detaining in pound of the cattle aforesaid until, &c. whereof the said John Cannon above against them complains, and this they are ready to verify; wherefore they pray judgment if the said John Cannon ought to have his action aforesaid thereupon against them, &c.

And the said John Cannon as to the said plea of the said Alan Smallwood, John Robson, Adam Bird, and John Harrison, as to the taking and impounding of the cattle aforesaid, and detaining them in pound, until the said John Cannon paid sixty-two shillings and two pence, the said John saith that he by any thing before alledged ought not to be precluded from having his action aforesaid thereupon against them, because he saith that the said plea by the said Alan Smallwood, John Robson, Adam Bird, and John Harrison, in the manner and form aforesaid pleaded, and the matter in the same contained, is not sufficient in law to preclude the said John Cannon from having his action aforesaid thereupon **[202]** against the said Alan Smallwood, John Robson, Adam Bird, and John Harrison; to which the said John hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said John Cannon prays judgment and his damages by occasion of the trespass aforesaid to be adjudged to him, &c.

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(1) Doth not say what sum.
(2) Here also the sum is wanting. *Vide post*, 203.
(3) Adam Bird?

And the said Alan Smallwood, John Robson, Adam Bird, and John Harrison, because that they above by pleading have alledged sufficient matter in law to preclude the said John Cannon from having his action aforesaid as to the said taking and impounding of the cattle aforesaid, and the detaining them in pound until the said John Cannon paid the said sixty-two shillings and two pence, which they are ready to verify, which matter the said John Cannon doth not deny nor to the same in any wise answer, but altogether hath refused to admit the verification thereof, they the said Alan Smallwood, John Robson, Adam Bird, and John Harrison as before pray judgment, and that the said John Cannon may be precluded from having his action aforesaid thereupon against them, &c. And because the justices will advise themselves of and upon the premises whereof the parties aforesaid above have put themselves upon the judgment of the Court, before they give their judgment thereupon, day is given to the parties aforesaid here until from the day of the Holy Trinity in three weeks to hear their judgment thereupon, because that the said justices here thereupon not as yet, &c. And as to the trial of the issue aforesaid between the parties aforesaid by the country to be tried, the sheriff is commanded that he cause to come here at the said term twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

[203] CANNON *against* SMALWOOD AND OTHERS.

After *freehold* pleaded in the County-Court they cannot proceed.
6 Mod. 117, 118, 119.

Trespass for taking and impounding his beasts until he paid 3l. 7s. &c. The defendant pleads as to all except the taking and impounding of the beasts until he paid 3l. 2s. and 2d. *Not guilty;* and as to that he pleads a suit in the County-Court brought by A. S. against the now plaintiff; whereto he (being then defendant) pleaded the *freehold* of the Earl of Arundel, and justified the taking as doing damage in the earl's freehold, whereto the then plaintiff pleads in bar of the conusance, that the earl ought to make the fences, and that for default of reparation the beasts escaped, &c. And thereupon issue was taken, that the fences were in good repair. The jury found they were out of repair, and assess *damages* besides costs and charges (but did not say what sum for damages) *and for costs and charges* 39*s*. *Et ideo consideratum fuit*, that the plaintiff should recover 1l. 3s. 2d. damages *per jurator' in forma præd' assess. necnon pro misis & custagiis* (but say not what sum) and yet conclude *quæ in toto attingunt ad* 3*l*. 2*s*. 2*d*. *whereupon there issued out of the same Court a precept in nature of a fieri facias under the seal of the sheriff, whereby he commanded* the defendant, being the bailiff, that he should cause the said 3l. 2s. 2d. to be levied: who by virtue of the said precept took the beasts and impounded them until the now plaintiff paid him the said 3l. 2s. 2d. which he paid to the recoverer; upon which plea the now plaintiff here demurred: and by Serj. Pemberton at the Bar divers exceptions were taken to the plea. 1. For that the verdict finds damages, but it does not appear to what sum, and yet concludes *quæ in toto attingunt, &c.* 2. The precept is in nature of a *fieri fac'*, and yet the precept is *quod levari faceret.* 3. That the precept ought not to have been by the sheriff but by the suitors who are the Judges; but all those exceptions were overruled: for as to the two first they do not prove the judgment and execution void, but only voidable by a writ of false judgment; and in the mean time they are a good excuse to the bailiff, and pleadable by him; and as to the third, it is the constant practice for the sheriff, as minister of the Court, to award the precept. 4. It was objected, that the bailiff ought not to have paid the money to the plaintiff, but to have returned it to the Court; and as to this exception the Court did not well agree, for the precept being *ita quod habeas denar' ill' ad reddend'* to the plaintiff, some said, that so are the writs in this Court, and yet the sheriff, when he has levied it, pays it to the plaintiff; and if he does not do so, this Court often compels him thereto, upon motion. But on the other side it was said, that this was by *permission* of the Court, and not by force of the law; and that this Court often orders the sheriff to bring the money levied into Court, and not to permit the plaintiff to have it, of which power the Court would be deprived by this means; and Cro. Cha. 446. *Girling's case*, the sheriff could not plead execution of his writ without pleading the return thereof; and

so are 21 H. 7, 22, and 2 Roll. 563, *nu.* 11, 12, 13. 5. It was objected, that the judgment was void, and *coram non Judice*, because after *freehold* pleaded the County-Court has no jurisdiction; for a freehold cannot be tried without writ. To which it was answered, that the freehold was not tried below, but arose on a collateral point; viz. whether the fences were in repair, &c. But *per Cur'* by this trial a charge upon the freehold is brought in question; and they have no power after freehold pleaded to proceed in the cause neither directly, nor collaterally: and therefore the proceedings here after that was pleaded were *coram non Judice*, and void: and upon this exception judgment was given for the plaintiff.

AYLESBURY *against* HARVEY.

In replevin avow and have a return, or justify and have no return. Com. Dig. Pleader. 3 K. 12. 4 Term Rep. 643.

Replevin brought of a silver-cup. The defendant justifies by a condemnation before the justices of peace on the Statute of Excise for not entering of strong-waters, and a warrant thereupon to levy 20s. fine set upon them. Whereupon the defendant took the cup, and detained it, until the 20s. was paid to redeem it. The plaintiff replies, that J. S. made him executor in 1666, and this cup he had, and yet has, as executor. The defendant demurs: and **[205]** now Pemberton for the plaintiff took exception to the plea and said, that the defendant in this replevin ought to have avowed, and not to have justified the caption. But the Court said he might do one or the other at his election; and the difference is only, *if he justifies he cannot have a return, as he shall if he avows*, which need not be in this case, because he has the *cup* again, Hill. 31 H. 6, pl. 1. Trin. 15 E. 4, pl. 8. Second exception, for that he pleaded the condemnation *prout patet per recordum*, whereas the justices are not in this case a Court of Record. *Sed non allocat'*. For 1. By the statute the justices are made judges of the matter. 2. By the Acts they may fine and imprison. It enacts, that no *certiorari* shall issue to remove their proceedings; and these are marks of a Court of Record, and the *certiorari* here is *certiorari volentes de recordo coram vobis, &c.* 4th exception, That the warrant was not pleaded with a *profert hic in Cur'*. But by the Court; 1. The statute does not require that the warrant be under hand and seal, but only in writing, and no writing is to be so pleaded, except it be a deed (*sed quære;*) also the sheriff's officers never plead their warrants with a *hic in Cur' prolat'*, Rast. Entr. 341 b. 342 a. 606 a. And it was said, the reason was because of things executed, or estates determined the deed need not be shewn, as 6th Co. 30, in the end of *Bellamy's case*. Wherefore judgment was given for the defendant. *Note*, The Court did not regard the plea, that he had it as executor so long ago, but said they would intend the property altered notwithstanding the *adhuc habet;* for it would be very dangerous for officers, if such pleading should be allowed.

BARRET *against* TROTMAN.

General non-tenure not pleadable in a *sci. fac' contra* if special. *Ante* 55. 6 Mod. 266. 4 Bac. Ab. 424.

In a *scire facias* on a judgment in debt, J. S. being returned tertenant . . . Hunt his attorney, and pleads non-tenure. The plaintiff demurs generally, and had judgment; because a general non-tenure is no plea in this action, though a special non-tenure is, as, that he has only a term of years; also here is no Christian name for the attorney.

[206] THE KING *against* PIGET.

In a *quare impedit* by the King for simony, the patron need not be made a defendant. *Ante* 16, 83, 115. *Post*, 337. 7 Co. 106. Noy. 151. 2 Roll. Rep. 239. Cro. Ja. 651.

A *quare impedit* by the King against the incumbent, and makes title to the King upon a simoniacal contract by Francis late Earl of Shrewsbury, and one Stacy. The

defendant pleads, that he is parson imparsonee by the presentment of Charles the now Earl of Shrewsbury, and demands judgment of the writ, for that the patron is not made a party therein. The plaintiff demurred, and judgment was given for him without argument, because the title to the patronage is not in question, but only the presentment *hac vice*, as was adjudged formerly in this Court between the King and the Archbishop of York, *ante* 10, which is entered Pasch. 32 Car. 2, Rot. 659, according to the case of the *quare impedit*, in Co. 7, fol. 106.

EVELIN *against* DAVIES.

Amerciament in the leet, not showing what sum. Amerciaments, by whom affeered.

Debt for amerciament in a leet, and shews, that the defendant was presented and amerced, *which said amerciament was affeered by all the jurors to* 40*s*. The defendant demurred generally: and *per Cur'*, the declaration is not good; 1. Because it is not shewn to what sum the amerciament was made, and yet some precedents are so, as Rast. Entr. 553, &c. 2. The afferement ought to be by officers to be elected by the steward, and not by the jury; and they take a special oath to that purpose, as Hob. 122, *Wilson* against *Hardingham* is in both points; whereupon judgment was given for the defendant.

[207] HILARY TERM, IN THE THIRTY-SIXTH AND THIRTY-SEVENTH YEARS OF THE REIGN OF CHARLES II. AND IN THE FIRST YEAR OF THE REIGN OF JAMES II. IN THE COMMON PLEAS.

What matters are discontinued, and what not, by the King's demise.

"Memorandum, that all the former part of this term Jones Chief-Justice was sick, and came not to Court, during which time little was done in Court. And towards the latter end of the term our most Gracious Sovereign King Charles the Second departed this life about twelve at noon: but news coming of his death approaching at seven of the clock that morning, some of the Judges of each Court hasted to Westminster to be sitting in Court to continue the term, but did little but hear some few motions, and so rose as soon as the King was dead, and the next morning all their commissions were renewed, and sealed all together at the Lord Chancellor's; but to preserve their seniority, each was sworn in the same order of seniority and priority as they stood before: and all judicial proceedings went on, except indictments and informations, and in them according to the resolution of the case of discontinuance of process by the King's death upon the statute of Ed. 6, 7 Co. 114. Such as had pleaded, and were ready for trial, pleaded *de novo;* and their trials were put off to the next term. But in case of actions of debt, *qui tam, &c.* upon penal statutes, a question being moved at the table in Serjeants-Inn in Fleet-Street, whether all the proceedings were fallen, except the informations or declarations, as in the other case? Most of the Judges were of opinion that they were not, because that is an action between party and party within the words of the statute of E. 6, and so resolved Cro. Cha. 10, in *Farrington's case;* and so I heard was the opinion of the Chief-Justice of the King's Bench, and the rest of the Judges of that Court, and did direct it should be so done there. But upon this occasion little of moment was done in the Common Pleas this term."

[208] LORD STURTON AND OTHERS *against* PIERPOINT.

Three plaintiffs; one of them is excommunicated, how to plead it.
Com. Dig. Abatement, E. 7.

Debt for rent by the plaintiffs, executors of the Lord Petre. Defendant pleads in abatement by *pet' judicium de breve, &c.* for that one of the plaintiffs is a *popish recusant* convict, and therefore *quasi excommunicat'* by the stat. 3 Jac. 1. To which the plaintiffs demurred. And now it was argued by Pemberton, that this disability in one of the plaintiffs is pleadable against all of them jointly, although they are executors, because

none ought to keep company with an excommunicated person, Co. Lit. 134 a. But for the plaintiffs it was urged and resolved by the Court, that this ought not to have been pleaded in abatement by *petit judicium de breve*, because the writ is not abated thereby, but only suspended, and the pleading ought to be *suspenderi non debet*, as are Hill. 32, 33 Car. 2, Rot. 495. Mich. 33 Car. 2, Rot. 440, and Pasch. 37 Car. 2, Rot. 703, all of them in this Court.

[209] EASTER TERM, IN THE FIRST YEAR OF THE REIGN OF JAMES II. IN THE COMMON PLEAS.

BEDINGFIELD *against* ONSLOW.

Case by him in reversion, and trespass by tenant in possession for the same trespass. *Post*, 359, 360. 1 Mallory 195. 1 Salk. 19.

Case brought and declares, that he was seised in fee of a close, and the defendant possessed of another close next adjoining, between which closes ran a rivulet, and that the defendant stopped the rivulet, whereby he surrounded and drowned the plaintiff's close, so that the *timber-trees* (of the plaintiff's) *viz. an hundred timber-trees of oak, and an hundred of ash became putrified, rotten, and perished.* The defendant pleads, that one Studman *long before the said time when, &c. and at the time when &c.* was possessed of the said close by virtue of a lease to him thereof made by the plaintiff's father, and that he had paid to Studman 20s. which he had accepted in satisfaction of the said trespass. Whereupon the plaintiff demurs: and after arguments at the Bar, and on consideration of the books of 19 H. 6, 12. 12 H. 6, 4. 2 Roll. Abr. 551. Cro. Eliz. 55, *Love* against *Piggot*, it was resolved by Charlton, Levinz and Street, who only were in Court, that this was no plea; for the plaintiff in respect of the prejudice done to the reversion, may maintain an action; and also Studman in respect of the possession, and so another may in respect of the *shade, shelter,* and *fruit* of the trees, for the same trespass; and the satisfaction given to one is no bar to the other. *But trespass during the plaintiff's term could not be had, it being founded merely on the possession.*

[210] WEBSTER *against* HAIGH.

Case for a vexatious suit without reasonable cause. 1 Salk. 14, 15. 1 Lev. 275. 1 Mod. 4. Co. Lit. 161 a. note 4.

Case for that the defendant wickedly intending and maliciously contriving *ipsum minus rite prægravare, & tam per corporis imprisonament' quam alias labores & expensas, prætextu justitiæ & legis processus defatigare opprimere & depauperare & multipliciter prægravare & damnificare ex malitia sua prœhabit' tali die & loco, virtute cujusdam brevis de quo minus e Cur' Scaccar' sine aliqua rationabili causa arrestari & imprisonari subdole fraudulenter & injuste causavit, & in prisona detineri procuravit,* until he gave a warrant of attorney to confess a judgment for 20l. in the King's Bench, Common-Pleas, or Exchequer, whereby he had and suffered damages to 40l. To this the defendant demurred generally; and now it was argued for the defendant, that no action lies for suing in a proper Court; for a man may mistake his own case, and think he has a good cause of action where it proves otherwise; *and here the declaration does not say, that he knowing he had no cause of action sued,* as it was in *Freeman* against *Waterer*, Hobart's Reports 267; and divers authorities were cited against the action, as Cro. Eliz. 794, an action lies not for suing in a proper Court, though he had no cause of action; and Cro. Eliz. 836, because it would deter the subjects from prosecuting their suits; and so is 2 R. 3, 9 b. by all the Judges of England; and 43 E. 3, Finchden's opinion, and Co. Lit. 161 g. to sue the King's writs is not actionable, be it by wrong or right; and the law has given a remedy against vexatious actions, viz. that the plaintiff being nonsuit or barred shall pay costs; and F. N. B. 43 G. and Co. Lit. *ubi supra*, this action lies not in any case, except in a replevin of a rent-service, and there because it amounts to a disseisin. But for the plaintiff it was argued, that the action lies as it is laid here; for it is said, the action was brought *ex malitia prœhabita, & sine aliqua causa rationabili ipsum damnifi-*

care, which implies the *knowing* he had no cause of action; and this is confessed by the demurrer; and Styl. 379, and 451, was cited, that the opinion of Rolle was, that such **[211]** actions lie. And Mich. 21 Car. 2, B. R. *Dowse* against *Swayne*, case for that the plaintiff, not having cause of action above 40l. sued him, and caused him to be arrested and imprisoned for 500l. and *Stribler* against *Jones and Waters* in the same term and Court. Case for arresting him for 500l. where he had no cause of action, *vel saltem non tantam causam actionis;* and both were said to be laid falsly and maliciously, and judgment for the plaintiff. But note, both those judgments were upon verdicts. And here Charlton held *totis viribus*, that the action did not lie because the law had provided another remedy, viz. *costs*. But Jones Chief-Justice and Just. Street held, that the action lay for the unjust, causeless, and malicious vexation premeditated, all which are confessed by the demurrer. Levinz doubted, because it is not expressly said, *knowing he had no cause of action;* but he inclined, that the action lay, because the defendant had compelled the now plaintiff to give him a judgment for 20l. whereby he is deprived of his remedy by costs, &c. But it was adjourned, and so were two other causes the same term; the one between *Slaiden and Haigh*, and the other between *Britnell and Haigh*.

WRIGHTON *against* BROWNE.

When acts done in peculiars are void, or not.

Ejectment on the issue *not guilty* was tried at Bar, and a special verdict found, that the Rectory of Hemsworth in the county of York had been time out of mind, &c. parcel of the Prebend of Laughton in the Morn in the said county of York, and not within the diocese and province of York, but within the peculiar jurisdiction of the Prebend of Laughton in the Morn, *belonging to the Dean and Chapter of York;* and that the dean and chapter always time out of mind &c. *have used to institute into the same church*, it being a church with cure of souls; and that the said church being void, the Duke of Norfolk, as patron, in 1679 presented the defendant, who was instituted and inducted by the Archbishop of York, and read the articles, &c. and that the church so continued 18 months without another institution, and that afterwards the King presented the lessor of the plaintiff for lapse, who was instituted by the dean and chapter, and if the institution, &c. **[212]** by the archbishop was good, or not? was the sole question. And it was argued for the plaintiff, that it being a peculiar the archbishop had nothing to do therein, but his acts are meer nullities and void; and this is not like the case of administrations granted of goods in another's diocese, or where there are not *bona notabilia*, which are only voidable; and they relied much on the books 11 H. 4, 9, where are some such opinions; and 13 Co. 4, *Porter* against *Rochester*, where it is said, that all the power exercised by the archbishop in such cases was by his legantine power derived from the Pope; and Roll. Abr. tit. Presentm. 357, cited as a case in point, and urged, that there are many peculiars in the hands of lay-men, where neither the archbishop or bishop have any thing to do. But upon consideration of all the books and arguments, the whole Court unanimously agreed, that judgment should be given for the defendant. And Jones Chief-Just. delivered it in the name of all the others; and their reason was, that in all those cases of the clergy the archbishop had two concurrent jurisdictions, the one Ordinary with the bishop in his diocese, the other super-intendent throughout his province of things ecclesiastical, to correct, and also to supply the defects of the Ordinary; and therefore his acts are not void, because he has jurisdiction throughout the province; and it shall be intended to be done in default of the Ordinary, till the contrary appear upon examination; and therefore they are only voidable, but till avoided are good: and they likened it to the case of a sheriff who executes a writ within a franchise which is not void, because within the county, and derived out of it: and it is not like the case of peculiars exempted *ab omni jurisdictione*, as many are in the hands of lay persons, and where the Ordinary has no power of visitation, which cannot be intended in this case, viz. that a prebend in a cathedral church shall be exempted from the Ordinary's visitation; and for authority herein they relied on Fitzh. Quare Imped. 162, and Hob. 15, *Sir Timothy Hutton's case*.

[213] Trinity Term, in the First Year of the Reign of James II. In the Common Pleas.

Gilmore *against* Harris.

A. tenant for life, remainder to his first and other sons, &c. Remainder to B. and the heirs male of his body, with power to A. to revoke the uses to B. A. by deed omitting the words *of his body* revokes the uses to B. and appoints the like uses to him, also omitting the words *of his body*, subject to a charge, &c. This is a good revocation, and the new estate is also an estate tail.

Ejectment on issue *not guilty*, tried at Bar, and a special verdict. The case was; Edward Monford seised in fee, did by lease and release 27 and 28 Febr. 1675, convey the tenements in question to the use of himself for life, the remainder to trustees to preserve the contingent remainders, the remainder to his first and other sons and the heirs males of their bodies successively, the remainder to Simon Monford and the heirs males of his body, the remainder to the heirs males of the body of Sir Ed. Monford father of the said Ed. the remainder to the right heirs of Edward, with power for Edward by deed ensealed, &c. to revoke the uses limited to Simon and the heirs males of his body, and to limit new uses. And afterwards Edward Monford, March 2, *eodem anno*, reciting the deed of 28 Febr. and that he thereby had power to revoke all the uses limited to Simon Monford and his heirs males, omitting the words (of his body) he thereby revoked all the uses limited to Simon and his heirs males, omitting the words (of his body, &c.) again, and *appoints the said estate in the said deed named to be to the said Simon Monford and his heirs males: provided that the said Simon pay to the wife of Edward* 400*l.* *and* 600*l.* *to his own executors within six months after his death.* Edward dies without issue male, leaving Elizabeth **[214]** Harris the defendant's wife, his daughter and heir. Simon dies without issue, leaving Edward Monford, lessor of the plaintiff his brother and heir. And it was argued at the Bar for the plaintiff, that the revocation was good, notwithstanding the omission of the words *of his body;* for the recital of the deed is right in the date and names of the parties, and then the words *heirs males* ought to be intended such heirs males as are expressed in the deed, viz. heirs males of his body. But 2dly, They argued that the new limitation to him and his heirs males is a fee-simple. For 1. A limitation to a man and his heirs males in deeds is always a fee-simple, though it is otherwise in *wills*. 2. The deed of revocation being made within three days after the deed of settlement, it cannot be intended that he revoked the first estate *to give himself* the same estate by the new limitation, which he had by the first settlement. 3. The new limitation is subject to the payment of 1000*l.* which cannot be intended to arise out of an estate-tail. But it was adjudged by the whole Court for the defendant, be the revocation good, or not: for if it be good (as they held it was for the reasons alledged by the plaintiff) then the same words in the new limitation shall have the same construction which they had in the recital, and shall create a new estate-tail, and an estate-tail may in its creation be charged with the payment of money; for it is the will of the donor. Also the words in the new limitation are, *the said estate in the said deed mentioned shall be to the use, &c.* which said estate was an estate-tail: also he had no power to revoke more than an estate-tail, and out of the estate he cannot create a fee. And the whole intent appears in every particular to be to revoke the estate-tail, which was not subject to any charge; and to create a new estate-tail, subject to a charge of 1000*l.* and if the first estate be not revoked by reason of the omission of the words (*of his body*) in the recital, then the first estate is unrevoked, and the estate of Simon determined, and so the remainder in fee is vested in the defendant, the right heir of Edward; and therefore take this case either way, judgment ought to be given for the defendant; and so it was. (*Sed quære legem.* W. B.)

[215] THOMASON AND OTHERS *against* WOODS, ADMINISTRATOR.

Declaration in debt upon a writing obligatory. Joinder.

Norfolk, to wit.—Robert Woods, late of Kirby Beadon in the county aforesaid, yeoman, administrator of the goods and chattels which were Henry Wood's late of Kirby Beadon, the county of Norfolk aforesaid, husbandman, who died intestate, &c. was summoned to answer George Thomason, clerk, and William Moore of a plea that he render to them one hundred and sixty pounds which he unjustly detains from them, &c. And whereupon the said George and William, by Richard Starling their attorney say, that the said Henry in his life-time, to wit, upon the 31st day of May, in the year of our Lord 1677, at Catton by his certain writing obligatory, granted himself to be holden to the said George and William in the said one hundred and sixty pounds to be paid to the said George and William, when thereto he should be requested; nevertheless the said Henry, in his life-time, and the said Robert after the death of the said Henry, from the time of his death [to whom administration of all the goods and chattels which were the said Henry's at the time of his death; after the death of the said Henry at Catton aforesaid was committed]. Although often times requested, the said one hundred and sixty pounds to the said George and William, or to either of them have not yet paid, but the same to them to pay have refused, and the said Robert as yet doth refuse to pay the same to them: whereupon they say that they are prejudiced, and have sustained damage to the value of twenty pounds, and therefore they produce their suit, &c. And they produce here in Court the writing aforesaid, which testifies the debt aforesaid, in the form aforesaid, the date of which is the day and year aforesaid, &c.

And the said Robert by Cuthbert Brereton his attorney, comes and defends the force and injury, when, &c. and prays oyer of the writing aforesaid, and it is read to him, &c. also he prays oyer of the condition of the said writing, and it is read to him in these words: the condition of this obligation is such; that whereas a marriage, by God's permission, is shortly intended to be had, and solemnized between the above bound Henry Woods, and Christian Beare of Towse aforesaid, single woman; now in **[216]** case the said marriage shall take effect, and that she the said Christian shall happen to survive and outlive the said Henry, then if the said Henry do and shall at the time of his death, leave and deliver unto or for the said Christian or her assigns in ready money, goods, chattels, wares or merchandizes, the full sum or value of eighty pounds of lawful English money, which she the said Christian, her executors, administrators or assigns, shall, and lawfully may from thenceforth peaceably and quietly have, hold and enjoy to the sole and proper use and behoof of her the said Christian, her executors, administrators and assigns for ever, without let, suit or molestation of any person or persons whatsoever; and in case the said Christian shall happen to depart this life before the said Henry, then if the said Henry in the life-time of the said Christian, do and shall permit and suffer her the said Christian at any time before her death, by writing, or by word of mouth, testified by two credible witnesses, to give away or dispose the sum of ten pounds of like money to such person or persons as she shall please; and if the said Henry, his executors, administrators or assigns, in case he outlive the said Christian, do and shall well and truly pay the said ten pounds to such person and persons as the said Christian shall as aforesaid give and dispose the same without fraud or covin, that then this present obligation to be void, otherwise to be in full force, effect and virtue; which being read and heard the said Robert saith that the said George and William ought not to have their action aforesaid against him; because he saith that the marriage between the said Henry Woods in his life-time and the said Christian Beare, after the making of the writing, aforesaid, to wit, upon the 6th day of November, in the year of our Lord 1677 aforesaid, at Catton aforesaid was had and solemnized, and that the said Henry after the marriage aforesaid, in the form aforesaid had, to wit, upon the 28th day of August, in the year of our Lord 1679, at Catton aforesaid, made his last will and testament in writing, and did make and ordain the said Christian his wife, his sole executrix of his testament aforesaid, and by his said last will did will and declare, that the said Christian his wife should pay and satisfy herself the said eighty pounds by the con-

dition of the writing aforesaid, to be left and delivered to her as aforesaid; and the said Henry after the making of the writing aforesaid, to wit, upon the 10th day of September, in the year of our Lord 1681, at **[217]** Catton aforesaid, died possessed of sundry goods and chattels amounting to the sum of one hundred pounds and upwards, and the said Christian survived him, and after the death of the said Henry became possessed of the goods and chattels aforesaid, as executrix of the testament aforesaid, of the said Henry, to wit, at Catton aforesaid; and this he is ready to verify: wherefore he prays judgment if the said George and William ought to have their action aforesaid against him, &c. &c.

And the said George and William say that the said plea of the said Robert, above in bar pleaded, and the matter in the same contained, are not sufficient in law to preclude the said George and William from having their action aforesaid against the said Robert, and that they to the said plea in the manner and form aforesaid pleaded have no necessity, neither are they bound by the law of the land to answer in any manner; and this they are ready to verify; wherefore for want of a sufficient answer of the said Robert in this behalf, the said George and William pray judgment and their debt aforesaid, together with their damages by occasion of the detention of the said debt to be adjudged to them, &c.

And the said Robert, because that he in his plea aforesaid, above hath alledged sufficient matter in law to preclude the said George and William from having their action aforesaid against the said Robert, which he is ready to verify, which matter the said George and William do not deny, but altogether refuse to admit the verification thereof, as before prays judgment, and that the said George and William may be precluded from having their action aforesaid thereupon against him, &c. and because the justices, &c.

[218] THOMASON *against* WOODS, ADMINISTRATOR OF WOODS.

Obligation to leave his wife 80l. Plea that he made her executrix, and left 100l. assets, and appointed her to pay herself is ill, not saying she administered or accepted thereof.

Debt on obligation, with condition, that the husband should leave his wife 80l. at his death, so that she might peaceably enjoy it to her own use. The defendant pleads that the husband made his wife executrix and left goods and chattels to the value of 100l. and by his will devised, she should pay herself. The plaintiff demurred and had judgment. For notwithstanding this devise the husband may have left debts due by him on securities of a higher nature, as judgments, statutes, &c. so that she might not be able to pay herself; and perhaps the husband's estate was so litigious, that it is best for the wife to renounce the executorship, and to permit the administration to be granted to another, and to bring debt on the obligation against such administrator, as she has here done.

DINGHURST *against* BATT AND OTHERS.

Formedon omits the name of one in whom a title appears, though he were never seised, is well. 8 Coke 88 b. Com. Dig. Abatement, H. 27.

A *formedon in remainder* was brought of lands which Anthony Abarrow gave to James Crane, to the use of Anthony Abarrow for his life, remainder to Dorothy the wife of the said Anthony, and to the heirs of the body of Dorothy by Anthony begotten; *so that* after the death of the said Anthony and Dorothy, and Alice their daughter, the lands ought to remain to Anthony Dinghurst the plaintiff (as son and heir of the said Alice) by form of the gift, &c. and so declares upon the gift; by virtue whereof Anthony Abarrow was seized for life, remainder to Dorothy and the heirs of her body by the said Anthony begotten; *& quod post mortem prædict' Anthon' & Dorotheæ & Aliciæ eidem Anthonio Dinghurst petenti remanere debet.* The tenant specially imparls with *salvis sibi omnibus, &c.* and after demands oyer of the original, *and then pleads in abatement,* that the said Alice had issue Lodowick her son and heir,

who survived the said Dorothy and Alice, & *hoc &c.* from **[219]** whence, and for that the said Lodowick is not named in the writ, he demanded judgment of the writ. The demandant demurred generally; and now it was argued this term by Pemberton for the tenant, that the omission of any person who has any right shall vitiate the writ, though he was never seised, and cited 8 Co. 175, at the end of *Buckmere's case*, Hob. 51, 51. Bro. Omission 8, and to that opinion the Court inclined: but upon the importunity of George Strode, who cited Dyer 216. 44 E. 3, &c. to prove, that such persons as were never seized, need not be named, it was adjourned; and so it depended until Mich. 1 Jac. 2. And then it was argued again, and for the demandant were further cited 5 E. 3, 35, and 7 E. 3, 47, 48, as a case in point, viz. *a formedon in remainder* on a gift to R. and K. with remainder to F. in fee, and says that after the death of R. and K. (omitting F.) the said F. the demandant, as son and heir of F. so omitted, ought to have the lands, &c. and this was ruled to be good; for there cannot be an heir of F. except F. be dead; and in Hob. 51, those cases in E. 3 are held for good law; and in the Register 243 a. those cases of E. 3 are also said to be ruled good; and it is not there said, that they were not good, but only that the form in the register was better. And now it was further argued by Maynard for the demandant, that a view had been had in this cause, and that after a view no plea can be in abatement except such as arises upon the view. Hengham Mag. 50, 51. 41 E. 3, 29, 33. But in 8 E. 3, 55, the writ abated after the view for a matter apparent in the writ itself; and in 46 C. 3. A writ of cosenage abated after the view, because upon the writ itself it appeared, that no writ of cosenage but a writ of besayel lay in that case; yet in 40 E. 3, 35, 36, it is held, that after a view nothing can be pleaded in abatement, except what shall arise upon the view; but then it was moved for the tenant that this matter ought to be pleaded, and that though Maynard had brought the writ of view into the Court, and the return thereupon had in the case, yet that not appearing upon the same record, the Court ought to have no regard thereto; but now the greater part of the Judges inclined, that notwithstanding the said exceptions the writ was good, according to the books of 5 and 7 E. 3, *supra*. And if it were not, yet it is affirmed by the view, whereof the Court may take notice, the writ being returned hither, and made a record of this Court, though it be not entered on the same roll; and this **[220]** they may do without any plea pleaded; and judgment was to answer over, except cause shewn within a week.

Bernes and his Wife *against* Rich.

In dower. Counterplea of view, that the husband aliened to the tenant, but does not say *feoffavit, &c. Ante* 169. 2 Lev. 117.

Dower, *unde nihil habet*. The tenant demands the view. The demandant counterpleads, for that her husband alienated the tenements aforesaid to the tenant, & *hoc, &c.* The demandant demurred generally. And now it was argued by Pemberton, that the counterplea was not good, for she ought to have pleaded *feoffavit;* for by *alienavit* it does not appear what estate he aliened, and even a lease for years is an alienation. But the Court on the contrary held, that an *alienation* implies his whole estate; and the stat. Edw. 2, 48, ousts the tenant from the view of lands which the husband aliened to the tenant, or any of his ancestors; so that the plea here is in the very words of the statute, and good: and judgment was, *quod respondeat ouster.*

The King *against* Sir Oliver Butler in the House of Lords.

S. C. 2 Ventris 344.

Scire fac. to repeal a patent, when it lies, or not. 2 Keble 465. 2 Saunders 174.

Error of a judgment in a *scire facias* in the Petty-Bag Office in Chancery, where by the *scire fac'* it was shewn, that the City of Rochester is an ancient city, and incorporated time out of mind by the name of citizens of Rochester, until 1 E. 4, when they were incorporated by the name of the mayor and citizens; and that the citizens

till 1 E. 4, and from thence the mayor and citizens have had a market there held every Wednesday and every Friday, and tolls &c. and that they held the said city of the King by the fee-farm rent of 12l. per annum; and that the King by letters patents of the 7th of March last (reciting an inquisition on an *ad quod dampnum*, whereby it was found, that it would not be to the damage of the King, or of any other person, if the King granted a market in Chatham to Sir Oliver Butler the defendant, to be held every Tuesday) granted to the defendant a market to be held there every Tuesday, with all profits, &c. *prout per* **[221]** *easdem literas patentes apparet:* and whereas the town of Chatham is within a mile and half of Rochester, and whereas we are given to understand by the Mayor, &c. of Rochester, that the said writ *ad quod dampnum* was executed the same day it bears date, at the distance of thirty miles from Rochester, and without notice to the mayor, &c. surreptitiously and fraudulently in deceit of them; and that the grant to the defendant is to the damage, &c. of the City of Rochester, and of the market there; and that by reason thereof the said letters patents to the defendant are void: therefore the Sheriff of Kent is commanded to warn the defendant to appear to shew cause wherefore the said letters patents should not be cancelled. The defendant appears, and pleads, that the *scire facias* and the matter therein contained *minus sufficien' in lege existunt ad ipsum ad respondend' compellend', quodq; ipse ad breve prædictum modo & forma præd' impetrat' necesse non habet, nec per legem terræ tenet' respondere, & hoc, &c.* The Attorney-General replies, that the writ and the matter therein contained are good and sufficient in law to cause the said letters patents to be cancelled and vacated; and thereby is the demurrer joined. And upon arguing the case in Chancery, the Lord Chancellor Finch (being assisted by the then Ch. Just. North, and by Jones then a Judge in B. R. and now Ch. Just. of C. B.) gave judgment that the patent should be cancelled and vacated: whereupon Sir Oliver Butler brought error in the House of Peers: and after argument at the Bar there the Lords referred the matter to the Judges then attending in Parliament, viz. Gregory, Charlton, Levinz, Withers, Halloway and Walcot, who all unanimously agreed, that the judgment given in the Chancery ought to be affirmed; and accordingly they delivered their opinions *seriatim* to the Lords by their Lordships command, with their answers to the several objections which had been made for reversal of the judgment, viz. 1. That a *sci. fa.* does not lie to repeal such patents, because there is another remedy by the common law, *i.e. by assize of nusance, quod permittat, &c.* where the matter shall be tried by a jury and several Judges, and not by one Judge only, as it is in Chancery: to which they answered, that the King has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced, and that by *sci. fa;* as 2 E. 3, 34, a *sci. fa.* to repeal a patent for toll, 17 E. 59 b. of a market, 11 H. 4, 5, of a market, Dy. 197, 198. 3 El. 7 or 8, the **[222]** like precedents are cited, Dy. 276. 10 El. of Markets; and Staundf. Prerog. says, that it is *jure Regio* by the common law, and in none of the cases was it any question whether the writ would lie, but only of the manner of pursuing it, and other incident matters; and it is not unusual for the King to have his remedy, as well as the subject also; as in batteries, trespasses, &c. the King has a remedy by information and indictment, and the party grieved by his action. As to the second objection, that no *ad quod damp'* was necessary; that the patent might have been granted without it, and therefore, though it were surreptitious, it is not material. It was answered and resolved by all the Judges, that which is always done in pleading is necessary to be done; but it may be dispensed with by a *non obstante; (quær.)* for there the King takes notice, that it is not *ad dampnum, &c.* and yet if it be *ad dampnum* the patent is void; for in all such patents the condition is implied, viz. that it be not *ad dampnum* of the neighbouring merchants; and in this case it is confessed by the demurrer, that the patent is *ad dampnum* of Rochester, and was illy executed, and in deceit of the King. As to the third objection, that nothing here is positively alledged but with a *dat' est nobis intelligi, so and so, &c.* It was answered and resolved by the said Judges. 1. It is positively alledged, that *concessio præd' est ad dampn' & depauperationem, &c.* which is a sufficient cause to revoke the patent, if there were nothing more. 2. That all under the *dat' est nobis intelligi* is a sufficient allegation to put the party to answer, as in all informations in B. R. the form is, that the Attorney General, or coroner of the Court *dat Cur' intelligi & informari, &c.* As to the fourth objection, that the demurrer was not well joined, the

defendant saying, that the writ was not sufficient to put him to answer, and the Attorney-General replying, *quod bon' & sufficien' ad causand' literas patentes præd' cancellandi' & vacand'*. It was answered and resolved by the said Judges, that it was sufficient to put the matter in judgment of the Court, and that it was well done of the Attorney-General to reply as he did, in order to have the event of his suit, viz. the patent cancelled. As to the fifth objection, that upon this demurrer a judgment in chief ought not to have been given, but only a *respondeas ouster*, it was answered and resolved by the said justices, that the *sci. fac.* shewing sufficient matter to have the patent cancelled, and the defendant having confessed it by his demurrer, he shall not by the **[223]** manner of his demurrer alter the judgment of the Court; for if so, it would be in his power to procure a delay for himself; but the matter in the *sci. fa.* appearing sufficient, and not denied by any plea of the defendant, but confessed by his demurrer, a judgment peremptory in Chancery ought to be given, and not a *respondeas ouster;* and so was it done in the case 17 E. 3, 59 b. and lately in a *scire fac'* in B. R. between *Cole and Green*, 1 Lev. 312, by Hale Ch. Just. and the whole Court; where in a *scire fac'* upon a judgment in waste upon the damages recovered, the defendant demurred partly in abatement, and partly in bar, and yet the Court gave judgment in chief. To the sixth objection, that there ought to have been an office found before the *scire facias* issued, for that a *sci. fac.* is a judicial writ, and ought to be founded upon a record; it was answered and resolved by the Judges, that true it is, a *sci. fac.* ought to be founded on a record, and so it is here; for the patent is a record in Chancery, upon which this *sci. fac.* issued, and it is a sufficient record whereon to found it, as appears by the precedents before cited; but where the *sci. fac.* is brought for the forfeiture of a patent, or other thing in another Court, there ought to be found an office in such other Court, before the *sci. fac.* issues, except the forfeiture appears of record in the same Court whereupon to found the *scire fac';* and where the office is found, the King shall seize presently upon the office (found); but where the *scire fac.* is founded on the patent itself, as here, the King cannot seize till the forfeiture or other defect of the patent be tried upon the *scire fac'* as is 11 H. 4, 5. And at last all the said Judges agreed, that by the demurrer in this case it is confessed, that the *ad quod dampnum* was deceitfully executed, and that the patent was *ad dampnum & deparperationem* of Rochester and their market; and therefore the judgment in Chancery ought to be affirmed, which the Lords in Parliament did accordingly. But afterwards, as I heard, the defendant sued another writ of *ad quod dampnum*, and took a new patent, which was granted because a market at Chatham was very convenient, if not (absolutely) necessary in respect of navigation, and the shipping and stores, and the labourers about the shipping there.

[224] HILARY, 1 JAMES II.

BODLE *against* WILKINS.

Declaration in trespass *vi et armis* for taking two hats.

Sussex, to wit.—John Wilkins, late of Grombridge, in the county of Kent, innholder, was attached to answer Thomas Bodle of a plea wherefore with force and arms the goods and chattels of the said Thomas to the value of one hundred shillings at East Grinstead, in the county of Sussex aforesaid, lately found he took and carried away, and other wrongs to him did, to the great damage of the said Thomas, and against the peace of the lord the now King, &c. And whereupon the said Thomas by John Awcock his attorney complains that the said John Wilkins, on the 10th day of January, in the 35th year of the reign of the lord the now King, at East Grinstead aforesaid, with force and arms, &c. the goods and chattels of the said Thomas following, to wit, two hats to the value, &c. there lately found took and carried away, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon the said Thomas saith that he is prejudiced, and hath sustained damage to the value of ten pounds, and therefore he produces his suit, &c.

And the said John Wilkins by Richard Bell his attorney comes and defends the force and injury when, &c. And as to the coming with force and arms, and also the

whole trespass aforesaid, except the taking and carrying away of the said two hats in the declaration aforesaid above supposed to be committed, saith that he is not guilty thereof, and of this puts himself upon the country. And the said Thomas Bodle doth the like. And as to the taking and carrying away of the said two hats in the declaration aforesaid above supposed to be committed, the said John saith that the said Thomas ought not to have his action aforesaid thereupon against him, because he saith that one Philip Packer, Esquire, long before the said time in which the taking of the said two hats is supposed to be committed, and at the said time in which, &c. was seized and now is seized of the manor of Grombridge with the appurtenances in the county of Kent, [whereof the town of Grombridge in the said county is, and at the said time in which, &c. and also from the time whereof the memory of man is not to the contrary, was parcel] in his demesne as of fee, and so being seized thereof the said Philip and all those whose estate the said Philip now hath, and at the said time in which, &c. had, of and in the manor aforesaid with the appurtenances have **[225]** had and held, and also from the time whereof the memory of man is not to the contrary, have been used and accustomed to have and hold a certain fair in the town of Grombridge aforesaid, in the county of Kent aforesaid, on every 14th day of September annually, and in every year, as belonging and appertaining to the manor aforesaid with its appurtenances. And the said Philip and all those whose estate the said Philip now hath, and at the said time in which, &c. had, of and in the said manor with the appurtenances have had and received, and have been used and accustomed to have and receive from every hatter who hath had one stall in any such fair, for his standing to sell hats in the said fair, two shillings and six pence of the lawful money of England for his standing in such stall to sell hats there, and if any such hatter hath refused to pay the said two shillings and six pence for his standing in such stall to sell hats in such fair, then the said Philip and all those whose estate the said Philip now hath, and at the said time in which, &c. had, of and in the manor aforesaid with the appurtenances, from the whole time aforesaid have been used and accustomed by their bailiffs and servants for the time being, to take and distrain the goods and chattels of such hatter refusing to pay the said two shillings and six pence, found within the manor aforesaid, and the same to detain in their possession until the said two shillings and six pence should be paid. And the said John Wilkins further saith that the said Philip of the manor aforesaid with the appurtenances so as aforesaid being seized, upon the 14th day of September, in the 35th year of the reign of the said lord the now King, had and held one fair in the said town of Grombridge, in the said county of Kent, and that the said Thomas Bodle, then and there being a hatter, on the said 14th day of September, in the 35th year aforesaid, had one stall in the said fair for his standing to sell his hats in the said fair, and sold sundry hats in the stall aforesaid during the time of the said fair, whereby two shillings and six pence became due and payable to the said Philip by the said Thomas for his standing in the stall aforesaid to sell hats in the said fair, whereof the said John Wilkins as the servant of the said Philip and by his command then and there gave notice to the said Thomas, and then and there requested the said **[226]** Thomas to pay to the said John Wilkins for the use of the said Philip the said two shillings and six pence, to do which the said Thomas Bodle then and there refused, whereupon the said John Wilkins as the servant of the said Philip and by his command afterwards, to wit, upon the said 14th day of September, in the 35th year aforesaid, the said two hats in the declaration aforesaid specified, found within the manor aforesaid, to wit, in the said town of Grombridge in the said county of Kent took and carried away, in the name of a distress for the said two shillings and six pence, to the said Philip by the said Thomas so as aforesaid due and unpaid, as it was lawful for him to do, which is the same taking and carrying away of the said two hats, whereof the said Thomas above now complains; without this that the said John is guilty of the taking or carrying away the said two hats, or of either of them, at East Grinstead aforesaid, in the said county of Sussex, or at any other place within this kingdom of England, without the said town of Grombridge, in the said county of Kent, and this the said John is ready to verify; wherefore he prays judgment if the said Thomas ought to have his action aforesaid thereupon against him, &c.

And the said Thomas Bodle as to the said plea of the said John Wilkins as to the taking and carrying away of the said two hats above alledged to be committed, saith that the said plea and the matter in the same contained are not sufficient in law to preclude him the said Thomas from having his action aforesaid thereupon against the said John, and that he to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient plea of the said John in this behalf, the said Thomas prays judgment and his damages by occasion of the taking of the said two hats to be adjudged to him, &c. And for cause of demurrer in law in this behalf, the said Thomas according to the form of the statute in such case made and provided, shews to the Court here the cause following, to wit, that the said plea doth not answer to the declaration aforesaid, &c.

And the said John Wilkins, because that he above hath alledged sufficient matter in law in his plea aforesaid above pleaded, to preclude the said Thomas from having his action aforesaid against him the said John, which he is ready to verify; which matter the said Thomas doth not deny nor to the same in any wise answer, but altogether had refused to admit the verification thereof, as before prays judgment, and that the said Thomas may be precluded from having his action aforesaid, &c. And because the justices, &c.

[227] BODLE *against* WILKINS.

Justification in trespass by *quæ est eadem* with traverse of the place, but not of the time, is good. 1 Ventris 184. 2 Jo. 146. Nel. Lut. 299, 300, 469. 1 Bulst. 138. Cro. Cha. 228. 1 Saund. 85. *Ante* 92. 1 Lev. 307. 20 Vin. Ab. 570.

Trespass for taking two hats of the plaintiff's at Eastgrinsted in Sussex, Jan. 10, 35 Car. 2. The defendant justifies for stallage in a fair by prescription at Grombridge in Kent, held Septemb. 14, 35 Car. 2, for that the plaintiff had refused to pay the stallage, *quæ est eadem, &c. absque hoc* that he is guilty of the taking any where out of the fair aforesaid. The plaintiff demurs specially because the said plea does not answer the declaration. And now it was argued by Birch, that the traverse was not good, because he does not traverse any other time as well as any other place. But *per Cur'*. The conclusion, *quæ est eadem* with a traverse of the place is good without traverse of the time; and judgment was for the defendant.

MALLOCKE *against* EASTLY.

No property of deer in a park, except tame and reclaimed. *Ante* 28. 18 Vin. Ab. 64.

Trespass *quare duas damas ipsius* the plaintiff, in a certain close of the plaintiff's called the Park, he took and carried away. The defendant demurred generally, and judgment was given for him, for that the plaintiff says *damas ipsius*, and none can have property in deer, except they are tame and reclaimed, although they are in a park, 7 Co. 89. But here it does not appear that they were in a park, but only in a certain close called the Park.

[228] PAYNE *against* BRIGHAM.

Trespass for spoiling his grass, and carrying away the plaintiff's hay, &c. Defendant pleads not guilty as to all except spoiling the grass, &c. and as to that justifies for tythes, the plaintiff traverses the *quantity* of the hay set out for tythe, this is held ill upon demurrer. 9 Viner Ab. 63.

Trespass for breaking his close called Brigham's Mead, and spoiling his grass *pedibus ambulando, & cum equis & plaustris*, and taking his grass cut by the plaintiff to such a value, and taking and carrying away the plaintiff's hay, viz. five cartloads of hay, to the value, &c. The defendant as to all, except breaking the close and spoiling the grass *pedibus ambulando, & cum equis & plaustris*, pleads *not guilty;* and as to them he justifies; for that he is seized of the tithes of hay *ex eodem clauso pro-*

venien'; and for that the hay, viz. the five cartloads of hay aforesaid, were cocked separately for the tithes of the said hay, he entered the said close to carry away the said hay, and (so) *pedibus ambulando, & cum equis & plaustris, &c.* he spoiled the grass, doing as little damage as he could, *quæ sunt eadem, &c.* The plaintiff replies, that the defendant took the grass cut by the plaintiff, and made it into hay upon the land, and carried it away, and (so) five cartloads of the plaintiff's hay, in the declaration mentioned, he took and carried away. *Absque hoc*, that there were five cartloads of hay in the said close separated for tithes, as the defendant has pleaded: whereupon the defendant demurs specially, for that the plaintiff had traversed the quantity of hay separated for tithes, which is not traversable, and of that opinion was the whole Court; for the defendant having pleaded *not guilty* as to all but spoiling the grass, and justified that by entering and taking his tithes of hay, this is good, whether the tithes were loaden in one or two carts; and it was lawful for the defendant to make the hay upon the land, after it was separated. And judgment was for the defendant by the whole Court.

[229] TRINITY 36 CHARLES II.

EDWARDS AND OTHERS *against* MORGAN.

Declaration in covenant by the grantee of the reversion against the lessee for rent in arrear after the grant. Profert.

Hereford, to wit.—Thomas Morgan, late of Wigmore, in the county aforesaid, gent. was attached to answer John Edwards Knight, and Richard Deerham Knight and Baronet, in a plea of breach of covenant, and whereupon they the said John and Richard by Francis Edwards their attorney complain, that whereas the most noble Elizabeth Viscountess Purbeck widow, upon the 11th day of April, in the 27th year of the reign of the said lord the now King, was seized in her demesne as of fee of and in a certain park called Radnor Park, containing by estimation 100 acres or thereabouts, and of and in one messuage situate and being in a certain place called the Crosse, in the county aforesaid, with the appurtenances, and so being seized thereof, upon the same day and year, by a certain indenture made at Wigmore aforesaid, between the said viscountess by the name of Elizabeth Viscountess Purbeck widow, late the wife of the late most noble Robert Viscount Purbeck, Baron of D. deceased, otherwise called Robert Danvers, otherwise Villiers, Esquire, of the one part, and the said Thomas Morgan by the name of Thomas Morgan, of the parish of New Radnor, gentleman, of the other part, which other part of which indenture, sealed with the seal of the said Thomas Morgan, they the said John and Richard bring here into Court, the date of which is the said day and year aforesaid, for the consideration in the said indenture mentioned, had demised, granted, and to farm let to the said Thomas Morgan the tenements aforesaid with the appurtenances, and all ways, easements, waters, profits, commodities, and appurtenances whatsoever, to the said park and land belonging or in any wise appertaining, or with the same used or enjoyed, as part, parcel or member thereof, or of any part thereof; [except and always being reserved from the said demise and grant to the said viscountess, her heirs and assigns, all and all manner of woods, underwoods, timber, and other trees there standing, growing and being, or which from that time afterwards during the term by the said indenture granted should stand, grow and be in and upon the before demised premisses, or any part thereof], to have and to hold the said **[230]** park, lands and messuage, and all the other premisses by the said indenture demised or mentioned or intended by the said indenture to be demised, with the appurtenances, [except the before excepted] to the said Thomas Morgan, his executors, administrators and assigns, from the 26th day of March then last past, before the date of the said indenture, for and during and until the full end and term of sixteen years from that time next ensuing fully to be compleated and ended, yielding and paying therefore yearly and every year during the said term to the said viscountess, her heirs and assigns, the rent or sum of thirty-eight pounds of the lawful money of England, at the two usual feasts or days of payment in the year, to wit, at the Feast of St. Michael the Archangel, and of the Annunciation of the Blessed Virgin Mary, at or in the gate of the church of Old

Radnor, by even and equal portions, and the said Thomas by the said indenture, for himself, his heirs, executors, administrators and assigns, did covenant, promise and agree with the said viscountess, her heirs and assigns, that he the said Thomas Morgan, his executors, administrators and assigns, or some of them, from time to time and at all times during the said term, well and faithfully would pay or cause to be paid to the said viscountess, her heirs and assigns, the said rent of thirty-eight pounds, at the days and place appointed for the payment thereof, according to the true intent of the indenture aforesaid, as by the said indenture among other things more fully appears and is manifest: by virtue of which demise the said Thomas into the tenements aforesaid with the appurtenances entered, and was and as yet is thereof possessed; and the said Thomas so being thereof possessed, and the said Elizabeth Viscountess Purbeck of the reversion of the tenements aforesaid with the appurtenances being seized as aforesaid in her demesne as of fee, the said Elizabeth afterwards, to wit, upon the 25th day of February, in the 28th year of the reign of the said lord the now King, at Wigmore, in the county aforesaid, by her certain indenture between the said Elizabeth, by the name of the most noble Elizabeth Viscountess Purbeck, sometimes called Elizabeth Danvers, otherwise Elizabeth Villiers, widow, of the one part, and the said John Edwards and Richard Deerham, by the names of John Edwards, of Heathouse, in the county of Salop, gent. and Richard Deerham, of Lincoln's-Inn, in the county of Middlesex, esquire, of the other part, which other part of which indenture, sealed with the seal of the said Elizabeth **[231]** Viscountess Purbeck, they the said John and Richard bring here into Court, the date of which is the said day and year, for the consideration in the said last recited indenture contained, did grant to the said John Edwards and Richard Deerham among other things, the reversion and reversions, remainder and remainders, and rents of the tenements aforesaid, with the appurtenances, to have and to hold to the said John and Richard, their heirs and assigns, as by the said last recited indenture among other things more fully appears and is manifest; to which grant of the reversion of the tenements aforesaid by the said Elizabeth Viscountess Purbeck to the said John and Richard as aforesaid made, the said Thomas Morgan of the tenements aforesaid with the appurtenances to him as aforesaid demised in the form aforesaid being possessed, to the said John and Richard afterwards, to wit, upon the 25th day of March, in the 29th year of the reign of the said lord the now King, at Wigmore aforesaid, did attorn and agree; by colour of which grant and attornment aforesaid, they the said John and Richard were seized of the reversion of the tenements aforesaid with the appurtenances, to the said Thomas in the form aforesaid demised in their demesne as of fee; and the said John and Richard say, that although the said Elizabeth from the time of the making the indenture of demise aforesaid, until the making of the said indenture of grant of the reversion aforesaid, to the said John and Richard made as aforesaid; and they the said John and Richard, after the making of the said recited indenture of grant of the reversion aforesaid, all and singular the covenants, grants and agreements in the indenture of demise aforesaid contained, on the part of the said Elizabeth Viscountess Purbeck and her assigns to be performed, well and faithfully have performed, fulfilled and kept, according to the form and effect of the said recited indenture of demise, in fact the said John and Richard say that the said Thomas, after the making of the said indenture of assignment of the reversion aforesaid, to the said John and Richard made as aforesaid, did not pay to the said John and Richard thirty-eight pounds of the said annual rent to the said John and Richard, for one year ended at the Feast of St. Michael the Archangel, in the 34th year of the reign of the said lord the now King, being in arrear and unpaid. And so they the said John and Richard say, that the said Thomas his covenant aforesaid hath not kept, but hath unjustly broke it, and the same with them to keep **[232]** hitherto altogether hath refused and still doth refuse, to the damage of the said John and Richard of fifty pounds, and therefore they produce their suit, &c.

And the said Thomas Morgan by William Phillips his attorney comes and defends the force and injury when, &c. and saith that the said John and Richard ought not to have or maintain their action aforesaid thereupon against him, because he saith that before the day of the suing forth of the original writ of the said John and Richard, to wit, upon the 8th day of February, in the 33d year of the reign of the said lord the

now King, at Wigmore, in the county aforesaid, he the said Thomas assigned his entire right, estate, title, interest, and term of years of and in the tenements aforesaid with the appurtenances then to come and unexpired unto one David Powel, by virtue whereof the said David afterwards, to wit, upon the day and year aforesaid, into the tenements aforesaid with the appurtenances entered, and was and as yet is thereof possessed, and that at the said time of that assignment there was no rent in arrear and unpaid, and this he is ready to verify; wherefore he prays judgment if the said John and Richard ought to have or maintain their action aforesaid thereupon against him, &c.

And the said John and Richard say that the said plea by the said Thomas Morgan above in bar pleaded, and the matter in the same contained, are not sufficient in law to preclude them the said John and Richard from having their action aforesaid against the said Thomas Morgan, and that they to the said plea in the manner and form aforesaid pleaded have no necessity, neither are they bound by the law of the land to answer in any manner, and this they are ready to verify; wherefore for want of a sufficient answer, they the said John and Richard pray judgment and their damages by occasion of the premises to be adjudged to them, &c.

And the said Thomas, because that he above hath alledged sufficient matter in law to preclude the said John and Richard from having their action aforesaid against him, which he is ready to verify; which matter the said John and Richard do not deny, nor to the same in any wise answer, but altogether refuse to admit the verification thereof, prays judgment, and that the said John and Richard may be precluded from having their action aforesaid, &c. And because the justices, &c.

[233] EDWARDS *against* MORGAN.

Covenant for rent lies against a lessee after assignment of the term by grantee of the reversion. 1 Sid. 338, 339. Cro. Ja. 309. Cro. Cha. 579. 6 Viner Ab. 412. 1 Bac. Ab. 536. 2 Bac. Ab. 18.

Covenant for non-payment of rent, and declares, that the Lady Purbeck was seized of the place where, &c. and demised to the defendant, who covenanted to pay the rent; and that afterward the said lady by indenture, for considerations therein mentioned (which indenture *ille profert in Cur'*, but it was not entered *in hæc verba*) granted the reversion to the plaintiff in fee, whereto the defendant attorned, and for rent arrear this action is brought in the county where the lands lie, as it ought. The defendant pleads, that such a day he assigned his term, before the plaintiff had any interest therein, but does not plead any acceptance of the rent by the plaintiff from the assignee, nor any notice of the assignment. Whereupon the plaintiff demurs generally: and the opinion of the Court was, that the action well lies against the lessee of the term by the grantee of the reversion, (it being an express covenant) after the assignment, Cro. Cha. 188, *Batchelor* versus *Gage*, and *Keigley* versus *Buckley* in B. R. and *Thursby and Hall* vers. *Plaint*, 1 Lev. 219, though notice and acceptance of the rent had been pleaded. But then for a fault in the declaration the judgment was staid, viz. for that the plaintiff does not mention to whose use the grant of the reversion was, nor any certain consideration, but only the consideration in the indenture mentioned, and it does not appear what that was.

[234] MICO *against* MORRIS.

Judgment in Inferior Court for a matter out of their jurisdiction is void. 1 Lev. 50, 69, 96, 104, 137, 153, 208, 209. 7 Viner Ab. 33.

Assumpsit brought in London for depasturing a horse *in com' Essex'*. The defendant pleads in bar a former action brought in the Sheriff's Court of London for the same depasturing, and judgment there for the defendant. The plaintiff replies, that the cause of action arose in Essex out of the jurisdiction of the Sheriff's Court.

To which the defendant demurs generally: and *per Cur'*, the plea in bar is ill; for if the Sheriff's Court there holds plea of a matter out of their jurisdiction, their judgment is void, and cannot be executed. But Charlton said, if the judgment in London had been given for the plaintiff, it would have been a bar here, because he had recovered, and had a judgment for him; yet *quære* of that matter.

BLEMERHASSET *against* PIERSON.

Defeasance of a duty due by obligation cannot be without deed, which a writing under hand does not imply. 7 Viner Ab. 496. Com. Dig. Defeasance, C.

Debt on obligation conditioned for payment of several sums at several days. The defendant pleads payment of all the sums due before such a day, at which day the plaintiff by his writing (which the defendant brought into Court signed with his hand) agreed to defer the payment of the residue till another day not yet come, The plaintiff demurs generally, and judgment was given for him; for the action being founded on a deed, no defeazance can be made thereof afterwards without deed; and a writing under hand does not imply a deed.

[235] YATES *against* PLAXTON.

Original in one county declared on in another county is good against the party, not against the bail. 2 Viner Ab. 507. 1 Bac. Ab. 215.

A *scire fac.* was against the bail of Hall. They plead, that the original was laid *in com' Ebor';* in which action so laid no judgment was against Hall, but that the judgment upon which the *sci. fac.* is brought was had against the said Hall on an action laid in the county *of the City of York*, in which case in respect of the jurisdiction of the county the bail are not liable. The plaintiff replies, that upon the original laid in the county of York he sued a *capias* to the Sheriff of the county of York, with intent to declare according to the course of the Court against the said Hall in the county of the City of York, and thereupon such proceedings were had that he recovered against Hall: in which case, according to the course of the Court, the action being between the same parties for the same damages, the bail by the course of that Court are liable. The defendants pleaded *protestando*, that by the course of the Court the plaintiff cannot have a *capias* in any other county than where the original is laid: and if he might have such *capias*, yet he cannot declare in another county, but by such varying of the county the bail shall be discharged, for plea says, that no judgment was given against Hall upon the original laid *in com' Ebor'*, but the judgment was given upon the declaration *in com' Civitat' Ebor'* after the bail entered into, *absq; hoc quod in isto casu licet talis recuperatio habeatur in consimili vel eadem actione inter easdem partes, & pro iisdem dampnis*, the bail should be according to the course of the Court liable for the damages recovered, *& hoc parat' &c. prout Cur' consideravit.* Whereupon the plaintiff demurs specially, because the traverse is of matters in law, and of matter not traversable: and now it was said by Stringer for the defendant, that this matter is triable by the Court, and the traverse concludes *prout Cur' consideraverit*, and therefore it was well. But the Court inclined, that the traverse was ill, and said the pleading was strange; yet upon examination of the prothonotaries they affirming that though by the course of the Court the plaintiff might **[236]** declare in other *Courts* against the same parties, and the judgment thereupon would be good, yet by such variation of the county the bail is discharged, and not liable to the damages on the new declaration; whereupon it now appearing on the whole matter that the plaintiff had no cause to have had the *scire fac'* ruled, judgment was given for the defendant.

[237] MICHAELMAS TERM, IN THE FIRST YEAR OF THE REIGN OF JAMES II. IN THE COMMON PLEAS.

THE MAYOR, ALDERMEN AND BURGESSES OF SCARBOROUGH *against* BUTLER.

Debt to an old corporation, they are incorporated by a new name, and recover by their new name. *Post*, 243.

Assumpsit, and declares, that time out of mind, &c. till Aug. 2, 36 Car. 2, they were a corporation by the name of bailiffs, &c. of Scarborough; and that then the King incorporated them by the name of mayor, aldermen, &c. and that 1 Aug. 36 C. 2 the defendant was indebted to the bailiffs of Scarborough in 60l. 12s. 2d. received to their use; and being so indebted, promised to pay; and that afterwards, viz. May 8, 1 Jac. 2, the defendant being indebted to the mayor, bailiffs, &c. accounted with them for the money by him received to their use; and upon the account he was found in arrear 60l. 12s. 2d. and promised to pay it. The defendant as to the second promise pleads *non assumpsit*, and issue was on that promise; and as to the first promise he pleads, that afterwards, viz. May the sixth, 1 Jac. 2, they accounted, and on the account he was found in arrear to them (*allocatis allocandis*) in 14l. only, which he tendered, and they refused, and pleads always ready, and brings in the money, &c. The plaintiff hereto replies, *quod bene & verum est* that they accounted, but that upon the account the defendant was found in arrear 60l. 12s. 2d. *absq; hoc*, that upon the said account he was found in arrear 14l. only, on which issue was also joined, and both issues were found for the plaintiff, and entire damages given to 60l. 12s. 2d. And now it was moved in arrest of judgment by Pemberton, that it appears by the plaintiff's confession in his replication, that **[238]** there was an account upon the first 60l. 12s. 2d. due on the first promise for money had and received, &c. whereby the action and the duty was extinguished by the account, and the action ought to be brought upon that only, and the damages being intire upon both promises, the plaintiff could not have judgment; upon which the judgment was staid, and the Court directed to be attended with books, &c. and at another day in the same term it was argued for the defendant, that a promise by parol may be discharged by parol, Cro. Cha. 383, *Langden* v. *Stokes*, Cro. Ja. 483, *Hartford* v. *Pile*, and *ibid.* 160, the opinion of Justice Haughton, Sty. 8. 2 Leon. 214, so here the first promise is discharged by the account, and the promise thereupon. But the whole Court were contrary; they agreed on a promise merely executory of both parts, as the cases cited before are; any thing may be discharged by parol; as if I promise you 5s. if you will go to Paul's, before you go I may discharge you from the going, and thereby the other shall be discharged from paying the 5s. for no debt was due before the going, nor any thing executed either by the one, or the other; but in the case at Bar there was a debt due and executed in the plaintiffs, and that could not be discharged without a release; also the new promise upon the account is only a *chose in action*, and one *chose in action* cannot be discharged by another *chose in action* of the same nature, as one obligation is not discharged by acceptation of another obligation instead thereof; wherefore judgment was given for the plaintiff: and here it appears, that the debt due to the first corporation remained due to the new after the names changed by the letters patents; but no doubt was made thereof.

BARNES *against* HARVEY.

After no award pleaded, the plaintiff may reply the award, without saying where made.

Debt on an obligation dated 18 Jun. 1684, for performance of an award, or an umpirage. The defendant pleads no award. The plaintiff replies and confesses no award, but says, that the umpire Aug. 18, (being the day given him by the submission) made and delivered to the defendant at his **[239]** house, (being the place appointed by the submission) an umpirage, but does not say where he made the umpirage, whereby he awarded, that the defendant should seal to the plaintiff two obligations, each of the penal sum of 10l. the one conditioned for the payment of 5l. on the 24th of December next after, and the other for payment of 5l. on the first of May then also

next after the date of the said writing of arbitration, and should give each to the other general releases of all things, &c. which had been, or *then* were had, moved, &c. between the parties aforesaid; *which releases and bonds should be sealed and delivered the first of December then next following at D. before three in the afternoon of that day, and assigns a breach in not making* the said two obligations. Whereupon the defendant demurs. And now it was argued for the defendant, that the replication was ill, not having shewn where the umpirage was made, which matter is traversable. But *per Cur'*. This cannot be objected now after no award or umpirage has been pleaded; for if he shews any thing to prove the umpirage void, as that it was not made according to the submission, or not delivered, &c. this would be a departure, and tantamount, that tho' an award was made, it was void, which is not to be permitted. 2. It was objected, that the releases awarded to be made of all things which had been or *then* were had, moved, &c. And the word *then* refers to the next antecedent, *i.e.* 1 May, and then it is a release of more than is submitted, and shall release the submission bond, and no other thing is awarded to the defendant, and so the award is void. But *per Cur'*, This cannot be referred by the word *then* to the first of May; for the last clauses are to be done on the first of December, which is before the first of May next after the submission; yet *per Cur'* the *tunc* in the last clause seems to refer to December next following, and then the objection is the same; and therefore they gave judgment for the defendant, except cause were shewn the first day of the next term.

[240] HAMPSON *against* BILL.

Excommunication pleaded without a defence is ill. *Ante* 182. Cro. Cha. 311. 1 Lut. 7. 2 Lut. 1590.

Debt on an obligation; the defendant by T. Tooke, his attorney, *venit & dicit*, that the plaintiff to his writ *respondere non debet*, and pleads an excommunication certified against him by commissioners delegats. The plaintiff demurs, and the plea was adjudged ill for two causes; 1. For that it is *venit & dicit*, without any defence (*viz. defendit vim & injuriam, &c.*) made. 2. The pleading *respondere* for *responderi* is not good. Wherefore in this cause, as well as two others between the same parties the same day, judgment was given, *quod respondeat ouster*.

BEAYNE *against* BEAL.

Trial, when to be as the parties agree, and when as the law directs. 16 Viner Ab. 381. 5 Bac. Ab. 330.

Debt on a bill obligatory, whereby the defendant obliges himself to the plaintiff in 40l. to be paid to him, if he (the defendant) did not deliver to the plaintiff a piece of plate, which the plaintiff being treasurer at a horse-race had delivered to the defendant, on a supposal that the defendant's horse called Cripple had won it, if within three months after the date of the bill it appeared before the Lord Brudenel, and others in the bill named, that Cripple was not the proper horse of the defendant for one month before the race, or that the said horse had run any race before. And the plaintiff averred, that within three months after the date of the bill it sufficiently appeared before the Lord Brudenel, &c. by three credible witnesses, viz. A. B. and C. examined by the Lord Brudenel, &c. that the said horse called Cripple was not the proper horse of the defendant, and so had the Lord Brudenel, &c. declared, and as far as they could had ordered the defendant to deliver the plate to the plaintiff, which he had refused to do, whereby an action accrued for the 40l. The defendant pleads, that the horse called **[241]** Cripple was his proper horse at the time of, and a month before, the race. The plaintiff replies, *protestando*, that it was not the proper horse of the defendant, for plea says, that within three months after the date of the bill it sufficiently appeared before the Lord Brudenel, &c, that Cripple was not the proper horse of the defendant, and this they had declared as aforesaid, *& hoc, &c.* The defendant rejoins, that Cripple was his proper horse, and that it did not sufficiently appear, &c. within the three months, &c. that the said horse was not the proper

horse of the defendant. *Et de hoc ponit se super patriam.* Whereupon the plaintiff demurs specially, for that the rejoinder is a departure from the bar: and now upon argument it was resolved by all the Judges, that the plea in bar is insufficient, and did not answer the declaration; for when the parties had particularly agreed in what manner it should be made to appear, and before what persons, the matter should be so determined, and not by trial on an action or otherwise, as it should have been, if the condition had been general, *i.e.* to make it appear. 2. The rejoinder is a departure from the bar; (1) and if the last part of the rejoinder by the omission of the words *before the Lord Brudenel, &c.* this had not been sufficient; for the appearing generally is not the point in question, but the appearing before the Lord Brudenel, &c. and that is exclusive of other appearings. Wherefore judgment was given for the plaintiff.

CLERK *against* THE GOVERNOR AND COMPANY OF TAYLORS OF EXETER, IN THE EXCHEQUER-CHAMBER.

S. C. 2 Shower 345 to 364.

Bond that one shall not use his trade in a certain place is void, so is a promise or covenant without good consideration. Style 111. Al. 67. 1 Jo. 13. 2 Bulst. 136. Cro. Ja. 326, 596. 3 Leon. 219. 11 Co. 53 b. 1 Danvers 42, pl. 6. 2 Danvers 19, pl. 5. 2 Saunders 155, 156. 1 Viner Ab. 295. 20 Viner Ab. 327. *Auterment d'un assumpsit, sur bon consideration.*

Error of a judgment in B. R. in debt upon an obligation conditioned, that the defendant should not use the trade of a *taylor* in Exeter. Whereto the defendant pleads *there*, that he was an expert *taylor*, and skilful in the art thereof; and the defendants, pretending that none who was not a member of their corporation ought to use that trade there, did many ways vex and trouble him; and he, to prevent such vexation, gave to them the said obligation, which is contrary to law, and void. The plaintiffs *there* replied, that the defendant sealed and delivered the said **[242]** obligation as his deed; and it was adjudged in B. R. that the obligation not restraining the trade generally, but only in a particular place, viz. Excester, was not void. Whereupon the defendant there brought a writ of error in the Exchequer-Chamber, and the error assigned was only in point of law, viz. whether the said obligation was void? And after divers arguments in Trinity term and this term, and also in the following Hilary term, it was held by all the Judges, that the judgment in B. R. was erroneous, and the obligation void, for which they in Hilary term following reversed the judgment; and the principal reason was, that it being a penal obligation for restraining the exercise of a trade, though it was in a particular place, it is void; otherwise if it had been on an *assumpsit* for a good consideration not to use a trade in a particular place, because in such cases all being to be recovered in damages, it is in the power of the jury to assess the damages, on weighing the consideration of the promise and the mischief to the party promising; but in this case the whole penalty is to be forfeited, let the consideration be what it will, and let the offence be never so small; as in the case of an infant, a bond or bill for necessaries is void, but an *assumpsit* is good; and some Judges held, that a covenant or promise to pay a certain sum if he use his trade is ill, because that is a debt for which an action of debt will lie; but a promise upon a good consideration, as for transferring his trade and shop, that he shall not use the trade in the town where he ought to use it, they allowed to be good, because all is uncertain, and is to be ascertained by the jury which tries the cause, viz. of what value the consideration is, and what damage the use of the trade is to the party to whom the promise is made: and for authorities were cited 2 H. 5, 5 b. the opinion of Hull, which they said is good law, and was never denied in case of an obligation to restrain a trade in any particular place, or for a particular time, as there for six months: but promises in such cases have been divers times allowed to be good, as

(1) The French is—*Et si le dernier part del rejoynder per le omission des parols devant le Seignior Brudenel, &c.* The meaning seems to be, that though the latter words of the rejoinder had been omitted, it would not have made the rejoinder good.

All. 67, the case of *Pragnell and Glass*, Mar. 77, 193, an *assumpsit* held good, but an obligation void in such cases, and Mo. pl. 255. Obligation not to use a trade in Nottingham, void; and *ib.* pl. 377. Obligation not to use a trade in Monm. void. Ow. 143. Obligation conditioned not to use a trade in Kent, void; 2 Leon. 210, the like obligation held void, but 596, an *assumpsit* upon a good consideration held good, and Noy. 98, the same case; so 2 Roll. Rep. 20, and Sty. 111, **[243]** *Pragnell* against *Goffe*, it was the consideration which made the promise good, All. 67, accords, and 2 Keb. 377, *Tresby* vers. *Arrowsmith*, the roll whereof was brought into Court, and is entered Pasch. 20 Car. 2, B. R. Rot. 66, an obligation that he should not use a trade in Chichester adjudged void; and in Hil. term following the judgment of B. R. in this case was reversed by the unanimous consent of all the Judges.

ADNEY *against* VERNON.

Judgment in an Inferior Court pleaded briefly. 1 Saunders 74, 75. 2 Lev. 50, 69, 96, 153. *Ante* 237. *Post*, 404. 2 Levinz, 181. 20 Viner Ab. 155.

Trespass for taking the plaintiff's goods. The defendant justifies for that time out of mind, &c. till 2 Jac. 1, there was a Court in Worcester, held *coram ballivis*, and from thenceforward *coram majore, &c.* and pleads a plaint levied there in debt, and a count thereupon, that the defendant being indebted to the plaintiff, *infra jurisdict' Cur'* promised, &c, whereupon *taliter processum fuit*, that afterward, viz. 2 Octob. 34 Car. 2, *consideratum fuit, &c.* And so justifies by a warrant upon this judgment. The plaintiff replies *de injuria sua propria absque tali causa, absq; hoc quod habetur aliquod tale recordum.* The defendant rejoins, *quod habetur tale recordum*, and at the day brings in the record, whereby it appears the judgment was given the 25th of December, 34 Car. 2, and if he had failed of the record, was the question: for it was argued for the defendant, that seeing the record produced agreed with the record pleaded in the entry of the plaint, and in all other things, except the day of the judgment given, it was no such variance as would make a plea faulty, seeing it is a sufficient record, by virtue whereof and of the warrant thereupon the defendant took the goods: but as to that the Court gave no judgment; but they gave judgment against the defendant for other matters in the plea, viz. 1. He pleads the Court to be held *time out of mind, &c.* before 2 Jac. 1, *coram ballivis*, and from thence *coram majore, &c.* and does not shew any grant, &c. for the alteration thereof; and then the Court held before the mayor, &c. was without any authority, and the judgment void. 2. It is not shewn in the plea, that the cause of action arose within the jurisdiction, and then the judgment is *coram non Judice*, and void. It is true in the **[244]** declaration set forth in the plea here, it is said to be *infra jurisdictionem Curie*, but that is not sufficient, for that is traversable, but the matter in the declaration there is not traversable here, but only that which is alledged in the plea here: and upon those exceptions to the plea judgment was given against the defendant; though they agreed the replication to be ill, by reason of the double traverse, yet the declaration being good, and the plea ill,(1) though the replication does not shew that the plaintiff had (no) cause of action, he ought to have judgment.

HOWE *against* BEECHE.

S. C. 1 Danvers, 67.

Assumpsit, if he would use his labour and pains and finish such a business, &c. after part done, the defendant forbids him from proceeding further, the plaintiff shall have his action for the whole, and the jury shall give the value of the business done. 2 Rol. Rep. 19, 39, 459. 1 Rol. Ab. 32 A. Cro. Ja. 483. Yel. 22. 1 Jo. 179. 1 Lev. 3. 1 Bac. Ab. 180. *Ante* 238.

Error in the Exchequer-Chamber of a judgment in B. R. where the plaintiff declared, that the defendant in consideration that the plaintiff would solicit a business which the defendant had with Gillingham, and put an end thereto to pay him 100l.

(1) *Et le replication ne monstrant, &c.*

and that the plaintiff did solicit it, and had therein employed much of his care and pains, but before he could put an end thereto, the defendant countermanded him; whereupon judgment was by default, and upon a writ of enquiry 100l. damages found, and judgment for the plaintiff in B. R. and thereof error was brought. And it was assigned, that the action does not lie for the 100l. for such an employment is always countermandable; and if the plaintiff had employed his labour, and had in part done the business before the countermand, he might have a *quantum meruit* for what he had done, but not an *assumpsit* for the whole: to which it was answered and agreed by the Court, that though the employment was countermandable, yet if after part of the business done the defendant countermands it, the plaintiff shall have his action for the whole; and upon the trial the jury shall give so much in damages as they find the business deserves; and although here it was not finished, yet that was by the defendant's own default; and perhaps when all the pains and labour to finish it are passed, the defendant would countermand it in order to finish it himself without any labour or pains, thereby to defeat the plaintiff of his recompence: and after the case had been twice argued in the Exchequer-Chamber, the judgment was affirmed.

[245] WHITWICK *against* HOVENDEN.

Action laid, and outlawry in London, on reversing the outlawry the plaintiff may declare in another county, be the action local or transitory. *Ante* 235.

Trespass for taking and detaining his beasts until he made a fine, and laid the action in Sussex. The defendant pleads, that *the cause of action did not accrue within six years before suing of the writ.* The plaintiff replies, that at another time he brought an original in battery in London, intending when the defendant had appeared to have declared for this trespass, and that the defendant was outlawed in London, and that within such a time after the reversal of the outlawry he declared here. The defendant demurred, and now for the defendant it was insisted, that the original being laid in London, he could not in his action declare in another county, though the cause of action be transitory. But upon information by the prothonotaries, that the course of the Court is, that although the original be laid in London for expediting the outlawry, yet when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory: and the statute 21 Jac. 16, gives to plaintiffs generally a power to commence a new suit within the year after the outlawry reversed; and that so he may do so in this case to warrant his declaration within the course of the Court, judgment was given for the plaintiff.

NORRIS *against* SPICER.

Obligation to pay at D. Plea of payment *secundum conditionem*, not saying at D. is not good on a special demurrer.

Debt on an obligation conditioned to pay a sum of money at D. such a day. The defendant pleads payment at the day *secundum effectum condition' prædict'.* Upon which the plaintiff demurs specially, for that he does not say where he paid it, so that no venue can be had thereof. To which it was said by Pemberton, that the condition being to pay it at D. the plea that he paid it according to the condition necessarily implies it was paid at D. But *per Cur';* It is at least formal **[246]** pleading to say he paid it *apud D. prædict;* and the plaintiff having demurred specially for that cause, judgment was given for the plaintiff.

HENT *against* BURTON.

Debt, or *assumpsit, &c.* and declares *adhuc, &c.* which refers to a time since the original, yet good. *Post,* 345, 346, 4 Mod. 152, 153. 1 Ventris 264. 2 Lev. 13, 176. 1 Ventris 135, 362. 2 Jo. 87, 149. 1 Ld. Ray. 576.

Covenant upon an indenture of lease, whereby the defendant demised to the plaintiff a messuage, and covenanted that he should enjoy it, and assigns a breach

that the defendant had erected another messuage *so near* it, that thereby the lights of the plaintiff's messuage, were, *& adhuc existunt, greatly darkened and overshadowed.* After a verdict for the plaintiff it was moved in arrest of judgment by Lutwyche, that *adhuc existunt* refers to the time of the declaration, and so damages are given for a thing after the original, which is always fifteen days at least before the declaration, and declarations in this Court are always upon originals, and the original is recited in them, viz. *quod* the defendant *attachiat' vel summonit' fuit* to answer the plaintiff; and the damages cannot be given for any thing after the commencement of the action, and that is the original in this Court; and cited *Harbin* against *Green*, Hob. 189, and 2 Saund. 169, *Hamilton* v. *Vere*, where damages being given for a matter after the original commenced, the judgments were staid, and in this case judgment was staid for the Court to have books, and to consider the cases cited; and at another day the same term the case was argued by Pemberton for the plaintiff, and Lutwyche again for the defendant; and upon their arguments judgment was given for the plaintiff by the whole Court; and as to the cases cited, the one was for ten years after the action, and the other was for three years at least, whereas here could not be above fifteen days at most, and *de minimis non curat lex;* also perhaps the defendant appeared *gratis* without any original, and then the action commences by the declaration, and the recital of *summonitus, &c.* in the declaration is only form, and is always used in this Court, though no original is sued; and if this judgment should be stayed for this cause, it would overturn many of the proceedings of the Court; for in debt upon an obligation the declaration is **[247]** *summonit' &c.* and afterwards it says *nondum solvit, sed ill' solvere contradixit, & adhuc contradicit, unde dicit quod deteriorat' est, & dampnum habet;* where the *adhuc contradicit* and the *dampnum habet* are in the present tense as here, and the damages are general as here; and so it is in *assumpsits* and other actions, and yet always held good.

[Actions for stopping lights, &c. *Vid.* 1 Lev. 122. 6 Mod. 116, 314. 5 Mod. 55. 1 Vent. 237, 239, 274. 1 Sid. 167. Ray. 87. 1 Lev. 122. 2 Lev. 194.]

[248] HILARY TERM, IN THE FIRST AND SECOND YEARS OF THE REIGN OF JAMES II. IN THE COMMON PLEAS.

GARDNER *against* HELVIS.

In case for words interpreted, a former action without such an interpretation pleaded in bar. *Ante* 30, 68. 4 Bac. Ab. 11, 513. 1 Viner Ab. 543.

Case for these words of the plaintiff, being an alderman of Norwich, and a justice of the peace there, *He is a rascally alderman, a factious alderman, a lampooner;* and avers, that a *lampooner* is there well understood to be a libeller. The defendant pleads in bar a former action brought by the plaintiff for the same words, and laid in the same manner as here (saving that in the former action no interpretation is given of the word *lampooner*) in which action the plaintiff was barred. Whereupon the plaintiff demurred. And it was now argued by Bedingfield the King's Serjeant, that by reason of the interpretation of the word *lampooner* in this action, this is another action than the former, and therefore the bar in that is no bar in this. But by the Court: the plaintiff having been once barred in an action for the same words, he shall not entitle himself to a new action by a new interpretation of a new word; and they gave judgment for the defendant.

MICHAELMAS, 1 JAMES II.

[249] TITUS *against* PARKINS.

Declaration in replevin. Gilbert upon Replevin, 216.

Hertford, to wit.—William Parkins, late of Bushy in the county aforesaid, knight, was summoned to answer Silas Titus, Esquire, of a plea, wherefore he took the cattle of the said Silas, and them unjustly detained against gages and pledges, &c. And

whereupon the said Silas by John Warburton his attorney, complains that the said William, upon the 18th day of May in the 1st year of the reign of the Lord James II. now King of England, &c. at Bushy, in a certain place there called Merry Hill Grounds, the cattle of the said Silas, to wit, thirty-six wether-sheep, twelve ewe-sheep, and eight lambs took and them unjustly detained against gages and pledges, until, &c. whereupon the said Silas saith that he is prejudiced, and hath damage to the value of ten pounds, and therefore he produces his suit, &c.

And the said William Parkins by Redmond Baldwin his attorney, comes and defends the force and injury when, &c. and the said William in his own proper right well avows, and as the bailiff of Algernon Earl of Essex well acknowledges the taking of the cattle aforesaid in the said place in which, &c. and justly, &c. because he saith that the said place in which the taking of the cattle aforesaid is supposed to be, contains, and at the said time in which the taking of the cattle aforesaid is supposed to be, did contain in itself two acres of pasture with the appurtenances in Bushy aforesaid; which two acres of pasture with the appurtenances are and at the said time, when, &c. were the soil and freehold of them the said William and Algernon Earl of Essex, and because the cattle aforesaid, at the said time, when, &c. were in the said two acres of pasture, eating up the grass then growing therein, and doing damage there, the said William in his own proper right well avows, and as the bailiff of the said Algernon Earl of Essex well acknowledges the taking of the cattle aforesaid, in the said place in which, &c. and justly, &c. so doing damage there, &c.

And the said Silas saith that the said William Parkins for the reason before alledged, the taking of the cattle aforesaid, in the said place in which, &c. ought not in his own proper right to avow, and as the bailiff of the said earl to acknowledge just; because he saith that the said two acres of pasture in which, &c. are and at the said time when, &c. **[250]** and also from the time whereof the memory of man is not to the contrary, were parcel of the manor of Bushy, and customary land of the said manor, and also demised and demiseable by copy of the rolls of the court of the said manor for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord or lords, according to the custom of the said manor; and the said Silas further saith, that the said earl and William before the said time in which, &c. to wit, upon the 21st day of April, in the 1st year of the reign of the said lord the now King aforesaid, then being the lawful lords of the manor aforesaid, they the said earl and William afterwards, and before the said time when, &c. to wit, upon the said 21st day of April, in the 1st year aforesaid, at the court of them the said earl and William of their manor aforesaid, then held for the said manor, within the manor aforesaid, at Bushy aforesaid, in the said county of Hertford, by one Thomas Smith, gentleman, then their steward of the court of the manor aforesaid, by copy of the rolls of the court of the said manor, granted the said two acres of pasture with the appurtenances in which, &c. among others to the said Silas, to have and to hold to the said Silas his heirs and assigns for ever, at the will of the lords according to the custom of the said manor; and the said Silas according to the custom of the said manor, then and there was admitted tenant thereto, by virtue of which grant and admission the said Silas before the said time in which, &c. into the said two acres of pasture, with the appurtenance in which, &c. among others entered, and as yet is thereof seised in his demesne as of fee at the will of the lords, according to the custom of the said manor; and the said Silas so being thereof seised, the said Silas before the said time in which, &c. put his cattle aforesaid into the said two acres of pasture, in which, &c. to eat up the grass then growing therein, and his said cattle were in the said two acres of pasture in which, &c. eating up the grass then growing therein, until the said William Parkins on the said 18th day of May, in the 1st year aforesaid, at Bushy aforesaid, in the said two acres of pasture, called Merry Hill Grounds, in which, &c. took the said cattle of the said Silas, and them unjustly detained, against gages and pledges, until, &c. as the said Silas above against him complains; and this he is ready to verify; wherefore because the said William Parkins, the taking of the **[251]** cattle aforesaid above hath confessed; the said Silas prays judgment and his damages by occasion of the taking and unjust detaining of the cattle aforesaid, to be adjudged to him, &c.

And the said William saith, that well and true it is that the said two acres with the appurtenances in which, &c. are, and at the said time when, &c. and also from the

time whereof the memory of man is not to the contrary, were parcel of the said manor of Bushy, and customary lands of the said manor, and also demised and demiseable by copy of the rolls of the court of the said manor, by the lord or lords of the said manor, or by their steward of the court of the said manor for the time being, to the person or persons willing to take the same in fee-simple or otherwise, at the will of the lord or lords according to the custom of the said manor; and that the said earl and William Parkins before the said time, in which, &c. to wit, upon the said 21st day of April, in the 1st year of the reign of the said lord the now King aforesaid, were the lawful lords of the said manor; and that the said earl and William then being lords of the said manor, the said earl and William afterwards and before the said time when, &c. to wit, upon the said 21st day of April, in the 1st year aforesaid, at Bushy aforesaid, in the county of Hertford aforesaid, by the said Thomas Smith, then their steward of the court of their manor aforesaid, by copy of the rolls of the court of the said manor, granted the said two acres of pasture with the appurtenances in which, &c. among others, to the said Silas Titus, to have and to hold to the said Silas Titus, his heirs and assigns for ever, at the will of the lords, according to the custom of the said manor, and that the said Silas, according to the custom of the said manor, then and there was admitted tenant thereto, and that by virtue of the grant and admission aforesaid, he the said Silas before the said time when, &c. into the said two acres of pasture with the appurtenances, in which, &c. among others entered, and was thereof seised in his demesne as of fee at the will of the lords, according to the custom of the said manor, as the said Silas above by pleading hath alledged, but the said William Parkins further saith, that the said two acres of pasture with the appurtenances in which, &c. together with other lands and tenements in the said copy mentioned, and by the said copy to the said Silas his heirs and assigns granted, and to which the said Silas was as aforesaid admitted, at the said time of the admission of the said Silas aforesaid, were of the clear yearly value of twenty-eight pounds, and that the said earl and William by the said **[252]** Thomas Smith, at the said full court of the manor aforesaid held within the manor aforesaid, on the said 21st day of April, in the 1st year of the reign of the said lord the now King aforesaid, the said Thomas Smith, then as aforesaid, being the steward of the said earl and William, then lords of the manor aforesaid, of their said court of the manor aforesaid, after the said admission of the said Silas to the said two acres of pasture, in which, &c. and to the said other lands and tenements by the copy aforesaid to the said Silas granted, then and there did assess and appoint the sum of thirty-five pounds for the fine for the said grant to the said Silas for the said two acres of pasture with the appurtenances in which, &c. and the other lands and tenements aforesaid, by the copy aforesaid, in the form aforesaid granted, to be paid by him the said Silas to the said earl and William, being as aforesaid lords of the manor aforesaid, upon the 1st day of May then next ensuing at the porch of the parochial church of Bushy aforesaid in the said county of Hertford, and that the said Silas then and there, to wit, at the manor aforesaid, of all and singular the premises had notice; and the said William further saith that the fine aforesaid, for the lands and tenements aforesaid, by the copy aforesaid, in the manner and form aforesaid, granted to the said Silas, was a reasonable fine; and that the said Silas Titus although he had notice of the premises aforesaid, from the lords aforesaid, of the manor aforesaid, at the court aforesaid, held as aforesaid, at the manor aforesaid, upon the said 21st day of April, did not pay to the said earl and William, lords of the manor aforesaid, or to either of them, the sum of thirty-five pounds for the fine aforesaid, in the form aforesaid assessed, upon the said first day of May then next ensuing the admission of the said Silas, at the said porch of the parochial church of Bushy aforesaid, but the said thirty-five pounds to the said earl and William then and there to pay wholly did deny and refuse, and as yet doth refuse, whereby the said Silas hath forfeited to the said earl and William, being as aforesaid, the lords of the manor aforesaid, whereof, &c. his entire right, estate, title and interest of and in the said two acres of pasture with the appurtenances in which, &c. parcel of the said other customary lands and tenements in the grant aforesaid; after which forfeiture in the form aforesaid made, and before the said time, when, &c. the said earl and William, being as aforesaid, lords of the manor aforesaid, into the said two acres of pasture **[253]** with the appurtenances, in which, &c. entered, and were and as yet are thereof seised as of fee; and

because the cattle aforesaid, after the entry aforesaid, to wit, at the said time when, &c. were in the said two acres of pasture with the appurtenances, in which, &c. eating up the grass then growing therein, and doing damage there, the said William as before in his own proper right well avows, and as the bailiff of the said earl well acknowledges the taking of the cattle aforesaid, in the said place, in which, &c. and justly, &c. so doing damage there, &c. and this he is ready to verify; wherefore as before he prays judgment and a return of the cattle aforesaid, together with his damages, expences and costs by him about his suit in this behalf (1) laid out, according to the form of the statute in such case thereupon lately made and provided, to be adjudged to him, &c.

And the said Silas by protesting that the said sum of thirtyfive pounds for the fine aforesaid for the said lands and tenements by the copy aforesaid, to the said Silas, in the manner and form aforesaid granted, was not a reasonable fine as the said William above by pleading hath alledged, for plea the said Silas saith, that within the manor there is had, and also from the time whereof the memory of man is not to the contrary, there was had such other custom used and approved of within the said manor for the whole time aforesaid, to wit, that such person or persons who should be admitted tenant or tenants to any customary lands or tenements of the said manor by copy of the rolls of the court of the said manor should pay, and ought and had been accustomed to pay to the lord or lords of the said manor for the time being, for a fine for his or their admission to such customary lands or tenements, such sum of money as the said lands or tenements were worth by the year at the time of such admission, and no more. And the said Silas in fact saith, that the said two acres of pasture with the appurtenances, in which, &c. together with the said lands and tenements in the said copy mentioned, and by the said copy to the said Silas and his heirs granted, and to which the said Silas was as aforesaid admitted, at the said time of the admission of the said Silas to the same were worth, and as yet are worth by the year twenty-eight pounds, and no more. And the said Silas further saith, that at the time of his admission aforesaid, to the tenements aforesaid, with the appurtenances, to wit, at the said court of the manor aforesaid, held **[254]** within the manor aforesaid, upon the said 21st day of April, in the 1st year aforesaid, he the said Silas was ready, and offered to pay to the said William, then one of the lords of the said manor, then and there being present in his proper person, such a sum of money as the said customary tenements with the appurtenances were worth by the year, at the time of the admission of the said Silas to the same, to wit, twenty-eight pounds of the lawful money of England; which twenty-eight pounds the said William, then and there, did wholly refuse to accept or receive from the said Silas; and this he is ready to verify: whereupon as before, he prays judgment and his damages, by occasion of the taking and unjust detention of the cattle aforesaid to be adjudged to him, &c.

And the said William Parkins saith, that the said plea of the said Silas above rejoining pleaded, and the matter therein contained, are not sufficient in law to preclude him the said William from having his avowry and cognizance aforesaid, and that he to the said plea in the manner and form aforesaid pleaded, hath no necessity, neither is he bound by the law of the land to answer; and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said William [as before] prays judgment and a return of the cattle aforesaid, together with his damages and expences, by him about his suit in that behalf (1) laid out, according to the form of the statute in such case thereupon lately made and provided. And for cause of demurrer in law to the said plea, the said William, according to the form of the statute in such case lately made and provided, sets down and shews to the Court here the following cause, to wit, that the value of the land remains in estimation, and the custom aforesaid, by the said Silas above in pleading pretended and alledged, is uncertain, insufficient, and void in law.

And the said Silas because that he hath alledged sufficient matter in law in his plea aforesaid, above by rejoining pleaded to preclude the said William from having his avowry and cognizance aforesaid, which he is ready to verify, which matter the said William doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, as before prays judgment and his damages by

(1) Sustained.

occasion of the caption and unjust detention of the cattle aforesaid, to be adjudged to him, &c.

[255] TITUS *against* PERKINS.

Custom to pay the yearly value for a copyhold fine, good. 6 Viner Ab. 108, 110, 111. Douglas, 732, *Grant* v. *Astle.*

In replevin, the defendant avowed for damage-feasant in the freehold of him and the Earl of Essex. The plaintiff in bar of the avowry pleads, that the land is copyhold, and pleads an admittance of himself thereto by the defendant and the Earl of Essex. The defendant replies, that the copyhold was of the yearly value of 28l. and a fine was set at 35l. and for non payment an entry and forfeiture. The plaintiff rejoins, a custom for a fine of a year's value, and that he tendered the value, viz. the 28l. which was refused. Whereupon the defendant demurs specially, because the value consists only in estimation, and is uncertain, and that the custom alledged is uncertain, and wants form. And the sole question argued at Bar was, whether a custom to pay for a fine certain a year's value of the land at the time of the grant be good? for it was objected, that the year's value is uncertain, being at some times more, at other times less; and a person will give more rent at one time than another: so that the matter is wholly uncertain. But *per Cur'*, it is certain enough, and issuable, and it is triable by jury, whether it be of such a yearly value, or not; and therefore the custom is good: and judgment was for the plaintiff.

THE KING *against* HUNTER.

Two men quarrelling, one casts a pot at the other, who instantly kills him with his sword. The pot is a weapon drawn within the statute of (1) the 1st Ja. 1, c. 8. Kelynge 55, 119. Foster C. L. 274, 295. 3 Bac. Ab. 672. 5 Bac. Ab. 320. 1 Hawkins P. C. 116, 125. 9 Coke 65. 2 Stra. 766. 2 Ld. Ray. 1485. 5 Burrow 2796. Leach C. C. 151, 156.

Memorandum, this term on a special verdict found at Newgate Sessions in the Old Baily, London, a matter was referred to all the Judges of England by the King's command, and it was argued before them at Serjeants-Inn, Fleet-Street, and was thus: David Hunter was indicted on the statute, 1 Jac. 1, against Stabbing, for the killing of Adrian de Loy, not having any weapon drawn: and on *not guilty*, the jury found that the year, day, and place in the indictment, *Hunter called de Loy lying sot; who thereupon called Hunter Scotch dog: whereupon Hunter struck de Loy on the face with the back of his hand. Thereupon de Loy attempted to draw his dagger* **[256]** *at Hunter, but was prevented by the company there present. Whereupon de Loy threw a pot at Hunter, but missed him; whereupon Hunter with his sword gave de Loy the wound whereof he died. And if upon the whole matter Hunter be ousted of his clergy by the statute, was the question.* And on hearing the counsel of both sides, it was held by Herbert Chief Justice of B. R. Jones Chief Justice of C. B. Gregory Baron of the Exchequer, Halloway a Judge of B. R. Charlton and Street of C. B. that he was ousted of his clergy, and yet divers of them admitted that the pot, as long as it was in his hand, was a weapon drawn; *but when he had thrown it out of his hand without hurt done, and it was out of his*

(1) The corresponding Irish Act is the 7th Will. 3, c. 11.—The enacting words of which are—1st section. That every person, &c. who shall stab or thrust any person or persons that hath not *then* any weapon drawn, or hath not *then* first stricken the party which shall so stab or thrust, so as the person or persons so stabbed or thrust shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice fore-thought, yet the party so offending, and being convicted, &c. shall be excluded from the benefit of clergy, &c.

2d section. Provided that the said Act shall not extend to any person killing another *se defendendo*, or by misfortune, or in any other manner than as aforesaid, or in preserving the peace, [unless willingly and under colour thereof,] or in correcting a child or servant.

reach, he had no weapon drawn at the time he received his death's wound. And they took the words of the statute, *not then having a weapon drawn, to refer only to the time of the wounding.* But Mountague Chief Baron of the Exchequer, Levinz a Judge of C. B. Withins and Wright Judges of B. R. and Nevil puisne Baron of the Exchequer, held the contrary, and that the word *then* in the statute is to be referred to the time of the fighting or controversy, and not to the immediate instant of the wounding: and it seemed unreasonable to them, that one having a weapon drawn at one time during the controversy, and having done all the mischief he can with it, should be within the statute, which they conceived was made on the first Union of Scotland to prevent the sudden killing of men without provocation or defence. Now here de Loy (who had a dagger, and which he offered to draw, and which he had still about him) had cast the pot (which they agreed was a weapon drawn) at the other, and was thereupon instantly wounded by him. Suppose two men are fighting, and the one *lets fall his sword, or it be beat out of his hand, and he is at the instant wounded;* or suppose, that in the combat he darts his sword at the other, who instantly wounds him, whereof he dies, shall the other be ousted of clergy? Or if one having a pistol discharges it at the other, who beats it out of his hand, or he let the pistol fall, and the other wounds him, shall he be ousted of clergy? Here de Loy threw the pot *mischievously and dangerously enough at Hunter, if it had hit him;* and that he had it not in his hands at the time of the wound given, that was his own fact, and like the case of darting the sword, or shooting off the pistol, **[257]** and afterward throwing it at another; and therefore they held he ought to have his clergy. Baron Atkins was absent; and the Recorder being of opinion with the five last Judges, he reported it to the King, who was himself also of the same opinion. Whereupon the prisoner had his clergy.

Memorandum, that two days before the end of this term I received a *supersedeas* under the Great Seal, signifying the King's Royal pleasure to discharge me from the office of a Judge, whereto I most humbly submit.

[258] TRINITY TERM, IN THE FIRST YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

IN B. R.

BOSON *against* SANDFORD AND SEVEN OTHERS.

S. C. Shower 29. 3 Mod. 321. 2 Salk. 440.

[Overruled, *Govett* v. *Radnidge*, 1802, 3 East, 68. Upheld, *Powell* v. *Layton*, 1806, 2 B. & P. (N. R.) 371. See *Kendall* v. *Hamilton*, 1879, 4 App. Cas. 543.]

Master or part-owners of a ship responsible, but all the part-owners to be joined. 2 Lev. 27. 2 Saunders 115, 116. 3 Mod. 322. 1 Salk. 10. 1 Bulst. 16. *Post.* 352, 362. 6 Mod. 181. 6 Term Rep. 370.

Case against the defendants proprietors of a ship, wherein goods are usually transported for hire; and that the plaintiff loaded goods on board the said ship to be carried for hire from London to Topsham in Devonshire; and that the defendants received them and undertook to carry them to Topsham, but that they not being careful therein, but neglecting their duty, did so carelessly place and carry the goods, that though the ship arrived safely at Topsham, yet the goods were spoiled: and on *not guilty* the jury found a special verdict, viz. that ten other persons besides the defendants are proprietors and part-owners of the ship; that the ship had a master placed in her by the part-owners, who had 60l. wages for every voyage between Topsham and London; that the goods were delivered to the master, none of the part-owners being present, and that no contract was made with them or any for the plaintiff, that the ship should arrive safe at Topsham, but that the goods were spoiled by negligence, &c. And if for the plaintiff, for the plaintiff; and if not, for the defendant. And two questions were made in this case. 1. Whether the proprietors

are chargeable, no contract being made with them, for that here was a master who was chargeable in respect of his wages, as in the **[259]** case of *Mors and Slue*, 1 Ventris 190, 238, lately adjudged in this Court. And as to this point Holt (now Ch. Just.) held clearly, that though the master be chargeable in respect of his wages, so are the proprietors also (in respect of the freight, which they received for the carriage of the goods) at the plaintiff's election. 2. Whether the action lay against the defendants only, it appearing there are other part-owners, who are not made defendants: *and he held, that the action did not lie, except it were brought against all the part-owners;* for they are all chargeable in respect of their (joint) profit made by the carriage, and that in point of *contract* upon their (joint) *undertaking*, be it either expressed or implied: *and they are not chargeable as trespassors, for then one of them might be charged alone, but in point of contract upon their receipt of the goods to be carried for hire, and so has the plaintiff laid it in his declaration, viz. that they undertook to carry them, &c. Sed Cur' advisare vult.* But afterwards (as Justice Dolben told me) judgment was given for the defendants for that cause. Levinz was of counsel for the plaintiff.

WRIGHT *against* WIVELL.

S. C. 2 Ventris 56.

[Referred to, *Pennefather* v. *Pennefather*, 1873, Ir. R. 7 Eq. 313.]

A devise to a wife of 600*l.* to be paid to Weddall in full for the purchase of such lands *already stated in part of a jointure to said wife for life;* the lands were not settled on her; they will not pass by the will, by virtue of these words. Cro. Eliz. 674. Hobart 32. 1 Leon. 313. Pop. 188. 2 And. 323. 2 Leon. 41. 3 Leon. 165. 1 Saund. 180. 2 Saund. 197. 2 Vent. 363. 1 Lev. 212. 2 Bac. Ab. 66, 67. 8 Viner Ab. 69, 260, 305, 356, 377. 14 Viner Ab. 61.

Ejectment of lands in Wigginton in Yorkshire, on a demise by Dorothy Hewly heir of Christopher Hewly, who being seised of the lands in question in fee made his will in these words; *I devise to my wife* (now the wife of Wivell the defendant) 600*l. to be paid to William Weddal, and it is for the full payment for the lands I purchased of him* (being the lands in question) *and are already stated in part of a jointure to my said wife during her life, being of the value of* 67*l. per annum; that of Wiston, York and Malton, the lands there amount to* 63*l. per annum, in all* 130*l. per annum, being also stated on my wife, in full of her jointure.* But the lands in Wigginton were not settled on the wife: and whether they should pass by the will to her for life? was the question: and it was resolved by Pollexfen Ch. Justice, Rooksby and Ventris Justices, that they should not pass by the will. Here are no words of devise to pass them, nor does any intent appear that she should have them **[260]** *by the will*, but only a mistake that he had settled them before, but no devise or intent appears by the will that she should have them; and therefore they cannot pass by implication, as in the case of H. 7, where a man devised his lands to his heir after his wife's death, there the wife shall have them in the mean time, for there the lands are devised, and to the heir, but not until after the wife's death; and therefore the heir is not to have them until her death, and so she shall have them in the mean time by implication; but in this case the lands are not devised at all, only he declares they are already settled on his wife, wherein he is mistaken, and this shall not be expounded a devise to the wife by implication. But Justice Powel held the contrary; for here appears an intent that the wife should have them, and though he be mistaken in the means or way that she should take them by, viz. the settlement, yet she shall have them by such way as she may take, viz. by the will, rather than his intent should be frustrated. But on the opinion of the other three Judges judgment was given for the plaintiff. Levinz of counsel with the plaintiff.

FOWKES *against* JOYCE.

S. C. Lutw. 1161 to 1165. 2 Ventris 50. Nelson's Lut. 364.

Cattle bringing to London were by leave lodged in a close, they are distrainable for rent. 2 Saunders 289. 5 Mod. 360, 362. Co. Lit. 47 a. Note 14, 47 b. Note 3. 3 Bur. 1498. 1 Blac. Rep. 483.

In replevin, on a special plea and demurrer, the case was; the defendant Joyce was seised of the George-Inn in Barnet, and demised it and close where the distress was taken to Willis for years, rendering rent. The plaintiff was a *drover*, and bringing the beasts to London, *ad proficuum suum inde faciend'* (for so is the pleading, and it is not said *ad mercatum*) by consent of the defendant, and by license of Willis the lessee, put his beasts in the place where, &c. to feed for a night, and the defendant the landlord distrained them for his rent arrear: and if he might lawfully do so? was the question: and no advantage was taken of its being an inn. 1. For that though it was let as an inn, yet it did not appear that it continued so at the time of the distress. 2. For that it does not appear by the pleadings that the close belonged to the inn, though demised therewith. 3. For that the plaintiff did not insist on the privilege of an inn, but only that the cattle were put **[261]** in by consent of the landlord Joyce, the defendant, which was held to be frivolous; for it was held without any doubt, that if the lessor consented that a stranger should put his beasts in the lands demised, by license of the lessee, yet the landlord may distrain them for his rent, notwithstanding such consent. But the principal question was, that those beasts being bringing to London, and so supposed to be for provision for this great city, whether it was lawful for the landlord to distrain them for rent due for a close wherein they are lodged only for a night in their way? And in the foregoing Michaelmas term, when this question was first argued, Justice Lutwyche held strongly that they were not distrainable for this reason, and grounded his opinion on Cro. Eliz. 549, 599, where one sending wool to a spinner's house to be spun, the spinner having no weights sent it to a neighbour's house to be weighed, where the landlord distrained it for the rent of the house: resolved, that this wool concerning trade was not distrainable, though not then in the spinner's house, but at a neighbour's to be weighed; and to this opinion Herbert Chief Justice inclined. But now Pollexfen Chief Justice, and the whole Court gave judgment for the avowant; for it is not reason that the beasts coming to this city from all remote parts of the realm should be priviledged against the distress of all landlords for their rent through all the way they come. *Note*, No notice was taken of the pleading, that the beasts were bringing *ad profic' inde faciend'*, and not said *ad mercat'*, but by the opinion of the Court that seemed to be admitted.

IN B. R.

SHUTTLEWORTH *against* GARNET.

S. C. 3 Mod. 239. Shower 35. 1 Danvers 28, pl. 13.

[S. C. Carth. 90. Referred to, *Fraser* v. *Mason*, 1883, 11 Q. B. D. 584.]

Assumpsit lies by an executor for a copyhold fine set by the testator. 1 Viner Ab. 266. 6 Viner Ab. 110, 112. 11 Viner Ab. 128, 132. 18 Viner Ab. 492, 574. 20 Viner Ab. 255. 2 Bac. Ab. 440.

Assumpsit by the plaintiff, executor of her husband, lord of the manor of Burbon, for a copyhold fine set by the husband in his lifetime, upon the defendant for his admittance. And upon *non assumpsit* and verdict for the plaintiff judgment had been stayed, and twice argued on this point, whether an *assumpsit* would lie for a copyhold fine **[262]** on an *assumpsit* in law? And now it was held by Holt Chief Justice, that it would not lie, it being a duty arising out of an inheritance, a custom, and a tenure, and therefore not fit to be thrown (as he termed it) into a declaration *in assumpit*. But Dolben, Gregory and Eyre were contrary, and cited *Sir Robert Howard's case* lately

adjudged in this Court, that an *assumpsit* lies for the profits received by one who claims a title to an office: and the case of *The Mayor, &c. of London* against *Gorry*, *assumpsit* for the scavage on the promise in law, yet they have an inheritance in the scavage; and here the fine is set, and does not depend on the inheritance, but is a fruit fallen, as escuage, for which the executors of the lord may have an action, Co. Lit. 47 b. Wherefore judgment was given for the plaintiff by the said three Judges: and also in another cause at the same time for the same executors for another copyhold fine.

[263] HILARY TERM, IN THE FIRST YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

TRINITY 36TH CHARLES II.

TRIPPET *against* EYRE.

S. C. 2 Ventris 113, 114. Danvers 543, pl. 11.

Arbitrators elect an umpire who refuses, and then elect another, which last election is good. 1 Levinz 285. 1 Keble, 790, 823, &c. 2 Jones 168. 1 Mod. 275. 2 Saund. 129, 130. 3 Term Rep. 592. Note b. Kyd on Awards, 56.

Debt on an obligation conditioned to perform an award, *ita quod, &c.* and if the arbitrators did not make any award, that they elect an umpire to make an umpirage, *ita quod, &c.* The defendant pleads, that the arbitrators made no award, and that they did not elect an umpire. The plaintiff replies, that the arbitrators made no award, and that they elected an umpire, who refused; and that they elected another umpire, who made an umpirage, and shews what it was, and assigns a breach. The defendant demurs; and it was argued several times at Bar, and the sole question was, whether after the arbitrators had elected one umpire, and he refuses, if they could elect another umpire afterward? or whether their power was so determined, that they could not elect another? And Pollexfen Chief Justice held their power determined, and their election of another umpire void; for it is agreed by the pleadings, that they had elected one umpire, and if so, that proves their first election was not void, and then they could not elect another; for authorities once executed are determined? But Powel, Rokesby and Ventris Justices to the contrary; that the first nomination or election became void by his refusal, as if he had never been elected, and cited *Coppin and* **[264]** *Hurnard's case* in Saund. Rep. 129, and Pal. 289, a sheriff makes an insufficient execution, he may make another, Hob. 167, and Cro. Eliz. 7, insufficient acts are no acts in law; and by the opinion of the said three Judges judgment was given for the plaintiff.

DOUSE *against* EARLE.

S. C. 2 Ventris 126, 127.

Covenant by a tenant to erect three houses, and them to keep in repair, and the said premises and the houses thereupon to be erected, to deliver up sufficiently repaired at the end of the term; this covenant extends to all houses erected upon the premises before the end of the term. Skinner 121. 8 Co. 94. 10 Co. 47. Cro. Ja. 47. Godb. 308. Palm. 335. 1 Roll. Rep. 356, 358. 1 Bulstr. 193. Cro. El. 795. Ray. 163. 1 Rol. Ab. 610. 1 Bac. Ab. 540.

Covenant, and declares, that John Earl of Clare, Decemb. 9, 1647, demised to Gale three messuages for 41 years, and Gale covenants to pull them down, and erect three others in their place; and also from time to time during the term, to maintain the messuages so agreed to be erected in sufficient repair; and also to repair the pavements, sinks, widraughts, &c. *Ac dicta dimissa premissa ac domos superinde fore erect' & earum quamlibet ad finem termini sufficienter reparat' deliberaret* to the said earl, his heirs and assigns, and he derives the reversion for a thousand years to the father of the plaintiff, who by his will devised the term of a thousand years to the plaintiff for his

life, the remainder to his son, and the heirs males of his body; and that the plaintiff by the devise was possessed of the said term for a thousand years, and then derived down the term of forty-one years to the defendant, as executor to Gale, and then assigns a breach, that the defendant permitted one messuage erected on the premisses to fall quite down, and had also permitted four messuages erected on another part of the premisses to be out of repair in the tiles and windows, and so left them at the end of the term. The defendant pleads, that Gale took down the three messuages, and erected three others, which the defendant left in repair; and as to the other messuages, that he left them in sufficient repair. And now the question was, when the lessee agreed to erect three messuages, and to leave them in repair, and he erects five, if in this case he shall be obliged to keep all the five messuages in repair? and *per tot' Cur'* he shall in this case be bound to repair all the five messuages, and to leave them in repair; for though in the first covenant he be obliged only to **[265]** repair the messuages so agreed to be erected, which were three, during the term, yet by the last covenant he is bound *dicta dimissa ac domos superinde erect'* (not agreed to be erected, but *superinde erect.* indefinitely) which extends to all the houses which should be erected on the premisses before the term (expired,) whether they were agreed to be erected, or not; also this last covenant is to leave them in repair at the end of the term: and they held, if a man took a lease of a messuage and land, and covenants to leave the demised premisses in good repair at the end of the term, and he erects another messuage on part of the land, besides that which was there before, he shall be bound to keep and to leave the messuage, by himself so newly erected, in repair, as well as the other, *vid.* Hob. *Darcy* against *Askwith.* And also here, whereas the plaintiff says that he was possessed by virtue of the will for the term of a thousand years, and the devise is to him for his life only, the remainder to his son and the heirs males of his body, the Court held it well; for the remainder to his son is only a contingent, supposing any remainder of a term can be; for every estate for life is in supposal of law of greater continuance than any estate for years, and therefore the whole term is in the father during his life, and the remainder to the son is but a possibility; and by all the justices, viz. Pollexfen Chief-Just. and Powel, Rokesby and Ventris, judgment was given for the plaintiff.

[266] EASTER TERM, IN THE SECOND YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

PROTHONOTARY WINFORD *against* WOLLASTON.

Action for disturbing one of a way, which he ought to have, use and enjoy, held good, although no title by prescription shewn. 6 Mod. 312, 313. *Ante* 133. Com. Dig. Pleader. C. 39. 3 Mod. 48. 2 Levinz 148.

Case, and declares, that for four years last past he was seized in fee of a parcel of land adjoining to the field of the defendant, called Brambleburg, and being so seized, he, during the time aforesaid, ought to have, enjoy and use a certain way through a certain gate of the defendant's in Brambleburg to a close of the plaintiff, &c. Notwithstanding which the said defendant *machinans ipsum impedire de usu viæ prædict'* 17 *Julii anno regni Regis nunc primo, januam præd' cum sera & catena obstruxit, & adhuc obstruit, per quod, &c.* Judgment was for the plaintiff by default, and a writ of enquiry of damages: and it was moved in arrest of judgment, that the plaintiff had not shewn any title by prescription, or otherwise, and therefore not good: and the case of *St. John and Moody* was after verdict, and therefore is no authority for this case. But Pollexfen and the whole Court on the contrary held, it was not substance, but only form, and was well enough on a judgment by default and a general demurrer without special cause shewn; and some of them held it good in all cases, although shewn for cause upon the demurrer, and gave judgment for the plaintiff: and afterwards in another cause between *Warren and St. Hill*, such a declaration was adjudged good upon a demurrer. Levinz of counsel for the defendant in both causes.

[267] NEWPORT *against* GODFREY.

S. C. 4 Mod. 44. 2 Ventris 184.

Arrears of rent on a lease parol determined, are payable by executors before obligations. 5 Coke 82. Cro. Eliz. 409. 2 Saunders 49. 1 Mod. 175. 3 Mod. 115. Vaughan 94, 95. Keilw. 74. 1 Sid. 21. *Ante* 57. 1 Vernon 290. Swinburne 457.

Debt for rent on a lease parol for three years from Septemb. 28, 1685, rendering 90l. per annum rent, and for 270l. rent, due at Michaelmas 1688, the action was brought after the term ended against the defendant executor of the lessee, who pleads an obligation entered into by the testator, and says he had not assets above 5l. which are not sufficient to satisfy the debt due by the obligation. The plaintiff demurs, and the question was, whether the rent on a lease parol, and the term being ended, be payable before a debt by obligation? and it was argued for the plaintiff, that the rent being due upon a real contract, although it was by parol, is of a higher nature than the obligation. But for the defendant it was said, that the term being ended, the arrears are become merely personal; otherwise perhaps, if the lease had remained in being, because then the plaintiff might have distrained for it. The authorities cited were Styl. 2, 61, 38. Roll. 1 Abr. 927, *lit.* S. *nu.* 2 & 3. 11 H. 4, 79 b. 13 H. 4, 9. None of which came up directly to this, nor is any authority to be found in the books direct in the case, which the Court admired, being a case which often happened. Pollexfen Chief-Justice inclined for the plaintiff, for the defendant could not wage his law, which proves it not to be merely personal. Powell Justice inclined to the difference, where the lease parol is determined, or not? and it was adjourned. But afterward judgment was given by the whole Court for the plaintiff, on which a writ of error was immediately brought in B. R. and in Trin. 3 W. & M. the judgment was affirmed by Holt Chief-Justice and the whole Court, who held, that the contract remains in the realty, though the term was determined. Pemberton for the plaintiff. Levinz for the defendant.

[268] JONES *against* HILL.

[See *In re Monk*, 1887, 35 Ch. D. 585.]

Case lies for dilapidations by a parson, &c. *Post*, 413. 2 Viner Ab. 17. 8 Viner Ab. 482. 2 Term Rep. 630.

Case by a parson for dilapidation against his predecessor, and declares, that the defendant being a parson accepted another benefice, and left the houses (of the former) out of repair; and the custom of the realm was, that in such a case he ought to pay to the successor *tant' denar' sum' quant' sufficiunt ad reparand'*, and the repairs amounted to so much, which the defendant had not paid. After verdict for the plaintiff it was moved in arrest of judgment, that the action did not lie, and of that opinion was Pollexfen Ch. Just. who tried the cause at Warwick Assizes, and continued still of the same opinion; for he said it was merely suable in the Ecclesiastical Court: but for maintaining the action were cited at the Bar Degg's Parsons Ley, part 1, c. 8, pag. 79, where it is said that many such actions had been maintained, and also cited Hill. 18 H. 8, Rot. 306. Hill. 15 Jac. 1, Rot. 474. Mich. 12 H. 8, Rot. 730. But upon searching the rolls no judgment was given in any of those cases, though in some of them a verdict, and divers continuances were entered. But Mich. 3 Jac. 2, C. B. Rot. 332, between *Day and Hollington*, in the like case, judgment was for the plaintiff upon a demurrer. But now the Court inclined to the opinion of the Ch. Just. Pollexfen, yet ordered the cause to be put in the paper to be further argued: and afterward in Trinity term, Pollexfen and Ventris being dead, the case was again argued before Powell and Rokesby, and they gave judgment for the plaintiff, Levinz being counsel for the plaintiff.

[269] BARKER *against* DYE, ADMINISTRATRIX OF DYE.

Assumpsit against the defendant as administratrix, she pleads a statute unpaid, the plaintiff replied that an extent and *liberate* were sued on the statute, and lands delivered thereon; the defendant rejoins, that the sheriff was removed from his office, whereby the return was void; to which plaintiff demurs generally, and has judgment. Styl. 63. 1 Sid. 356. Cro. Ja. 338, 694. 1 Lut. 429, 430, 453. Nel. Lut. 131. *Sed vide* 2 P. Wms. 92, 93. 1 Stra. 462. 2 Bac. Ab. 354. English Acts: 32 H. 8, c. 5; 16 & 17 Cha. 2, c. 5. The Irish Acts: 10 Cha. 1, sess. 3, c. 7. 17 & 18 Cha. 2, c. 11, and British stat. 8 Geo. 1, c. 25.

Assumpsit against the defendant, as administratrix of her husband, for 20l. 10s. The defendant pleads, that the intestate was bound in a statute of 2000l. to Cardel for a true and just debt, remaining unpaid. The plaintiff replies, that Cordel sued an extent and a *liberate* on the statute, and had lands delivered and accepted by him, and the return of the writ thereupon, *prout patet per recordum*. The defendant rejoins, that the sheriff, who returned the writ, was removed from his office, whereby the return was void. The plaintiff demurs generally, and had judgment; for *per Cur'*, Cordel by his acceptance of the lands on the *liberate* was concluded to have any other execution against the goods of the deceased, and so the administratrix is not chargeable upon this statute. *Vid.* Fitz. Execution 84. Cro. Ja. 694, and 15 H. 7, 15, 16, *Delenham's case;* and this very point was lately resolved in this Court between Johnson and Young, by reason of the presumption, that by the acceptance of the lands the statute was satisfied; and as to the plea, that the sheriff was removed before the return made, that is contrary to the record, and is not receivable; wherefore the plaintiff had judgment.

HILARY, 1 WILLIAM AND MARY. IN B. R.

KNIGHT AND ANOTHER, EXECUTORS OF KNIGHT, *against* COLE AND HIS WIFE, EXECUTORS OF LAWFORD.

Writ of *scire facias*. Return.

England, to wit.—The lord the King and the lady the Queen have given in charge to the sheriffs of the City of Bristol their close in these words, to wit, William and Mary by the grace of God of England, Scotland, France and Ireland King and Queen, defenders of the faith, &c. to the Sheriffs of the City of **[270]** Bristol greeting. Whereas John Knight, Knight, William Eyre, Esquire, and John Knight, Esquire, lately in the Court of the Lord Charles the Second late King of England, before the late King himself, by bill without the writ of the said late King and by the judgment of the said Court, recovered against John Lawford, Esquire, otherwise called John Lawford, of the City of Bristol, Esquire, six thousand pounds of debt, and also sixteen pounds, thirteen shillings and four pence for their damages, which they sustained as well by the occasion of the detention of that debt, as for their expences and costs by them about their suit in that behalf laid out, whereof he is convicted, as appears to us of record. And afterwards, to wit, upon the first day of March, in the 36th year of the reign of said Lord Charles the Second late King of England, &c. the said John Knight, Knight, and William Eyre, Esquire, at the City of Bristol aforesaid, in the county of the said city, died, and the said John Knight, Esquire, survived them; and afterwards, to wit, upon the 1st day of June, in the 36th year of the reign of the said Lord Charles the Second late King of England, &c. aforesaid, the said John Knight, Esquire, at the City of Bristol made his last will and testament in writing, and by the said will constituted John Kent, Thomas Knight, Esquire, and William Doning, merchant, executors thereof, and afterwards there died, [the debt and damages aforesaid, upon the judgment aforesaid, or any part thereof, then and there not being satisfied], after whose death the said John Kent, Thomas Knight, and William Doning took upon themselves the burthen of the execution of the testament aforesaid, and the said testament proved in the due form of law. And afterwards, to wit, upon the first day of September, in the year of our Lord 1688, the said John Kent at the City

of Bristol aforesaid, in the county of the said city died, and the said Thomas Knight and William Doning survived him; and afterwards, to wit, upon the first day of October, in the year of our Lord 1688 aforesaid, he the said John Lawford at the City of Bristol aforesaid, in the county of the said city, made his last will and testament in writing, and by his said will constituted his daughter Mary then and as yet the wife of Thomas Cole, Esquire, sole executrix thereof, and afterwards there died, [the debt and damages aforesaid or any part thereof not being satisfied] after whose death the said Mary took upon herself the burthen of the execution of the testament aforesaid, **[271]** and the said testament proved in the due form of law. And now on the behalf of the said Thomas Knight and William Doning in our Court before us, we have understood that although the judgment aforesaid is given, nevertheless execution of the debt and damages aforesaid as yet remains to be made; whereupon the said Thomas Knight and William Doning have besought us to grant them their proper remedy in this behalf; and we being willing that that which is just in this behalf should be done, command you that by good and lawful men of your bailiwick you make known to the said Thomas Cole and Mary, that they be before us at Westminster on Saturday next after the octave of St Martin, to shew if they have or know any thing to say for themselves; wherefore the said Thomas Knight and William Doning ought not to have execution against the said Thomas Cole and Mary of the debt and damages aforesaid, of the goods and chattels which were the said John Lawford's at the time of his death, in their hands to be administered according to the force, form and effect of the recovery aforesaid, if it shall seem expedient to them, and further to do and receive what our Court before us concerning them then and there shall consider in this behalf, and have there then the names of those by whom you shall make known to them, together with this writ, witness John Holt, Knight, at Westminster, the 6th day of November, in the 1st year of our reign. HENLY.

At which day before the lord the King and the lady the Queen at Westminster came the said Thomas Knight and William Doning in their proper persons: and the sheriffs of the City of Bristol, to wit, John Bubb, Esquire, and John Blackwell, Esquire, upon the writ aforesaid return that they the said sheriffs by Daniel Jones and Richard Edwards good and lawful men of their bailiwick, have made known to the said Thomas Cole and Mary his wife, that they should be before the lord the King and the lady the Queen at the day and place in the said writ contained, to shew in the form aforesaid, &c.

And the said Thomas Cole and Mary his wife on the fourth day of plea being solemnly called come by Andrew Innys their attorney, and say that the said Thomas Knight and William Doning ought not to have their execution aforesaid, upon the debt and damages aforesaid thereupon against them, because they say that the said William Doning before the day of the issuing of the writ of *scire* **[272]** *facias*, to wit, upon the 29th day of May, in the first year of the reign of the Lord William and the Lady Mary the now King and Queen of England, &c. at the City of Bristol aforesaid, in the county of the said city, by his certain writing of release, sealed with the seal of the said William Doning, which they the said Thomas Cole and Mary his wife bring here into Court, the date of which is the said day and year, acknowledged that he had received upon the day of the release aforesaid, of and from the said Thomas Cole and Mary his wife, executrix of the last will and testament of John Lawford, Esquire, deceased, the sum of five pounds being a legacy given to the said William Doning by the said John Lawford in and by his last will and testament, and therefore the said William Doning did remise and release the said Thomas Cole and Mary his wife of and from the said legacy, and of and from all actions, suits and demands whatsoever, which the said William Doning had had or then had against the said Thomas Cole and Mary his wife, executors and administrators, or executor or administrator of the said John Lawford deceased, for any matter or cause whatsoever, from the beginning of the world until the day of the date of the said release, and this they are ready to verify; wherefore they pray judgment, and that the said Thomas Knight and William Doning may be precluded from having their execution aforesaid for the debt and damages aforesaid against the said Thomas Cole and Mary his wife.

J. POWEL.

And the said Thomas Knight and William Doning say that the plea aforesaid by the said Thomas Cole and Mary his wife above pleaded, and the matter therein contained are not sufficient in law to preclude the said Thomas Knight and William Doning from having their execution aforesaid against the said Thomas Cole and Mary his wife, for the debt and damages aforesaid, according to the force, form and effect of the recovery aforesaid; to which plea and the matter therein contained, the said Thomas Knight and William Doning have no necessity, neither are they bound by the law of the land in any manner to answer, and this the said Thomas Knight and William Doning are ready to verify; wherefore for want of a sufficient plea in this behalf, the said **[273]** Thomas Knight and William Doning pray judgment and the debt aforesaid, together with their damages, by occasion of the detention of that debt, to be adjudged to them, &c. HENRY TRINDER.

And the said Thomas Cole and Mary his wife say that the said plea by them the said Thomas Cole and Mary in the manner and form aforesaid pleaded, and the matter therein contained, are good and sufficient in law to preclude them the said Thomas Knight and William Doning from having their execution aforesaid against them the said Thomas Cole and Mary his wife for the debt and damages aforesaid, which plea and the matter therein contained the said Thomas Cole and Mary are ready to verify and prove, as the Court, &c. And because the said Thomas Knight and William Doning to the said plea do not answer, nor the same in any manner hitherto do deny, the said Thomas Cole and Mary pray judgment of the writ aforesaid, and that the said writ may be quashed, &c. But because, &c.

IN B. R.

KNIGHT AND ANOTHER, EXECUTORS OF KNIGHT, *against* COLE AND HIS WIFE EXECUTORS OF LAWFORD.

S. C. Carthew 119.

General words in a release restrained by the particular occasion. 1 Lev. 99, 101, 235. 2 Lev. 210, 214. 1 Ventris 314. 2 Shower, pl. 32. 1 Mod. 99. 1 Sid. 141. Carth. 119.

The plaintiffs, executors of Knight, bring a *scire facias* against the defendants, executors of Lawford, upon a judgment of 6000l. obtained by Knight the testator against Lawford the testator. The defendants plead in bar a release by Doning, one of the plaintiffs, to Cole, one of the defendants, which is entered *in hæc verba, I acknowledge to have received of T. Cole the sum of five pounds given me for a legacy by Lawford,* **[274]** *and release to him all actions, suits and demands whatsoever, which I against him, as executor of Lawford, have, or may or can have for any matter whatsoever.* The plaintiff demurs; and now it was argued for the defendant, 1. That a release by an executor of all demands will release demands which he has as executor, as well as those he has in his own right, 2 Roll. Abr. 409 a. sect. 1, *ibid.* 404, *lit. p.* sect. 1. And if an executor grants *omnia bona sua*, it passes goods he has as executor, Cro. Eliz. 164. *Gillam's case*, Cro. Ja. 318. *Arnold* versus *Bidgood*, Cro. Eliz. 759. And it is a rule in *Altham's case*, 8 Co. Rep. 154 b. when the words are particular in the commencement, and general words follow, the operation of the deed shall be upon the general words; otherwise, if the words are general in the commencement, and particular in the conclusion; and in this case the general words are in the conclusion. But for the plaintiff it was argued, that by the release itself it appears that it was made for a particular purpose, viz. for discharging the legacy of 5l. and this particular purpose shall restrain the generality of the words; and it cannot be imagined that any one upon the payment of a legacy of 5l. would discharge a debt of 6000l. due by a judgment, and cited Dyer 240 a. 255 a. Hob. 275. Hetl. 15, whereto Dolben and Eyre inclined upon the first argument; and Eyre cited 2 Rol. Abr. 409, *lit. A.* sect. 3. But Holt said, that that was only a quotation by Tanfield, and the case is not to be found in any book, but inclined, the words *all demands* should be intended all that he could have in his own right, as if he had said, all his actions and demands; and he

said, that an executor by a grant of all his goods did not pass goods which he had as executor, Cro. Eliz. 6, but he said it was a case of general concernment, and therefore it was adjourned to be further argued. But afterward, as I heard, judgment was given for the plaintiff, and that the general words of the release should be restrained by the particular occasion, and should only release the legacy of 5l. Levinz for the defendant, Shower for the plaintiff.(1)

[275] IN B. R.

MORDANT ADMINISTRATOR OF LADY THOROLD *against* THOROLD BART.

S. C. 1 Salk. 252. 1 Shower 97. 3 Mod. 281.

A *sci. fac'* to have damages and costs taxed in a writ of dower after the death of the demandant, before writ of enquiry and final judgment, doth not lie. Noy 126. 9 Viner Ab. 288, 295. 10 Viner Ab. 553. 11 Viner Ab. 132.

A *scire fac.* on a judgment in dower obtained by the Lady Thorold against the defendant to have the value of the damages, mesne profits, costs and waste, from the time of the husband's death, which in value amounted to 670l. which judgment was removed by writ of error out of C. B. into B. R. and there affirmed, after which the lady died, and administration was committed to the plaintiff, who brought this writ against the defendant, to shew cause wherefore the plaintiff should not recover the damages, &c. and the costs in the writ of error. The defendant pleads, that no damages, &c. were adjudged to the lady in her life-time for the damages, mesne profits, &c. nor for the costs in the writ of error. And now it was argued for the plaintiff, that although the damages, costs, &c. were not assessed in the lady's life-time, by reason of the defendant's delay, &c. yet they were due and vested in her (viz. the right to have them) by the judgment, and therefore they shall go to the administrator, who shall have them taxed upon this writ; and the rather in this case since by the statute 16 & 17 Car. 2, cap. 2, sect. 3, *no judgment after verdict in dower shall be stayed till bail found to answer the costs and damages.* Whereto it was answered, that the statute does not concern this case, for it appears not, that the judgment in dower was upon a verdict, nor is the bail sued in this case; and if the judgment had been upon verdict, it should not extend to this case; for the statute was made only to secure the costs for delay in the writ of error in such manner as they were before secured by the statute 3 Jac. 1, c. 8, in personal actions. *But there damages* are given in satisfaction of an injury, which is in nature of a trespass, *and* die with the person, where the person dies before the judgment perfected. And to this opinion the Court inclined: and Dolben remembered the case of *Aleworth and Roberts* in this Court, Mich. 13 Car. 2, where after judgment in dower and a writ of seisin executed the tenant died, and the demandant brought a *scire fac.* against the heir and tertenant to have the damages enquired of: and it was adjudged it did not lie. But this being a new case, the Court would advise. Pemberton for the plaintiff, Levinz for the defendant.

See this case 1 Salk. 252, better reported.

[276] CLERK *against* TUCKET AND STAPLEDON.

HILARY, 1 WILLIAM AND MARY. IN C. B.

Declaration in trespass *vi et armis.* Demurrer. Joinder. Continuance.

City of Exeter, to wit.—John Tucket, of the City of Exeter, in the county of the said city, hosier, and William Stapledon, late of the City of Exeter, in the county of the said city, woolcomber, were attached to answer Thomas Clarke of a plea wherefore with force and arms the house of the said Thomas, at the City of Exeter, in the

(1) Marriage will not release a bond if the parties intended that it should not.—5 Term Rep. 381.

county of the said city they broke, and the goods and chattels of the said Thomas, to the value of 20 shillings there lately found took and carried away, and other wrongs to him did, to the great damage of the said Thomas, and against the peace of the lord and lady the now King and Queen of England, &c. Whereupon the said Thomas by John Northmore his attorney complains that the said John Tucket and William Stapledon, on the 22d day of October, in the first year of the reign of the lord and lady the now King and Queen of England, &c. with force and arms, &c. the house of the said Thomas, to wit, his mansion house at the City of Exeter, in the county of the said city broke, and the goods and chattels, to wit, fourteen pewter plates of the said Thomas to the value, &c. there lately found took and carried away, and other wrongs, &c. to the great damage, &c. whereupon he saith that he is prejudiced, and hath sustained damage to the value of forty pounds, and therefore he produces his suit, &c.

And the said John and William by Thomas Ford their attorney come and defend the force and injury when, &c. and as to the coming with force and arms, or whatever that is against the peace of the said lord the now King and the said lady the now Queen, they say that they are not guilty thereof, and of this they put themselves upon the country; and the said Thomas doth the like. And as to the residue of the trespass aforesaid above supposed to have been committed, the said John and William say that the said Thomas ought not to have or maintain his action aforesaid thereupon against them, because they say that long before the said time in which, &c. Edward the Fourth late King of England by his letters patent, sealed with his Great Seal of England, which they the said John and William **[277]** produce here in Court, the date of which is at Westminster, upon the 16th day of November, in the sixth year of his reign, of his especial grace and with a view to charity, and for the especial devotion which he had and bore in his mind to the most holy prophet John the Baptist, granted for himself, his heirs and successors, to his beloved liege men of the Mystery of Taylors within the City of Exeter, that they in the said city one guild or company in honour of the said St. John the Baptist of the men of the said mystery and others might unite, found, create, erect and establish, and the said guild or company so united, founded, created, erected and established, might have, hold and enjoy the same to them and their successors, to endure to future times for ever; and that they might encrease and augment the said guild or company, as often as and whenever it should seem to them to be necessary and convenient. And that the men of the said guild or company for the honour of St. John the Baptist in every year might have, hold and exercise the said Guild or Company of Taylors, and of the other persons whom they should will to receive into the company aforesaid; and might elect, have and make one master and four wardens of themselves as often as it should seem good to them, or as there should be occasion, for the government, wardship and rule of the said company for ever, as it should seem good to them. And that the said master and wardens in every year might appoint one livery for the cloathing of the brothers and sisters of the said company. And that the said masters and wardens might make their meetings and assemblies in the places of the said city convenient to them, and there might hold and keep in a laudable manner their feast of meat and drink at the said Feast of St. John the Baptist, and there might make orders between themselves, as it should seem to them to be more necessary and convenient, for the better government of the company aforesaid for ever. And further the said late King of his further grace did will and grant for him and his heirs, that the said master and wardens and their successors should be perpetual, and that the said company should be in itself an entire and corporate company, and that the said Company of Taylors of St. John the Baptist in the City of Exeter, and the said Master and Wardens of the Company of Taylors of St. John the Baptist in the City of Exeter thereafter should be named and called *the Master, Wardens and Company of Taylors of St. John the Baptist in the City of Exeter.* **[278]** And the said masters and wardens and their successors and also the company aforesaid did incorporate to endure for ever; and them did make as one body, and them did declare, accept and approve to be one body, and also that they should be held to be one body, and that they should have a common seal, and also by the name of the Master, Wardens and Company of Taylors of Exeter for ever might plead and be impleaded, as by the said letters patent among other things

more fully is manifest and appeareth. And the said John and William further say that the said Master and Wardens of the Company of Taylors of Exeter afterwards and before the said time in which, &c. to wit, at a certain assembly of the said Master and Wardens of the Company of Taylors of Exeter aforesaid, held at the said City of Exeter, the 26th day of March, in the 21st year of the reign of the Lord Charles the Second late King of England, &c. among other things for the good and wholesome government, quiet and prosperity of the company aforesaid, did ordain and establish, that if any person who should be master or chief warden of the corporation aforesaid, at any assembly of the said company, should revile, abuse, or use any scurrilous or opprobrious discourse towards the master or any of his brethren of the said company, the said discourse being duly proved, should forfeit and lose six shillings and eight pence, and that all and every other person and persons of the said company who should revile, abuse or use any scurrilous, opprobrious, or unhandsome discourse towards the said master, wardens, or any of the council of the said company, he should forfeit and lose three shillings and four-pence, and that the fine or fines aforesaid should be levied and recovered by distress, by warrant under the common seal of the corporation aforesaid, and by the sale of the goods distrained, first giving to the person or persons so offending notice of such fine or fines for the space of four days before the levying thereof, by a demand thereof by a warden of the company aforesaid, or by the beadle of the company aforesaid. Which ordinances and rules among other things afterwards, to wit, upon the said 26th day of March, in the 21st year aforesaid, at the City of Exeter aforesaid, in the county of the said city, by John Vaughan, Knight, then Chief Justice **[279]** of the Bench, and John Archer, Knight, then one of the justices of the Bench aforesaid, justices of the said lord the King, assigned to take Assizes in the county of the City of Exeter aforesaid, were examined and approved according to the form of the statute in such case lately made and provided. And the said John and William further in fact say that the said Thomas Clark, upon the said 22d day of October now last past, and for the space of divers years then last past, and always afterwards hitherto was and as yet is a member, freeman and one of the said company, to wit, at the City of Exeter aforesaid: and that after the making of the ordinance aforesaid, and notice thereof by the said Thomas then and there had, and before the said time in which, &c. to wit, upon the 5th day of July now last past, at the City of Exeter aforesaid, in the county of the said city, at a certain assembly of the said Mayor and Wardens of the Company of Taylors of Exeter aforesaid, and of the company aforesaid, at the common hall of the said company then and there had and held, and the said Thomas then being a member, freeman and one of the said company, came to the said common hall of the said company within the said city, and then and there with very many scoffing, opprobrious and scurrilous discourses and clamours did revile and abuse the master and wardens of the company aforesaid then and there being assembled, and openly, publicly and contemptuously then and there in the presence and hearing of very many persons then and there present and hearing, concerning the said master and wardens of the said company then and there assembled, did say and with a loud voice did assert these words following, to wit: *The masters* [meaning the said master and wardens] *are all a company of pickpocket rogues, let them kiss my arse, I* [meaning the said Thomas] *care not for any of them. And if any of the masters and wardens* [meaning the said master and wardens] *dare to come to my house* [meaning the house of the said Thomas] *I will knock out their brains*, to the great disturbance of the said master and wardens, and of all others then and there being assembled, and in violation of the ordinance aforesaid; whereupon the said Thomas for his said offence in the premisses forfeited and lost three shillings and four-pence, according to the form and effect of the ordinance aforesaid, whereof the said Thomas then and there had notice, **[280]** and then and there was requested by the said John Tucket, then one of the wardens of the company aforesaid, to pay the said three shilllings and four pence, which to do the said Thomas then and there, and for the space of six days from that time next ensuing did refuse and neglect; and thereupon the said Master and Wardens of the Company of Taylors of Exeter aforesaid afterwards and before the said time in which, &c. to wit, upon the 6th day of August now last past, at the City of Exeter aforesaid, by their certain warrant in writing, sealed under their common seal, and to the said John then warden,

and to the said William Stapledon then beadle of the said company directed, did command the said warden and beadle to levy the said three shillings and four pence of the goods and chattles of the said Thomas; whereby the said John and William at the said time in which, &c. into the said house of the said Thomas in the declaration aforesaid mentioned, through the door of the said house then and there being open, did enter, and then and there the goods and chattels aforesaid took in name of a distress, for the said three shillings and four pence so as aforesaid forfeited, and then being in arrear and unpaid, as it was well and lawful for them to do; which is the said trespass as to the entering of the house aforesaid, and the taking and carrying away of the goods and chattels aforesaid, whereof the said Thomas above now complains, and this they are ready to verify; wherefore they pray judgment if the said Thomas ought to have his action aforesaid thereupon against them, &c.

And the said Thomas Clark saith that the said plea of the said John Tucket and William Stapledon, as to the residue of the trespass aforesaid above in bar pleaded, and the matter therein contained, are not sufficient in law to preclude him the said Thomas Clark from having his action aforesaid against the said John Tucket and William Stapledon; and that he to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer, and this he is ready to verify; wherefore for want of a sufficient answer in this behalf the said Thomas Clark prays judgment, and his damages by occasion of the trespass aforesaid to be adjudged to him, &c.

And the said John Tucket and William Stapledon, because that they above have alledged sufficient matter in law to preclude the said Thomas Clark from having his action aforesaid against them, which they are ready to verify; which matter the said Thomas Clark doth not deny, nor to the same in anywise answer, but altogether doth refuse to admit the verification thereof, pray judgment, and that the said Thomas Clark may be precluded from having his action aforesaid, &c. And because the justices, &c.

[281] CLERK *against* TUCKET AND STAPLEDON.

S. C. 2 Ventris 182.

Bye-law to levy fines by distress and sale of goods, ill. 5 Coke 64. Carth. 482, 483. Com. Dig. Bye-law C. 7, D. 2, E. 2.

Trespass for entering his house and taking ten pewter-plates, value 20s. The defendant pleads an incorporation of the Taylors of Exeter by patent, 6 E. 4, with power to make by-laws and a by-law made by them, that if any member spoke any scurrilous or disgraceful language to another member of the company at any meeting or assembly of the said community, he should forfeit 3s. 4d. to be levied by distress and sale of his goods, and that the plaintiff at an assembly of the said company said, *The masters of the company are a company of pickpocket rogues, let them kiss my arse, I care not for any of them; and if any of them dare come to my house, I'll knock out their brains.* Whereby he forfeited 3s. 4d. and for non-payment thereof upon demand the defendant, as beadle of the company, by their warrant under the common seal for levying the 3s. 4d. by distress and sale of goods, entered into the house and took the plates in name of a distress, *quæ est eadem, &c.* Upon which the plaintiff demurs generally; and now it was argued, that the distress of ten several plates of the value of 20s. for 3s. 4d. without protestation as to the value (of each) is not good, 42 E. 3, 26 a. Bro. Distress 41 and 88. 2. It is not said that they sold them, or what became of them, or if they sold them what is become of the overplus. 3. This by-law to levy by distress and *sale* of goods is illegal, though to levy by distress is good by *Clark's case*, 5 Co. 64 a. but by distress and sale is not good, Co. Lit. 145 b. A lease with power to distrain and retain against *gages* and pledges is ill. The Court **[282]** did not speak much to any of the exceptions, except the third; and as to that they all held the by-law void *in toto, viz.* as to the levying by distress and sale, and thereupon principally they gave judgment for the plaintiff on the argument of Levinz for the plaintiff, and Tremain, now made King's Serjeant, for the defendant.

[283] TRINITY TERM, IN THE SECOND YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

SNODE *against* WARD.

S. C. 2 Ventris 197.

Statute of Limitations pleaded in the same manner since the revolution as before. 15 Viner Ab. 122. 2 Ventris 185, S. P.

Assumpsit upon a promise 1 Jun. 1 W. & M. The defendant pleads *non assumpsit* within six years before suing the original writ; on which the plaintiff demurs: and now it was argued for the plaintiff, that this plea, although it was the usual way of pleading before the stat. 1 W. & M. whereby it is enacted, that from the 10th of December (which was the day that King James departed, till the 12th of March, 1688, when the now King assumed the government) *shall not be accounted any part of the time within which any person by virtue of the Statute of Limitations might bring his action, but that he shall have so much allowance of time as from the 10th of December to the 12th of March for bringing his action.* Which time containing 92 days, therefore the plea now ought to have been pleaded *non assumpsit infra* six years and 92 days. And so it had been (usually) pleaded since the statute. But the whole Court held the plea to be good, and they would not alter the former way of pleading: but if the case had been so, that though he had not promised within six years but had promised within six years and 92 days, that should have come in by the replication.

[284] THOMPSON *against* LEACH.

S. C. 2 Ventris 198. 3 Mod. 296. 2 Shower 296.

[Discussed and applied, *Townson* v. *Tickell*, 1819, 3 B. & Ald. 37. Referred to, *Siggers* v. *Evans*, 1855, 5 El. & Bl. 380. Considered, *Peacock* v. *Eastland*, 1870, L. R. 10 Eq. 20. Discussed and applied, *Standing* v. *Bowring*, 1885, 31 Ch. D. 286. *Mallott* v. *Wilson* [1903], 2 Ch. 500.]

A surrender shall not vest an estate before an agreement thereto: affirmed upon a writ of error in B. R. but determined otherwise upon error in *Dom. Proc.*

Ejectment upon the demise of Charles Leach, and on *not guilty* and a special verdict, the case was thus: Nicholas Leach being tenant for life, remainder to Sir Simon Leach in tail. Nicholas Leach makes a deed of surrender to Sir Simon before the birth of any son of Nicholas, and afterward had a son, viz. Charles the lessor of the plaintiff. Nicholas keeps the deed of surrender in his hands, and Sir Simon had no knowledge of it till five years after the said son's birth. But as soon as he had notice of it, he accepted it, and entered on the lands; after which Nicholas dies, and Charles the son brings the ejectment: and whether the contingent remainder was destroyed by this surrender? was the question. And after divers arguments, Pollexfen Ch. Just. Powell and Rokesby Justices, held, that the estate did not pass by the surrender till the acceptance of it; and for this they relied much on the constant form of pleading surrenders, wherein always the precedents are not only to plead the surrender, but also with an acceptance, viz. that the surrenderee agreed thereto, except one or two in Rastal; and divers other authorities were cited in the case *pro & con*, and that then the surrender not taking effect, nor the estate for life merged before the birth of the son, he had a good title. 2. The said three Judges held, that the acceptance afterward should not so relate to the making of the deed, as to cause the estate to pass *ab initio*, and so by relation to make it a surrender before the son's birth, so as to destroy his estate; for that would be to make a relation work to the prejudice of a third person, and relations do always make acts good only between the parties themselves, but not to prejudice strangers, as 3 Co. *Butler and Baker's case.* But Justice Ventris to the contrary held, that the estate vested immediately by the making the deed of surrender; but to be divested by the surrenderee's

refusal to accept it afterwards, but that till such refusal the estate was in the surrenderee; and divers cases were cited on that side **[285]** also: and he also held, that if it did not vest at the first by the delivery of the deed of surrender, yet by the acceptance afterward it should be by relation a surrender from the beginning, and so destroy the contingent remainder to Charles the son born afterwards; and this relation does no wrong to a third person, for Charles was not a person *in esse* when the surrender was first made. But by the opinion of the other three judgment was given for the plaintiff, upon which error was brought in B. R. and in Hill. 3 W. & M. the judgment given in C. B. was affirmed by the whole Court. But afterwards the defendant brought error thereof in the House of Peers; and in December, 1692, on hearing of the Judges there, they all continuing in their former opinion, (except Sir Robert Atkins Chief Baron, and then speaker of the House of Peers) the judgment was reversed by the Lords in Parliament, the said Sir Robert Atkins and Mr. Justice Ventris concurring with them as before. Levinz. of counsel for the defendant.(1)

[286] MICHAELMAS TERM, IN THE SECOND YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

IN B. R.

KELLOWE *against* ROWDEN.

S. C. 3 Mod. 253.

A. seised in fee makes an estate-tail, reversion to himself in fee; he enters into an obligation, and after divers descents from heir to heir in tail the estate-tail determines, the heir of the fee ought to be charged as heir to A. and not as heir to any of the mesne heirs, *quia, &c.* Dyer 361, 368. Hetley 134. 1 Lutw. 305. 2 Roll. Ab. 256. 1 Roll. Ab. 577, 920, 921. 4 Coke 22. 6 Coke 58. Cro. El. 810. Owen 36, 132. Keilw. 63. Hob. 66, 265. 1 Coke 87, 98. Golds. 29. 1 Anderson 138. 2 Anderson 172. 3 Leonard 32. 1 Cha. Rep. 12, 148, 256. 2 Cha. Rep. 152. 1 Ventris 111. 1 Lev. 306. Hardres 405. *Post* 304. Carthew 126. Com. Dig. Assets A.

Debt against Richard Rowden, as heir to his father, upon an obligation made by the father. The defendant pleads *riens* by discent from his father, issue thereon, and a special verdict finds, that the defendant's father was seised in fee of lands, and settled them to the use of himself for life, remainder to John his son in tail, remainder to the right heirs of the father; that John the father died, and the reversion descended to John the son, and that John the son being seised of the estate-tail and of the reversion in fee died seised, whereby the estate-tail and the reversion in fee descended to John his son, *i.e.* the grandson of the first John; and John the grandson died without issue, and the tenements descended to the defendant, who was heir to all the said three Johns, and he entered: and whether he should be charged in respect of those lands as heir to John his father, or as heir of the grandson, heir of his father, heir of the obligor, or immediately as he is the son and heir of his father the obligor? (was the question). For here the reversion descended to John the son, and also to John the grandson. But for the plaintiff it was argued, that they were not actually seised by virtue of the reversion, but only of the estate tail; and that the reversion descended to them as a reversion, of which, though they were seised by the **[287]** said descents, yet they were not actually seised thereof by the descents, but the actual seisin was only of the

(1) After the judgment of reversal in Parliament in this case, the plaintiff brought a new ejectment in B. R. in the 9th Wil. 3, and the jury then found that Nicholas Leach at the time of the surrender was *non compos mentis;* whereupon the Court of B. R. determined that the surrender was void, which was afterwards affirmed upon a writ of error.—*Vide* 2 Ventris 208. 2 Salk. 576, 618. 3 Mod. 301. 12 Mod. 173. Comyns Rep. 45. 1 Lord Ray. 313. Shower P. C. 151. 3 Bur. 1798. 1 Ridgeway's P. C. 83, 89, 99. 20 Viner Ab. 122.

estate-tail; and the defendant in claiming this reversion ought to claim it by descent from his father, for by Co. Lit. 11 b. he who will make himself heir to any land ought to make himself heir to him who was last actually seised of the land, who in this case was John the obligor; and as he ought to claim the land as heir to him, so ought he to be charged as heir to him; and they also cited 8 E. 3, 13. Co. Lit. 14 b. F. N. B. 212 f. Co. Lit. 11 b. in case of a warranty; and Cro. Cha. 151, *Jenk's case* is not contrary; for there the land itself descended from one heir to another, and they were actually seised, and therefore ought not to be charged immediately as heir to the obligor, but mediately as heir from one heir to another. But on the defendant's side it was argued, that the reversion in fee is assets in whosesoever hands it comes, upon such a general plea, as *riens per discent*, if he does not aid himself by special pleading; which proves that the reversion is descended, and is actually in the party to whom it is descended; and they cited 6 H. 4, 1, where a seigniory descended, which as a seigniory could not be assets, but if afterwards a tenancy escheats, that shall be assets; so here the land coming in the possession, instead of the reversion, is assets; and that *Jenk's case* in Cro. Cha. 151 was an authority in point. But the Court upon the first argument inclined for the plaintiff, and Gregory and Eyre Justices denied that upon generally pleading *riens per discent* a reversion in fee shall be adjudged assets to charge the heir; and they said that constant experience was to the contrary: and *it was adjourned*. But in Hilary term following judgment was given for the plaintiff by the opinions of Holt Ch. Justice, Dolben and Gregory. But Justice Eyre was then against the judgment. Levinz for the plaintiff, and Tremain, the King's Serjeant, for the defendant.

[288] In Chancery.

The King and Queen *against* Manlove, Warden of the Fleet.

S. C. 2 Salk. 469.

Warden of the Fleet forfeits his office by two voluntary escapes.

It was found by inquisition on a writ issued out of Chancery, that the wardenship of the Fleet is an antient office, and the warden an antient officer, who time out of mind has had the custody of all prisoners committed by the Courts of Chancery, Common Pleas and Exchequer; and that the 19th of March, 1689, Richard Manlove was, and yet is, warden of the prison of the Fleet, and that such a day he voluntarily permitted Nicholas Stephens in execution in his custody to escape; and that at another day he voluntarily permitted Henry Slaughter also in execution to escape; and found divers other misdemeanors by him committed in the said office; and all this was done at the prosecution of one Colonel Lugton, with intent to procure a grant of the office by the King to himself. To which inquisition divers exceptions were taken: but the principal was, that it was not found by the inquisition what estate Manlove had in the office; for although those two voluntary escapes were agreed to be a forfeiture of the office, yet if the fee of the office be in another, and Manlove has only an estate for life, as the truth is, the forfeiture of Manlove is only a forfeiture of an office for life, and that is to him in the reversion, and not to the King, 39 H. 6, 32. Poph. 119, the case of the Earl of Pembroke, and so was the case of the Lady Broughton lately, who had the custody of the prison of the Gatehouse at Westminster under the dean and chapter, who being convicted of a forfeiture before Hale, it was resolved by him and all the Judges of B. R. that the forfeiture belonged to the dean and chapter, and not to the King. And of that opinion was the now Lord Keeper, and the two Chief Justices Holt and Pollexfen, whom he called to his assistance, and quashed the inquisition.

[289] HILARY TERM, IN THE SECOND YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

WOODWARD *against* FOXE.

S. C. 2 Ventris 187, 213, 267.

An archdeacon for money grants the office of register, it is a forfeiture to the King, and not to the bishop. *Ante* 262. 2 Lev. 245. *Ante* 288. C. L. 284 a. 2 Salk. 468.

Assumpsit for money had and received to his use; and upon *non assumpsit* and a special verdict found before Pollexfen Chief Justice at Guild-Hall, the case was this; the archdeacon being within the patronage and diocese of the Bishop of Lincoln, for 100l. granted the office of register of the archdeaconry to Ince and Ince for their lives; they died, and the archdeacon granted the office to the plaintiff for life, to whom also the King granted it, without office found, and the Bishop of Lincoln granted it to the defendant, who received the money arising by the profits. Whereupon the plaintiff brought his action; and therein three points were moved. 1. Whether by the sale of the office it was a forfeiture of the office, and a disability upon the archdeacon to grant it again upon the statute of E. 6? And it was agreed by the whole Court without difficulty, that it is an office within the statute, being an office concerning the administration of justice, according to *Dr. Trevor's case*, Cro. Ja. 269. But the second point was of greater difficulty, viz. whether the King should have the disposal of the office upon the forfeiture thereof, or the bishop within whose diocese it is? And it was argued for the defendant, that the bishop should have it, who had the care and superintendency of the whole diocese, and the whole is derived from him, viz. both the archdeaconry and the office of registry; **[290]** and the archdeacon is only a minister under him to discharge a part of that care which the bishop has over the whole diocese, and therefore the bishop ought to have the provision and disposal of it where the archdeacon is disabled by the statute; and although where statutes give forfeitures, generally it shall be intended given to the King, yet when the forfeiture is prejudicial to any particular person, that person shall have the forfeiture, and not the King, as in the case of a forfeiture of the treble value for tithes substracted by force of a statute of the same King Ed. 6, Co. Litt. 159 a. But on the other side it was argued, that the King is Supreme Ordinary, and has the care over the whole Church of England, and the bishops themselves are under him; as the leet is derived out of the sheriff's torn, yet if it be forfeited, it is forfeited to the King, and not to the sheriff; and of that opinion was the whole Court, viz. Pollexfen, Powell, Rokesby and Ventris; and therefore the plaintiff had a title by the King's grant, though none by that of the archdeacon. 3. It was argued for the defendant, that if the King had the right, yet he could not grant it before office found. Whereto it was answered, and also resolved by the whole Court, that the King may grant it without any office found; for that no estate or interest in the office is forfeited, either of the archdeacon, or of the register; nor is any freehold to be divested out of him, and vested in the King. But the office is (only) become void, and by the disability of the archdeacon, the power to suppy the office of register is in the King, as 20 E. 4, 11 a. wherefore they unanimously gave judgment for the plaintiff. Pemberton and Levinz for the defendant, Birch and Serjeant Powell for the plaintiff.

KEMPE *against* ANDREWS.

Three joint-merchants of a ship, &c. two of them die, and make their executors; if the survivor bring an action, this matter at most is only pleadable in abatement. 2 Lev. 188. 2 Saund. 97. 1 Salk. 3. 1 Show. 4. 1 Mod. 214. 2 Mod. 63, 64. Com. Dig. Abatement, E. 12. 2 Term Rep. 476.

Trover of a ship and divers goods. The defendant pleads in bar, that the plaintiff and Nightingale and Penning were joint-merchants of the ship and goods, and that the other two made such persons their executors, and died, and that the said executors

had administered. Whereupon the plaintiff demurs, and judgment was given for him; for at most it is only a plea in **[291]** abatement, and he has pleaded it in bar. See *Hall* v. *Huffam*, 2 Lev. 188, two cases of this nature, the one entered 29, 30 Car. 2, B. R. Rot. 545, the other the same term, Rot. 862.(1)

KEMPE *against* ANDREWS.

S. C. 12 Mod. 3.

Matter of abatement pleaded in bar. 1 Lev. 312. 6 Mod. 102. Lutw. 42, 403. *Supra* 291.

Case, and declares, that the plaintiff and Nightingale and Penning, of whom the plaintiff is survivor, were possessed of divers goods at Mocho in China, and had provided a ship to carry them to London, and that the defendant took and carried away the ship, whereby the goods could not be brought to London, but were lost. The defendant pleads *actio non, &c.* for that the plaintiff and Nightingale and Penning were joint-merchants, &c. as in the case next precedent. Whereupon the plaintiff had judgment as in that case; for the plea is but in abatement at the most.

BAKER *against* LADE.

S. C. 4 Mod. 149. 2 Ventris 145.

Grant of a rent for money and affection, how it shall operate. *Post*, 370.

Replevin, avowry for rent, and pleads a grant of a rent-charge to another, and brings it by divers mean conveyances to the father of the avowant in fee; and that he being so seised by indenture, in consideration of affection and of 5l. paid, gave, granted, assigned and transposed it to the avowant; which grant being without attornment, or other execution had thereupon, except only the sealing and delivery of the deed, did operate by way of covenant to stand seised to the use of the avowant; whereby, and by force of the Statute for Transferring Uses into Possession, the avowant was seised, and for so much in arrear he avowed. Whereupon the plaintiff demurred, and it was now resolved by the whole Court, 1. That here being two considerations expressed, viz. affection and money, the deed might operate either as a bargain and sale, if enrolled, or as a covenant to stand seised, if duly **[292]** pleaded, according to Styl. 204. *Watts* versus *Dixe*, 7 Co. Rep. 40 b. Roll. 2 Abr. 787, *Tibb* versus *Poplethwayte*, and *Crossing and Scudamore's case*, Pasch. 23 Car. 2, B. R. Rot. 871. But 2. It was resolved by the whole Court, that the plea, that there being no attornment or any other execution had thereupon, and thereupon pleading the special matter, and leaving the determination of the law to the Court, was impertinent and idle. 3. It was resolved by Powell, Rokesby and Ventris, Justices, that the pleading by the words of the deed, *dedit, concessit, &c.* was sufficient, and the Court shall adjudge thereupon, according to what the law will construe upon such words; and those words shall amount in this case to a covenant to stand seised to the use of the son, as 8 Co. Rep. *Fox's case*, where the plea is, that he *demised, granted, and to farm let* for years, and yet the Court there adjudged it to amount to a bargain and sale for years by way of use; but they agreed that the avowant here might have pleaded it as a covenant to stand seised of the rent to the use of him and his heirs, and said it had been *the neater pleading;* but as it is, they ought to adjudge according to what the law will operate

(1) The executor and the survivor cannot join in action, for the remedy survives but not the duty.—Salk. 444. *Etiam vide* 2 Bac. Ab. 440. 3 Bac. Ab. 192.

Under a count for money had and received by three defendants, the plaintiff cannot give in evidence money had and received by them and by a fourth partner who is now dead.—6 Term Rep. 363.

A debt due from the plaintiff as surviving partner to the defendant, may be set off against a debt due from the defendant to the plaintiff in his own right.—6 Term Rep. 582.

upon the words. But Pollexfen Chief Just. held the contrary; and that the pleading by the words of the deed was altogether ill, and that the avowant ought to have pleaded it at his peril, so as he would use it, viz. that the father covenanted to stand seised to the use of him and his heirs; and he resembled it to the case where there are in deeds these words, *give, grant, release and confirm*, there the party in pleading ought to rely on one of them only; and for that it was not so done here, he held that judgment ought to be given *for* the avowant. Whereupon a writ of error was brought in B. R. and there in Mich. 4 W. & M. the judgment was reversed for that cause only, viz. the not pleading so as Pollexfen held, *ut supra*. Levinz of counsel for the avowant. But afterward, as I heard, the judgment was *affirmed against the plaintiff*; which you may now see in 4 Mod. Rep. 149, &c.

[293] WATTNOUGH *against* HOLGATE.

S. C. 2 Ventris 221.

Replication stating an award that defendant should pay 15l. at or before the 1st of December next, and that he did not pay upon the 1st of December only, is held bad upon demurrer. 2 Saunders 420, 421. 1 Ventris 38. 2 Brownlow 273. 1 Lut. 550, 570. Nel. Lut. 178. 1 Saunders, 326, 327. Kyd on Awards 202. Com. Dig. Pleader. C. 46.

Debt upon an obligation conditioned to perform an award. The defendant pleads no award. The plaintiff replies an award, that the defendant should pay to the plaintiff 15l. at or before the first of December next following; and assigns a breach, that the defendant did not pay the 15l. upon the said first of December: whereto the defendant demurs generally, and judgment was for him; for although he did not pay it upon the said first of December, he might have paid it before the said first of December; and although payment before the day is a good payment at the day, where the payment at the day is pleaded, yet in pleading the parties ought to pursue the words of the condition. Levinz of counsel for the defendant.(1)

MAYOR, &C. OF OXFORD *against* WILDGOOSE.

Bye-law, that if any be duly elected chamberlain and refuse, he shall forfeit, &c. this bye-law is void, for it ought to have been if any citizen, &c. should be elected. Com. Dig. Bye-law. C. 2.

Debt was brought, and declares, that the City of Oxford is an antient city and a corporation, by the name of mayor, &c. and that time out of mind they have used to make bye-laws for the good government of the city, and the citizens and burgesses, and to elect a chamberlain of the burgesses aforesaid yearly for a year, and that Aug. 19, the first year of the present King, they made a bye-law, that if any person should be duly elected to be chamberlain, and should refuse to undertake the said office, he should forfeit 10l. to the mayor, &c. and then shews, that Sept. 30, in the said first year, the defendant was according to the custom aforesaid duly elected into the said office, he being a citizen and freeman of the city aforesaid; and that he refused to accept it, whereby the action accrued for the said 10l. Upon which declaration the defendant demurred, and judgment was given for him by the whole Court; for the bye-law to elect *aliquam personam* is void, for thereby they might elect any stranger to be their chamberlain, and the words *foret debite electus* will not cure it, for that extends only to the manner of the election, but not to the persons **[294]** to be elected; and although it is said that they elected the defendant being a citizen and freeman, that is only the execution of the bye-law, but will not make the bye-law good which is void in itself; for it ought to have been, if any citizen or burgess shall be elected, and refuse, he shall forfeit 10l. to the mayor, &c. Levinz of counsel for the defendant.

(1) *Quære.*—If the defendant's demurrer be consistent with his plea?—1 Levinz 245. Com. Dig. Arbitrament, I. 4. Pleader, F. 7.

[295] EASTER TERM, IN THE THIRD YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

TONGUE *against* PITCHER.

S. C. 2 Ventris 234. 4 Mod. 71. 1 Shower 340. 1 Salk. 81.

Debt for rent against assignee of the executor of the lessee, he pleads an assignment over before the rent arrear, but does not shew any notice thereof, upon error this plea held good. 1 Sid. 266, 338. 1 Lev. 127, 308. 2 Saund. 181, 182, 302, 303. 2 Ventris 209. 3 Mod. 325. Com. Dig. Covenant, C. 3, Debt F. Cro. Eliz. 555. 1 Salk. 81. 2 Stra. 1221. Douglas 452. *Barnfather* v. *Jordan* 766. *Chancellor* v. *Poole* 461, note 1, *Walker* v. *Reeves*.

Debt for rent, and declares on a lease made by the plaintiff to J. S. who made J. D. his executor, who assigned the term to the defendant. The defendant pleads, that before any rent arrear he assigned the term to J. G. but does not plead any notice thereof, nor any acceptance of the rent from him by the plaintiff. Upon which plea the plaintiff demurs; and it was adjudged for the plaintiff by Pollexfen Chief Justice, and Rokesby Justice, against Powell Justice, who held, that the privity of the contract being altered by the assignment of the executor before any rent due, as well as the privity of the estate by the assignment of the assignee of the executor, there remained nothing to support the action. Pollexfen Chief Just. and Rokesby held, that till notice of the assignment it was no compleat assignment so as to destroy the privity of the estate; for until notice he remained tenant as to payment of the rent; as in the case of lord and tenant, if the tenant makes a feoffment, he yet remains tenant as to the avowry till notice of the feoffment and tender of the arrears; and for authorities they cited *Penant's case*, 3 Co. Rep. 66. *Whitchcott* versus *Fox*, Cro. Ja. 358. *Sir Paul Tracy's case*, Cro. Ja. 617, and *Keightley and Bulkley's case* in B. R. 1 Lev. 215; whereupon they gave judgment for the **[296]** plaintiff. But afterwards in Easter term, 4 W. & M. this judgment was reversed in B. R. by the whole Court upon the matter in law; which you may now see in 4 Mod. 71 to 76.

MICHAELMAS, 2 WILLIAM & MARY.

HORTON *against* COGGS.

Declaration upon a note payable to the bearer. Custom of London. Issue.

London, to wit.—John Coggs, late of London, goldsmith, was attached to answer Edward Horton of a plea of trespass upon the case, &c. And whereupon the said Edward by Thomas Goodall his attorney complains, that whereas the City of London now is and from the time whereof the memory of man is not to the contrary hath been an antient city; and whereas also at London aforesaid, to wit, in the parish of the Blessed Mary of the Arches, in the ward of Cheap, there is had and from the whole time aforesaid there was had a custom used and approved, to wit, that if any merchant or goldsmith of the city aforesaid, or any other person by way of merchandize at London aforesaid, trading and using traffick, made any bill or note in writing, his name being thereto subscribed, and by such bill or note promised to pay to any other person in such bill or note named or to the bearer upon demand any such sum of money in such bill or note mentioned; and if such bill or note by such person named in the same to whom the payment thereof was appointed to be made was assigned or delivered to any other person, to receive the said sum of money to the proper use of such other person, and if such other person to whom such assignment or delivery was made, hath carried and shewn such bill or note to such merchant, goldsmith, or other person so making the same, and hath requested him to pay such sum of money to him the said bearer, then such merchant, goldsmith, or other person making such bill or note, from the said time whereof the memory of man is not to the contrary, hath been liable, and hath been accustomed to be liable to the payment of such sum of money, in such bill or note mentioned, to such person who hath so carried and shewn the

same, and hath requested such payment to be made to him; and the said Edward further saith that the said John, upon the 1st [297] day of October, in the 4th year of the reign of the Lord James late King of England, &c. and long before and continually afterwards hitherto hath been a goldsmith of the said city, and a person by the way of merchandize at London aforesaid trading and using traffick, to wit, in the parish and ward aforesaid; and the said John so being a goldsmith, and trading and using traffick as aforesaid, upon the said 1st day of October, in the 4th year of the reign of the Lord James late King of England, &c. aforesaid, at London aforesaid, in the parish and ward aforesaid, made his certain bill or note in writing, his name being thereto subscribed, and by the said bill or note promised to pay to one William Barlow, Esquire, or to the bearer upon demand, the sum of fifty-five pounds; and that afterwards, to wit, upon the 20th day of October, in the 4th year of the reign of the Lord James late King of England, &c. aforesaid, at London aforesaid, in the parish and ward aforesaid, the said bill or note was delivered by the said William Barlow to the said Edward Horton for good consideration, [to wit, in satisfaction of the like sum of fifty-five pounds to him the said Edward by him the said William then due] to receive the said sum of fifty-five pounds in the said bill or note mentioned to the proper use of the said Edward. And the said Edward afterwards, to wit, upon the 31st day of January, in the 1st year of the reign of the said lord the now King and of the said lady the now Queen, at London aforesaid, in the parish and ward aforesaid, the said bill or note carried and shewed to the said John, and to him gave notice of the said delivery thereof by the said William to the said Edward in the form aforesaid, and then and there requested the said John thereupon to pay to the said Edward the said sum of fifty-five pounds in the said bill or note mentioned, whereby the said John according to the custom aforesaid, became liable and was liable to the payment of the said fifty-five pounds upon the said bill or note to the said Edward; and so being liable the said John afterwards, to wit, upon the said 31st day of January, in the 1st year, &c. aforesaid, at London aforesaid, in the parish and [298] ward aforesaid, in consideration of the premisses upon himself assumed, and to the said Edward then and there faithfully promised, that he the said John the said fifty-five pounds to the said Edward would well and faithfully pay and content; and although the said Edward at the said time of the shewing of the said bill or note to the said John as aforesaid, and always afterwards was ready and offered to deliver to the said John the said bill or note upon payment by the said John to the said Edward of the said fifty-five pounds, and the said bill or note to the said John upon payment of the said sum of money to the said Edward as yet is ready to deliver. Nevertheless the said John his promises and assumptions aforesaid not regarding, but contriving and fraudulently intending the said Edward in this behalf craftily and subtilly to deceive and defraud, the said fifty-five pounds or one penny thereof to the said Edward [although thereto afterwards upon the 1st day of February, in the first year, &c. aforesaid, and often afterwards at London aforesaid, in the parish and ward aforesaid, by the said Edward he the said John was requested] hath not paid, nor in any wise hath contented him for the same; but the same to him to pay hitherto hath refused, and as yet doth refuse, to the damage of the said Edward of one hundred pounds, and therefore he produces his suit, &c.

And the said John by John Waring his attorney comes and defends the force and injury when, &c. and saith that he did not assume upon himself in the manner and form as the said Edward above complains against him, and of this he puts himself upon the country, and the said Edward doth the like; therefore the sheriff is commanded that he cause to come here from the day of St. Michael in one month twelve, &c. by whom, &c. who neither, &c. to recognize, &c. because as well, &c.

[299] HORTON *against* COGGS.

The custom to pay a note payable to the bearer held to be too general. Molloy, lib. 2, c. 10, § 17, 19, &c. Com. Dig. Action on the Case upon Assumpsit. A. 2.

Assumpsit, and declares of a custom in London, that if any merchant, or other person merchandizing in London, makes a note in writing under his hand, and

thereby promises to pay any sum of money therein mentioned to the person therein named, or to the bearer; and if the person named in the note, to whom by the note it is promised to be paid, shall assign or deliver it to another person to receive it to his own use, and he carries it to the drawer of the note, and requests him to pay it to him that brings it, that then the person who makes the note is chargeable to pay it to the bearer; and that the defendant being a *goldsmith* made such a note, thereby promising to pay 55l. to William Barlow, or the bearer: and that Barlow delivered the note to the plaintiff to receive the money to his own use, in satisfaction of the said 55l. due to him by Barlow, and that the plaintiff carried and shewed it to the defendant, and requested him to pay the 55l. which he had not done; so that by the custom he became chargeable, and being so chargeable, promised to pay: and after a verdict for the plaintiff it was moved in arrest of judgment, that this custom to pay to the bearer was too general; for perhaps the *goldsmith* before notice by the bearer had paid it to Barlow himself (which at the Bar was said to be the truth of the case). And of that opinion after divers motions were Pollexfen, Powell and Rokesby, (Ventris dying in the last vacation;) though upon the trial of the cause before Pollexfen at the Guild-Hall he then held, that the action well lay, this matter having been objected at the said trial. Levinz of counsel for the plaintiff.

HILARY II. WILLIAM AND MARY.

[300] HAIGHT *against* LANGHAM AND WIFE.

Debt. Declaration in debt against the heir, with whom one of the executors is joined. Plea. Oyer.

London, to wit.—Lucas Langham, late of London, haberdasher, and Susannah his wife, sister and heir of Thomas Bostock of London, gentleman, were summoned to answer John Haight of a plea that they render to him two hundred and sixty pounds which they owe to him and unjustly detain, &c. And whereupon the said John by Francis Leigh his attorney, saith, that whereas the said Thomas in his life-time, the brother of the said Susannah, whose heir she is, to wit, upon the 21st day of November, in the 36th year of the reign of the Lord Charles II. late King of England, &c. at London in the parish of the Blessed Mary of the Arches, in the ward of Cheap, by his certain writing obligatory, granted himself to be holden to the said John in two hundred and sixty pounds to be paid to the said John, when thereto he should be requested, and to the payment thereof well and faithfully to be made, the said Thomas bound himself and his heirs by the said writing; nevertheless the said Thomas in his life-time and the said Lucas and Susannah, the sister and heir of the said Thomas, although oftentimes requested, the said two hundred and sixty pounds to the said John have not yet paid, but the same to him to pay have refused, and the said Lucas and Susannah still do refuse to pay, whereupon he saith that he is prejudiced, and hath sustained damage to the value of twenty pounds, and therefore he produces his suit, &c. and he produces here in Court the writing aforesaid, which testifies the debt aforesaid, in the form aforesaid, the date of which is the day and year aforesaid, &c.

And the said Lucas and Susannah, by George Wheeler their attorney, come and defend the force and injury, when, &c. and pray oyer of the writing aforesaid, and it is read to them, &c. also they pray oyer of the condition of the said writing, and it is read to them in these words: The condition of this obligation is such, that if the above bound Thomas Bostock, his heirs, executors or administrators, shall and do well and truly pay, or cause to be paid unto the above named John Haight, his executors, administrators or assigns, the sum of 137l. 16s. of good and lawful money of England, on the 22d day of November, which shall be in the year of **[301]** our Lord God 1685, then this obligation shall be void, or else to remain in full force and virtue; which being read and heard the said Lucas and Susannah pray judgment of the writ aforesaid, because they say that the said John heretofore, to wit, in the term of St. Michael last past, in the Court of the lord the King, and of the lady the Queen of the Bench here, to wit, at Westminster impleaded the said Lucas, and one Thomas Hull and

Penelope his wife, and Robert Raworth as executors of the testament of the said Thomas Bostock, by the names of Thomas Hull, late of London, gent. and Penelope his wife, relict and executrix of the testament of Thomas Bostock, gent. deceased, and lately called Thomas Bostock of London, gent. Robert Raworth late of London, haberdasher, and Lucas Langham, late of London, haberdasher, executors of the testament aforesaid of the said Thomas Bostock, together with the said Penelope, of a plea of debt for two hundred and sixty pounds of and upon the writing obligatory aforesaid, in the declaration aforesaid above specified; and whereupon the said John, then by declaring against the said Lucas, and the said Thomas and Penelope, and Robert, of and in the said plea by the said Francis Leigh, then his attorney said, that whereas the said Thomas Bostock in his life-time, to wit, upon the 21st day of November, in the 30th year of the reign of the Lord Charles II. late King, &c. at London, in the parish of the Blessed Mary of the Arches, in the ward of Cheap, by a certain writing obligatory granted himself to be holden to the said John in the said two hundred and sixty pounds, to be paid to the said John when thereto he should be requested; nevertheless the said Thomas Bostock in his life-time, and the said Penelope whilst she was sole, Robert and Lucas, and the said Thomas Hull and Penelope after the espousals between them celebrated, Robert and Lucas after the death of the said Thomas Bostock, although oftentimes requested, the said two hundred and sixty pounds to the said John had not paid, and the same to him to pay had refused, and the said Thomas Hull, Penelope, Robert and Lucas then did refuse to pay, and therefore he said that he was prejudiced and had sustained damage to the value of twenty pounds, and therefore he then produced his suit, &c. and produced here in Court the writing aforesaid, which testified the debt aforesaid, in the form aforesaid, the date of which is the day and year aforesaid, &c. And the said Lucas **[302]** by George Wheeler then his attorney came and defended the force and injury, when, &c. and prayed oyer of the writing aforesaid, and it was read to him; also he prayed oyer of the condition of the said writing, and it was read to him in these words: The condition of this obligation is such, that if the above bound Thomas Bostock, his heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, unto the above named John Haight, his executors, administrators or assigns the full sum of 137l. 16s. of the good and lawful money of England, upon the 22d day of November, in the year of our Lord God 1685, then this obligation to be void, or else to remain in full force and virtue; which being read and heard the said Lucas saving and reserving to himself all and all manner of exceptions, advantages and allegations whatsoever, as well to the writ as to the declaration aforesaid, prayed leave to imparl thereto here until the octave of St. Hilary in this same term, and he had, &c. and the same day was given to the said John here, &c. as by the record and proceedings thereof, in the said Court here remaining more fully appeareth; and the said Lucas and Susannah in fact say, that the said plea against the said Lucas and the said Thomas Hull, Penelope and Robert, as executors of the said testament of the said Thomas Bostock, as aforesaid prosecuted in the said Court here, as yet depends undiscussed, undetermined, and not discontinued; and this they are ready to verify: wherefore they pray judgment of the said writ against the said Lucas and Susannah, as the sister and heir of the said Thomas Bostock, in the form aforesaid sued out and now prosecuted, the other plea aforesaid pending against the said Lucas, and the said Thomas Hull, Penelope and Robert, as the executors of the said testament of the said Thomas Bostock for the said cause; with this, that the said Lucas and Susannah will verify that the writing obligatory aforesaid, for and upon which the said John against them the said Lucas and Susannah as the sister and heir of the said Thomas Bostock, above in the form aforesaid now complains, and the said writing obligatory for and upon which the said John in the other plea aforesaid, against the said Lucas and the said Thomas Hull, and Penelope and Robert, as the executors of the said testament of the said Robert Bostock, heretofore in the form aforesaid, hath declared are one and the same writing obligatory, and not other nor different, &c.

[303] And the said John saith, that the said plea of the said Lucas and Susannah above pleaded for quashing of the original writ of the said John, and the matter in the same are not sufficient in law to quash the said writ, or to preclude the said John from having his action aforesaid against them, and that he to the said plea in the

manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer; and this he is ready to verify: wherefore for want of a sufficient plea of the said Lucas, and the said Susannah in this behalf, the said John prays judgment, and that his writ aforesaid may be adjudged good, &c.

And the said Lucas and Susannah, because that they above have pleaded sufficient matter in law for quashing of the said writ of the said John, against them the said Lucas and the said Susannah, as the sister and heir of the said Thomas Bostock, now sued out; which they are ready to verify: which matter the said John doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, pray judgment and that the said writ for the reason by them before alledged may be quashed, &c. And because the justices, &c.

HAIGHT *against* LANGHAM AND HIS WIFE.

Debt upon an obligation against husband and *wife—the wife being heir to* J. S.—they plead in abatement another action against the husband and others as executors of J. S. *Respondeas ouster* awarded. 11 Viner Ab. 249. 14 Viner Ab. 264.

Debt upon obligation against them, as the wife was heir to Bostock. The defendants plead in abatement another action depending against the husband and others, as executors of Bostock. The plaintiff demurs, and it was argued for the defendant, that the plea was good; for admitting that the plaintiff could charge either the heir or executors at his election, or both severally, and recover part against the one, and **[304]** the residue against the other, yet he cannot charge one and the same person as heir, and also as executor, at the same time; for by that means he might have two judgments at the same time for the same thing, of which the defendant cannot have any remedy by *audita querela;* for he cannot alledge that matter for his relief in an *audita querela*, because he might have pleaded it in abatement. But where an action is against one person as heir, and another action against another person as executor, and he recovers two judgments, and after he has levied the debt upon one of them, he endeavours to levy it again on the other, there he shall be aided by *audita querela*, because he could not have pleaded it in abatement; and of that opinion was Pollexfen Chief Just. upon the first argument in this term. But Powell Just. held the contrary; for that seeing one and the same person represented as well the heir, as the executor, it is all one as if it were in divers persons; Rokesby being at that time silent. But afterward in Trinity term, Pollexfen being dead, judgment was given by Powell and Rokesby Justices, that the defendant should answer over. Levinz of counsel with the defendant.

HAIGHT *against* LANGHAM, HALL, &C. EXECUTORS OF BOSTOCK.

Debt on obligation against J. S. as executor, he pleads another action against him, as heir. [*Note*, The heir of the executor, or both, are chargeable on the obligation of their ancestor.] *Respondeas ouster* awarded.

Debt against them as executors of Thom. Bostock upon the obligation *supra*. Langham pleads in abatement another action pending against him and his wife as she was heir. The plaintiff demurred, and the Judges differed in opinion, *ut supra*. And it was adjourned to be further argued. See 36 E. 3, 36, 38, two writs brought for the same thing, each was pleaded in abatement to the other, and both abated; see the like opinion, 9 H. 6, 51, *ad id.* & 39 H. 6, 38, & Co. 5, *Sparry's case*. The reason of the abatement of writs is not only because the party shall not be twice charged, but also that he shall not be twice vexed for the same debt: and *note*, the obligee may charge the heir or executor at his election, or both of them, if one is not sufficient. See 1 And. pl. 13, the heir charged though the executor had assets. Fitz. Execution 163, out of 19 R. 2, the like Dyer 204, in debt against **[305]** the heir, it is no plea that the executor had assets; but on the contrary see 7 H. 4, 2. Debt lies not against the heir till the sheriff returns that the executor has not assets; and 2 Co. Inst. 233, and 7 E. 4, 13 a. an opinion that debt does not lie against the heir, if the executor has

assets: and afterwards in Trinity term following judgment was given as in the foregoing case, to answer over. Levinz of counsel for the defendant.

HOLMS *against* SELLER.

Articles that one shall have and use a way amounts to a grant of the way. 5 Term Rep. 163.

Debt upon an obligation of 20l. conditioned for performance of articles, whereby the defendant granted and agreed with the plaintiff, and his heirs and assigns, that it should be lawful for them at all times afterwards to have and use a way by and through a close of the defendant; in consideration whereof the plaintiff granted and agreed to pay to the defendant 20s. at the signing of the articles, and 6d. per ann. to him, his heirs and assigns, and also to repair the gate between the closes of the plaintiff and the defendant: and the defendant covenants, that John Seller his son, when he attained the age of 21 years, should confirm it. The defendant, after the articles set forth, *ut supra*, pleads, that John Seller the son had not yet attained the age of 21 years, and that he had performed all the residue. The plaintiff replies, that J. Seller, jun. since the said articles (then being the defendant's tenant, and farmer of the close *in quo, &c.*) had obstructed the way so granted to the plaintiff, as aforesaid. The defendant demurs; and now upon argument it was resolved by Pollexfen and Rokesby only in Court, 1. That it was a good grant of the way, and not only a covenant for the enjoyment, as was objected; but 2. It was resolved that the replication was ill, in not shewing that J. S. the son had a title to stop it; and then it is only a trespass, for which the plaintiff may have his remedy by action of trespass, but cannot have (1) covenant against the covenantor upon the covenant; and perhaps the son, though within age, and farming the close of his father, might have a better title than himself. Whereupon judgment was given for the defendant.

[306] TRINITY TERM, IN THE THIRD YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

BARRINGTON *against* CRANE.

The father covenants to levy a fine, and that the son shall stand seised to the use of the father until the marriage, and after the marriage to the use of the son in tail, the marriage was had, but no fine was levied, held that no use arose upon the deed, but that it rested only in covenant. *Ante* 126. *Post* 370, 371. 1 Mod. 175. 2 Jo. 105. 2 Lev. 213, 225. 1 Ventris 372. 2 Ventris 260, 266, 318. 22 Viner Ab. 214, 282.

Ejectment, and upon *not guilty* and special verdict the case was; one Cotteril being seised in fee of the tenements in question, in consideration of the marriage of his son, and of a marriage-portion, June the 8th, 1723, covenanted to levy a fine to his son, *and that the son should stand seised to the use of the father and his heirs till the marriage should be had;* and after the marriage to the use of the son in tail, with divers remainders over, and afterward in the same deed covenanted that he (*i.e.* the father) was seised in fee, and so should be till the use should be vested in the son. *And that after the marriage the lands shall remain and be to the son free from all incumbrances, &c.* and afterward the marriage was had, and no fine was levied: and whether the use arose upon the covenants, and the land should remain after the marriage to the uses *supra?* was the question: and upon argument it was resolved by Powell and Rokesby (then the only Judges of the Court) that this covenant did not raise any use, but rested only in covenant, as Dy. 55 a. 96 a. 162 a. and the rather, for that if the uses should arise upon the deed, it would be contrary to the intent of the parties, which was to raise it upon the fine; and if the use should arise on the deed, it would disable the father to levy the fine, he having before parted with the estate by the deed.

(1) This was an action of debt.

Also the father could not covenant that the son **[307]** should stand seised of lands whereof the father is seised. And the subsequent covenant was intended against incumbrances only, as is usual in such cases, and not to raise any use, as it should if the covenant had been (as is usual in such settlements) *that for any default of a fine, or other execution of the conveyance, the father should stand seised to the uses.* But here the first covenant is, that the son should stand seised, which he cannot do, before a fine be levied to give him seisin; and therefore they gave judgment, that no use did arise upon the deed, as it had been before adjudged upon the same conveyance in this same Court, upon a special verdict formerly given, which appears entered in Hill. 33, 34 Car. 2, C. B. Rot. 637, *Hale* against *Cockeril.* Levinz for the plaintiff, Birch for the defendant, who claimed the remainder by the said deed.

SIMPSON *against* BITHWOOD.

S. C. 2 Danvers 429, pl. 9.

Custom to have the best cable of a ship cast on the manor. *Ante* 85. *Contra.*

Trespass for taking the plaintiff's anchor and cable. The defendant justifies, for that Wharton and Cook were seised of the manor of Burling juxta Mare in Sussex; and a custom there, that the lords of the manor have used in cases of wreck of any ship there, cast upon the manor between the flux and reflux of the sea, to take care as well of the burial of dead persons, as of living persons there cast, being sick or wounded; and to preserve the goods there cast for the use of the owners; and in consideration thereof to have the best anchor and cable of the ship there cast; and that such a ship being wrecked and cast on the said manor, the defendant, as servant of the lords, took the anchor and cable in the declaration mentioned, being the best cable belonging to the said ship. Whereupon the plaintiff demurs; and now it was argued for the plaintiff, that this custom is unreasonable, and without any good consideration; for all the consideration is no more than what common charity obliges the lord to do. To which it was answered, that that may be good by custom without any consideration, which would not be good by prescription without a consideration; as a custom to turn his plow on another's **[308]** headland, so for *fishermen* to dry their nets on another's land; or to dig another's land to make bulwarks in time of danger, &c. because those things are for the public good; so the custom here is for the encouragement and safety of navigation; and although it be a charity, yet it is not unreasonable to have a recompence for a man's charity and charge. And of that opinion were Powell and Rokesby (being the only Judges of the Court;) but it was adjourned. But afterwards it was accordingly adjudged for the defendant. Serjeant Powell for the plaintiff, Levinz for the defendant.

BARNES *against* CORKE.

Admittance of a copyholder for life is so of him in the remainder, and no fine due by the remainder-man *sans* special custom. 1 Mod. 120. 1 Ventris 260, 261. Cro. El. 441, 504, 662. Golds. 95. Cro. Ja. 31. 4 Co. 22, 23. 1 Leon. 4. 4 Leon. 11.

Ejectment on the demise of Bird, and on not guilty and special verdict, the case was; the land in question is copyhold, parcel of the manor of Widford, whereof the lessor is lord; and the father of the defendant being seised of the said copyhold in 1650, surrendered it to the use of himself and his wife for their lives, the remainder to the defendant in tail; the husband and wife were admitted, and paid 10l. fine, and 4 Jac. 2, they being both dead, the defendant prayed to be admitted to the remainder, and so he was, and 58l. set upon him for his fine, the land being 112l. per ann. The fine was afterward demanded of the defendant, and a day and place appointed for payment of it, which he did not pay, and said that he thought none was due, for that he was admitted by the admittance of his father and mother, tenants for life; and therefore he refused to pay it. Whereupon the lessor entered and made the lease to the plaintiff; and in this case three points were moved: 1. Whether any fine be due

in this case? And upon argument it was held by Powell and Rokesby, the only Judges in Court, that no fine was in this case due, except there be a special custom for it; but the admittance to the particular estates was also an admittance to the remainder; and that which is said in 4 Co. Rep. 22, 23 b. that it shall not be to the prejudice of the lord in respect of his fine, is to be intended where a fine is due by custom for an admittance of the remainder; but without a special custom none is due. Cro. Eliz. 504, **[309]** *Gupping* vers. *Bunnie*, 1 Roll. Abr. 505, *lit. x.* Mo. pl. 488. *Dell* vers. *Higden, & ibid.* pl. 658. 2. They held, that this refusal being upon a doubtful matter, and in such a manner, was no such obstinate and wilful refusal as would incur a forfeiture. 3. Objected; supposing no fine was due, yet seeing he had prayed to be, and was thereupon, admitted, he ought to pay the fine (for it) though no admittance was necessary, but the admission of the tenants for life had been sufficient for him; for upon every admittance a fine is due to the lord, and here by the acceptance of the new grant and the admission of him thereupon, he had waived the benefit of the admission of his father and mother, and is now in as by a new grant from the lord: and to this Rokesby Justice seemed to incline, that he having prayed and obtained an admittance where there needed none, he ought to pay a fine for it; to which Powell seemed contrary, and it was adjourned; but afterwards adjudged for the defendant.

THE KING *against* LEE IN B. R.

Mandamus does not lie for a proctor. 1 Lev. 23. 2 Lev. 14, 18, 19. Trem. P. C.

A *mandamus* was granted to restore a proctor in the Court of Arches: and now after a retorn, and argument thereon, it was resolved by Holt Ch. Just. Gregory and Eyre Justices, (Dolben being absent) they delivering their opinions *seriatim*, that this was no such public office whereof a writ of *mandamus* would lie. This case was by the report of John Powell Serjeant at Law, and afterward a Baron of the Exchequer, then a Judge of B. C. and lastly a Judge of B. R.

IN B. R.

NEWTON *against* TRIGG.

S. C. 1 Shower 96 & 268. 3 Mod. 326, 329. 1 Salk. 109, 110.

Inn-keeper not bankrupt. Com. Dig. Bankrupt, B. 4 Bur. 2068. 1 Term Rep. 572. Green's B. L. 24. Cooke B. L. 21, 31. Esp. Dig. 548. Irish Bankrupt Act is 11 & 12 Geo. 3, c. 8.—*Vide ante.*

Trespass for entering his house, and taking his goods 1 May 1 Jac. 2, and upon *not guilty* a special verdict found the plaintiff an inn-keeper in London, and that he bought hay, oats and other provisions, and sold them in his inn, and thereby got his living, (and further found he had a part in a ship set to freight, and had therein a stock to **[310]** the value of 50l. But by an imperfection in the finding of this no regard was had of it) and they found, that such a day he left his house, and absconded from his creditors, and that the commissioners of bankrupt sold the goods to the defendant; whereupon he entered the house, and took the goods, *& si, &c.* And the only question was, whether this innkeeper on this finding of the jury could be a bankrupt? And after it had been twice argued, the Court delivered their opinions upon this point only, without having any regard to the imperfections in the verdict. And Dolben Justice held, that an innkeeper, as such, cannot be made a bankrupt within the statute: but by the special finding in this verdict, viz. that he bought and sold his provisions, and thereby got his living, he inclined, that he might be a bankrupt according to Jones and Berkeley's opinion in the case of *Crisp and Pratt*, as it is reported by Jones and March; but he agreed, that a common country innkeeper, who rents land, and has hay, oats, &c. of his own growth, shall not be a bankrupt. But the other three, viz. Holt Ch. Just. Gregory and Eyre held, that neither the plaintiff, as this case is found, nor any other innkeeper, could be a bankrupt or trader

within the statutes, he being a person who for the common good keeps a house to entertain and lodge travellers, and furnish them with provisions at reasonable prices, which he is compellable by law to do, and is punishable for the non-feasance thereof; wherefore they gave judgment for the plaintiff (Dolben being absent) but he afterwards told me that he consented to the said judgment. Levinz of counsel for the plaintiff.

[311] KNIGHTON *against* MORTON, EXECUTOR OF MORTON.

Executor pleads several judgments; the plaintiff replies but 100l. due on all, and that he has assets beyond; this replication held good, [save only as to want of venue]. *Post*, 368, 394.

Debt on obligation. The defendant pleads a judgment against him as executor upon an obligation of the testator, but does not conclude *prout patet per recordum*, and pleads divers other judgments well, and that he has fully administered all the testator's goods except 10s. which (monies) are charged with the said judgments, and are not sufficient to satisfy them. The plaintiff replies, *protestando* that all the judgments were obtained by fraud, for plea says, that the day of the writ there was no more than 100l. due on all the said judgments, *and that the defendant had then assets sufficient to satisfy the judgments, and also the plaintiff his debt*, and that he permitted the judgments to remain in force to defraud him. Whereupon the defendant generally demurs; and now it was resolved by the Court, 1. That this general pleading of assets sufficient to satisfy all the judgments and the plaintiff, was good. But then 2dly, The material part of the plea is the assets, and thereof no venue is laid, where he had assets as he ought; so that the assets are not triable, and this is an incurable fault. But then 3. It was objected, that the plea is ill in not concluding *prout patet per recordum* of the first judgment: to which it was answered, that that fault is no more than a default of trial by the record, which is past over by the replication, which has admitted all the judgments, but says, that the defendant had assets *ultra* to satisfy them, and is no more than the omission of a venue for trying by the country, which is always cured by pleading other matter over to be tried, which is the assets here; and thereof the Court would advise. But afterwards they ruled it accordingly. Levinz for the defendant.

[312] STEPHENS *against* HANHAM IN B. R.

Conusee of a statute cannot assign the land after a *liberate* without actual entry, or recovery in ejectment. 4 Mod. 48. 2 Salk. 563. 1 Bac. Ab. 157. *Post*, 427.

One Blanker 26 Eliz. being seised in fee of the tenements in question, acknowledged a statute to Parry and Studely; Studely survives and dies intestate in 1623, and in 1675 Robert Studely his administrator sued an extent and a *liberate*; and before any entry or recovery of the possession assigns his interest to the lessor of the plaintiff, who brings his ejectment; and on the trial before Ventris, a Judge of C. B. he at the Assizes caused it to be made a case for the opinion of the Court: and upon argument in B. R. where the case depended, it was held by all the justices, that the assignment before entry or possession was void; for by the *liberate* he has accepted the possession, and is estopped to say the contrary: and then when the owner continues in possession, *this turns the possession*, which the administrator of the conusee hath accepted by the *liberate, to a right which is not assignable before the possession be regained by ejectment, or re-entry, or some other lawful means*; and they gave the same judgment in the same case between *Hanham and Woodford*, upon another statute acknowledged by the same Blanker. Levinz of counsel in both cases for the plaintiff.

SMITH *against* CAVE.

Execution sued after error brought, and bail, is void without notice. But the party is not in contempt without notice. 4 Bac. Ab. 683. Com. Dig. Pleader, 3 B. 12. 1 Salk. 321. "*No execution shall be stayed by writ of error after verdict and judgment, unless there be a recognizance first acknowledged, &c.*" Eng. stat. 16 & 17 Cha. 2, c. 8. Irish. stat. 17 & 18 Cha. 2, c. 12.

The plaintiff brought *ejectment*, and had a verdict at the Assizes this last vacation. The defendant brought error, and had it allowed, and bail was put in the 24th of October. The plaintiff afterward, viz. Octob. 27, not having notice of the writ of error, enters judgment generally, which refers to the first day of the term, and takes out execution tested the first day of the term, and had it executed before notice of the writ of error. And now it was moved to have restitution; for by the suing of the writ of error, and allowance, and bail put in, the hands of the **[313]** Court are foreclosed, so that they cannot grant execution, and therefore the execution (here) is void; and although the party ought not to be punished for suing execution after the writ of error allowed, he not having notice of it, and therefore in no contempt, yet restitution ought to be made to the defendant, because the execution is void, and so it was resolved Pasch. 13 Car. 2, & Trin. 14 Car. 2, B. R. 20 H. 6, 4. Cro. Ja. 342, 535. Roll. 2 Abr. 492. Sty. 159. By all which books it appears, that the hands of the Court are foreclosed by the writ of error. And although the judgment in this case by the general entry refers to the first day of the term, viz. October 23, and the execution is of the same date, which is before the allowance of the writ of error, which was not till Octob. 24, yet the judgment being founded upon the verdict, which was given in the vacation, and whereupon the judgment could not be entered by the rules of the Court till the *quarto die post*, viz. Octob. 27, (at which time the judgment was signed) the Court shall award restitution without costs of either side; and the plaintiff is excused of the contempt, he having no notice of the writ of error. Levinz for the defendant.

HELE *against* THE BISHOP OF EXETER AND HAYMAN.

S. C. 4 Mod. 134. 2 Salk. 539. Shower P. C. 88. 2 Lut. 1094. Nel. Lut. 348.

Bishop pleads that a clerk *fuit minus sufficiens in literatura, sive capax ad habend' eccles.* and therefore he refused him—this plea was held good in *dom. proc.*

A *quare impedit* for the church of Southpole, and declares that the plaintiff was seised of the advowson in fee, and presents one Gultramore, who died, and that it belonged to him to present, and the defendants disturbed him. The bishop pleads he claims nothing but as Ordinary, and that within six months after the death of Gultramore the plaintiff presented Hidder, who was *persona in literatura minus sufficiens, sive capax ad habend' eccles. præd';* and that the bishop upon examination finding him *minus sufficiens, &c.* refused him, and thereof gave notice to the plaintiff, and required him to present another; which he did not do within the six months, and therefore he collated the defendant Hayman. Hayman pleads the same plea, *mutat' mutand'.* Whereto the plaintiff replies, that Hidder upon his examination by the Ordinary was admitted into orders, and received the cure of souls, and had been a vicar instituted, &c. into another church for divers years **[314]** before, & *fuit in verbo divino doctus, &c.* Whereto the defendant makes an impertinent rejoinder. And after divers impertinent pleadings a demurrer was joined thereupon: and the only question was upon the plea in bar, and that was argued for the plaintiff to be too general, viz. in saying that the plaintiff's clerk Hidder was *minus sufficiens in literatura, non capax ad habend' eccles.* not shewing particularly wherein he was insufficient, or incapable; and 5 Co. Rep. *Specot's case* was cited, that *schismaticus inveteratus* is insufficient in not shewing wherein he was a *schismatick.* Whereto it was answered, that there are several particular matters which will make a *schismatick*, and some of them by the temporal law, as nonconformity, not reading the articles, &c. appointed by Acts of Parliament, and are

triable by the common law; other matters by the canon law, and some of the canons were never received in England; and therefore in the case of a *schismatick* it ought to be shewn wherein, so that the Court may judge thereupon: but a sufficiency in literature is a complicated thing, consisting of divers sorts of learning to make one fit to be a divine, of which the Temporal Courts are not Judges, but the Metropolitan only, as was agreed in *Specot's case*, and *illiterateness* is there agreed to be a good cause of refusal: and such pleadings as here in this case have been heretofore, as Trin. 3 Eliz. C. B. Rot. 906. Mich. 6 El. C. B. Rot. 646. Mich. 15, 16 Eliz. C. B. Rot. 1941, which rolls were brought into Court; and thereupon all the Judges, viz. Nevile, Powell and Rokesby (no Ch. Justice being yet made since Pollexfen's death) held the plea to be good; but it was adjourned to be further argued; but afterwards, Treby being made Chief Justice, upon a further argument the plea was adjudged insufficient by the whole Court. Levinz for the defendant, Pemberton for the plaintiff. Whereupon error was brought in B. R. and there the judgment was affirmed. But afterwards upon error brought in Parliament it was reversed, and the plea was adjudged good by the Lords in Parliament.

[315] MICHAELMAS TERM, IN THE THIRD YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

TRINITY, 3 WILLIAM AND MARY.

KEECH *against* KNIGHT.

Declaration in *assumpsit* 1st count, upon a special agreement for the sale of a vessel. 1st Mallory's Entries, 186.

London, to wit.—William Knight, late of Westbeer, in the county of Kent, clerk, was attached to answer William Keech of a plea of trespass upon the case, &c. And whereupon the said William Keech, by J. T. his attorney, complains that whereas one Nicholas Carrington in his life-time, to wit, upon the first day of July, in the year of our Lord 1688, was lawfully possessed of a certain part [being one moiety or thereabouts] of a certain vessel called The Lawrel, as of his own proper part, and so being thereof possessed of such his interest, afterwards, to wit, in the parish of the Blessed Mary of the Arches, in the ward of Cheap, died thereof possessed; and whereas the said William Knight in the right of Anne his wife, executrix of the last will and testament of the said Nicholas Carrington [as he the said William Knight affirmed] afterwards, to wit, upon the 13th day of July, in the year of our Lord 1689, at London aforesaid, in the parish and ward aforesaid, was lawfully possessed of the entire interest of the said Nicholas Carrington in the said ship, then being in a certain voyage upon the high sea, and divers sums of money then were due, and from that time afterwards would become **[316]** due to the said William Knight in the right of his wife aforesaid, growing and accruing for the profits of the said voyage; and afterwards, to wit, upon the said 13th day of July, in the year of our Lord 1689 aforesaid, at London aforesaid, in the parish and ward aforesaid, a certain discourse was moved and had between the said William Keech and the said William Knight, of and concerning the sale and purchase of the entire interest of the said William Knight in the said vessel, in the right of his wife, together with the profits accruing from the voyage aforesaid; and upon that discourse, then and there it was agreed between them, that the said William Knight should sell and convey to the said William Keech his entire interest aforesaid in the said ship, and should assign to the said William Keech his entire profit aforesaid, accruing from the said voyage; and that such sale and assignment should be made in writing, and that the said William Keech should pay to the said William Knight six hundred pounds for the entire interest of the said William Knight in the said vessel, and for the entire profit aforesaid accruing from the said voyage; provided his interest aforesaid in the right of his said wife should amount to one full moiety of the said vessel, and after that rate for the entire interest of the said William Knight in the said vessel, should his interest aforesaid be more or less than the moiety aforesaid; and that the said William Keech should pay to the said William Knight,

twenty-three pounds, and ten shillings of the said money before hand, and the residue thereof at the time of the execution of the writing aforesaid; and thereupon the said William Knight [in consideration that the said William Keech then and there paid the said William Knight, the said sum of twenty-three pounds, and ten shillings before hand, and then and there upon himself assumed, and to the said William Knight faithfully promised to perform the said agreement in all things on his part to be performed] upon himself assumed, and to the said William Keech then and there faithfully promised, that the said William Knight the said agreement in all things on his part to be performed well and faithfully would perform and fulfil. And whereas also the said William Knight afterwards, to wit, upon the 1st day of March, in the 2nd year of the now King and Queen, at London aforesaid, in the parish and ward aforesaid, was indebted to the said William Keech in one *other* sum of twenty-three pounds, and ten shillings, for money to the use of the said William Keech before that **[317]** time had and received, and so being therein indebted, the said William Knight in consideration thereof afterwards, to wit, upon the same day and year at London aforesaid, in the parish and ward aforesaid, upon himself assumed, and to the said William Keech, then and there faithfully promised to pay to the said William Keech the said twenty-three pounds, and ten shillings, last mentioned; nevertheless the said William Knight his several promises and assumptions aforesaid, in the form aforesaid made, not in the least regarding, but contriving, and fraudulently intending the said William Keech in this behalf, craftily and subtilly to deceive and defraud, the said twenty-three pounds, and ten shillings last mentioned, to the said William Keech hath not paid, nor his agreement aforesaid, hitherto in any wise hath performed, [although to do this the said William Knight by the said William Keech afterwards, to wit, upon the 10th day of March, in the 2nd year aforesaid, at London aforesaid was requested;] but the said money to pay, or the agreement aforesaid to perform, altogether hath refused, and as yet doth refuse, to the damage of the said William Keech of 600l. and therefore he produces his suit, &c.

And the said William Knight, by Richard Hastler his attorney, comes and defends the wrong and injury, when, &c. and as to the second promise and assumption in the declaration aforesaid above specified, the said William Keech saith that he did not assume upon himself in manner and form as the said William Keech above against him complains, and of this he puts himself upon the country; and the said William Keech doth the like, &c. And as to the first promise and assumption in the declaration aforesaid above specified, the said William Knight saith, that the said William Keech ought not to have or maintain his action aforesaid thereupon against him; because he saith that the sale and assignment in the declaration aforesaid mentioned were not made in writing, nor ever were executed by the said William Knight to the said William Keech; and this he is ready to verify: wherefore he prays judgment if the said William Keech ought to have or maintain his action aforesaid thereupon against him, &c.

And the said William Keech as to the said plea of the said William Knight, as to the first promise and assumption in the declaration aforesaid above specified, saith that he by any thing in the said plea alledged, ought not to be precluded from having his action aforesaid thereupon against the said William Knight, because he **[318]** saith that the said plea by the said William Knight in the form aforesaid above pleaded, and the matter therein contained, are not sufficient in law to preclude the said William Keech from having his action aforesaid thereupon against the said William Knight, to which plea the said William Keech hath no necessity, neither is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore for want of a sufficient answer in this behalf, the said William Keech prays judgment thereupon, and his damages thereupon to be adjudged to him, &c.

And the said William Knight saith, that the said plea as to the first promise and assumption in the declaration aforesaid above specified, by him the said William Knight, in the manner and form aforesaid above pleaded, and the matter therein contained are good and sufficient in law to preclude the said William Keech from having his action aforesaid thereupon, against the said William Knight; which plea and the matter therein contained, the said William Knight is ready to verify and prove, as the Court, &c. And because the said William Keech to the said plea doth not answer,

nor it hitherto in any manner doth deny, the said William Knight [as before] prays judgment, and that the said William Keech may be precluded from having his action aforesaid thereupon against the said William Knight, &c. And because the justices, &c.

[319] KEECH *against* KNIGHT.

S. C. 4 Mod. 188.

In assumpsit on mutual executory promises it is sufficient to assign a breach generally, that the defendant had not performed his part, &c. without shewing wherein. 1 Lev. 20, 44. Hardres 102, 103. 1 Vent. 177, 214. 2 Saund. 350, 351. Cro. Ja. 202. Yelv. 128. Owen 123. *Ante* 70. 4 Bac. Ab. 17.

Assumpsit, and declares that the defendant was possessed of the moiety of a ship, as he affirmed, and offered to sell it, whereupon it was agreed between the plaintiff and him, that the defendant should sell all his interest to the plaintiff, the sale to be in writing, and that the plaintiff should pay to the defendant 600l. for it, if it was a moiety and according to that rate or proportion, be his part more or less; and that the plaintiff should pay to the defendant 23l. 10s. in hand, and the residue thereof upon the execution of the writing; and that in consideration that the plaintiff had paid the said 23l. 10s. and had assumed to perform the agreement on his part, the defendant promised to perform it on his part; notwithstanding which the said defendant had not performed the agreement on his part: and on *non* (1) *assumpsit* and verdict for the plaintiff, it was moved in arrest of judgment, that the breach was not well laid, being too general, but he ought to have shewn some particular wherein he had not performed it, as to say, the plaintiff had tendered to him a writing which he had refused to sign, or that he had not delivered his part in the ship, and that the plaintiff ought to do the first act, viz. to tender the writing. Whereto it was answered and resolved by the Court, viz. Nevile, Powell and Rokesby, no Ch. Justice being yet made, 1. That the defendant having undertaken to sell his part by writing, he is to make and tender the writing at his peril, for he has undertaken to do it; as where a covenant is to make an obligation, &c. the covenanter is to draw the obligation, &c. and to tender it. This case being upon a mutual promise, the breach is well enough assigned in the words of the promise, especially after a verdict, and therefore they gave judgment for the plaintiff. Levinz for the plaintiff, and Tremain now King's serjeant for the defendant.

And note, this judgment was affirmed in error in B. R. Pasch. 5 W. & M. *Vid.* 4 Mod. 189, on the authorities and reasons of Dy. 297. Hob. 88, 106. Cro. El. 543. 2 Saund. 351. *Quær.* 1 Sid. 178. Hob. 67. Cro. El. 292. Cro. Ja. 503.

[320] PIERSON *against* THE HUNDRED OF WESTWARD.

Statute of Winton gives only forty days for the country to take the robbers, &c. 2 Saund. 171, 205, 379, 285, 286. Cro. Ja. 44. Styl. 53. *Post*, 328, 347.

Action brought on the Statute of Winton, and declares that he was robbed, and none of the thieves taken within 40 days, according to the said statute: and after verdict for the plaintiff it was moved in arrest of judgment that the statute was mistaken; for it was not the Statute of Winton which gave the forty days to the country to take thieves, for the Statute of Winton gives half a year; but it was the stat. 28 E. 3, 11, which restrains the time to 40 days, Co. 2 Inst. 569. Old Entr. 218. Dyer 370, pl. 59. Co. Entr. 350. 2 Leon. 12. Whereto it was answered, that those books are mistaken, for the Stat. of Winton itself gives no more than 40 days, and so are all the modern precedents, as Rast. Ent. 406. Co. Ent. 351. Herne 215. Thes. Brev. 141. Bro. 225, 232. 2 Saund. 376. Bro. Formula Placitand. 99. Rob. 328, 329, 331. Whereupon the Court directed the Parliament-roll to be searched, and thereby it appears, that the Statute of Winton gives only 40 days to the country, and

(1) The point was upon demurrer. See the pleadings.

the statute 28 E. 3, c. 11, is but a confirmation thereof. And thereupon judgment was given for the plaintiff. Levinz for the plaintiff, Lutwyche for the defendant.

JEFFERY *against* LEGENDER IN B. R.

S. C. 4 Mod. 48. 1 Shower 320. 2 Salk. 443.

Assumpsit on a policy of insurance. Molloy L. 2, c. 7, § 12. 2 Saund. 205. 2 Keble 717, 722. Douglas 72, *Lilly* v. *Ewer*. *A warranty in a policy of insurance is a condition upon a contingency, and unless that is performed there is no contract. The contract does not exist, unless it is literally complied with. Per L. Mansfield.* 1 Term Rep. 346.

Assumpsit on a policy of assurance made in the usual form; and in the conclusion of the policy were the words usually there inserted, viz. *warranted to depart with convoy;* and the voyage was to be from London to Naples; and June 17, the ship departed from London with convoy, but the 19th of June the ship and the convoy were separated by tempest, and the ship was by the tempest driven into Foy, and the convoy into Torbay, ten leagues distant from Foy; and the ship and the convoy continued in the said several ports 'till March 1, when the wind changed, and so continued 'till March 3, which was time enough for the convoy to have arrived at the ship; and that the ship sailed out of Foy to go to the convoy, but before she reached the convoy, she **[321]** was by another tempest drove seventy leagues out to sea, the convoy remaining all this time at Torbay; and the ship being so out at sea was taken by pirates. And upon a special verdict finding the whole matter (on the issue *non assumpsit*) the question was, whether the insurer should be charged? And 1. It was agreed and admitted of both sides, that by the custom of merchants those words, *warranted to depart with convoy*, are the words of the assured, and not of the assurer, and by them the assured is to find the convoy. 2. It was held by the Chief Justice Holt and the most part of the Court, that although the words are only *to depart with convoy*, yet they extend to sail with convoy throughout the whole voyage. But 3. That this separation being by the tempest at the first, and the ship and the convoy never after meeting, and the ship failing to meet with the convoy to go with it the rest of the voyage, and being again driven away by tempest, and taken by the pirates, though the convoy remained all this time at Torbay, yet this was not such a neglect in the (1) convoy as to discharge the insurer, who might have staid at Foy 'till the convoy came to him; and therefore they gave judgment for the plaintiff. Thompson King's Serjeant for the plaintiff, Levinz for the defendant.

THOMAS *against* BLIGH AND BLIGH.

In a *warrantia chartæ* where only a term for years is evicted, if the defendant obtain a verdict he shall have his costs. Query? F. N. B. [135]. 6 Viner Ab. 341. Com. Dig. Pleader 3 N.

A *warrantia chartæ*, and counts that the defendants enfeoffed him, and covenanted that they were seised of a good estate in fee, and had good power to convey to the plaintiff; and that the plaintiff should quietly enjoy it from all former grants, &c. except a term of 20 years to one Barret; whereof there were only seven years to come: and that the said tenants all and singular the said premisses should warrant to the plaintiff against all men. And the plaintiff says, that at the time of the feoffment there were more than seven years to come of the said term to Barret; and that Boscawen had a title thereto, and entered and expelled the plaintiff; and that the defendants refused to warrant the tenements to him; and upon issue, that there were no more than seven years to come of the said **[322]** term, a verdict was for the defendant; and upon this verdict it was moved, that the defendant ought to have costs by the statute 4 Jac. 1, c. 3. *That in all cases where the plaintiff shall have costs,*

(1) *Scilicet*, "*the ship.*"

the defendant shall have costs if the verdict be for him: and by the statute of Gloucester, cap. 1, costs are to be given in all cases where damages are to be recovered: and in a *warrantia chartæ* the demandant shall recover damages, F. N. B. 135, H. 42 E. 3, 7 b. Bro. Warr. Char. 31. Fitz. Garranty de Char. 20, 28, 29. 18 E. 3, 42. And although covenant had been the proper action in this case upon the eviction of the term, and not a *warrantia chartæ*, yet seeing that the tenant will accept of a judgment in this action, he ought to have his costs; but *quære* hereof; for if the action does not lie, the judgment ought to be against the defendant, *although the verdict be for him.* Levinz for the defendant.

[323] HILARY TERM, IN THE THIRD YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

DANBY *against* HODGSON.

S. C. 2 Lutw. 1389. Nel. Lutw. 447.

The defendant pleads a proscription to enter and take stones for repairs, but does not say that he used them in repairs. Upon demurrer this plea held bad. Moor 492. Cro. Eliz. 498. Owen 63. 1 Rol. Rep. 507. 5 Bac. Ab. 203.

Trespass *inter alia* for breaking his close, and digging four cart-loads of stones, and carrying away and converting them to his own use. The defendant, as to all but the breaking of the close, and the carrying away the four load of stones, pleads *not guilty;* and as to them he prescribes to enter and dig stones for reparation of his house and fences, wherefore he digged them and carried them away to repair his house and fences, being out of repair; whereupon the plaintiff generally demurred. And now it was argued for the plaintiff, that the plea is not sufficient, it not saying that he used them for repairs, or indeed that he kept them by him to *repair;* for otherwise it may be that he has sold them, although at first he digged them and carried them away for that use, as in Long. 5 E. 4, 100, in waste; so Cro. Eliz. 433, 434, 693, 694. Trin. 10 H. 7, pl. 9, 15. Mich. 39 H. 7, pl. 13. To which it was answered, that then it was within the plea of *not guilty.* Whereto it was replied, that the *not guilty* shall not go to the four cart-loads, but to the residue; and the taking and carrying away those four cart-loads is in itself a conversion of them, if the justification is not good; and of that opinion was the Court, viz. Nevile, Powell and Rokesby, and gave judgment for the plaintiff. Levinz for the plaintiff, Lutwiche for the defendant.

[324] SMITHSON *against* GARTH AND OTHERS.

Trespass for several things at the same time against several defendants, one does one part, and another another part; all of them shall be charged for the whole, and not severally for several parts. 7 Vin. Ab. 259. *Where the trespass is joint, and the jury find the defendants guilty of a joint trespass, they cannot sever the damages. Per Lord Mansfield.* 5 Bur. 2792. *But where the defendants do not plead jointly, the damages may be severed.* 2 Stra. 1140.

Trespass of assault, battery and imprisonment, and taking two silver buttons, against James Garth and his wife, Sarah Richmond and one Robinson and his wife. Whereto Sarah Richmond and Robinson and his wife plead *not guilty* to the whole, and issue thereon. Garth and his wife, as to the coming with force and arms, and against the peace, plead *not guilty*, and as to the residue (they plead in bar) *actio non, &c.* because the plaintiff assaulted them, and they defended themselves; and so the damage, if any, was by reason of their own assault. The plaintiff replied *de injuria sua propria absque tali causa*, that they assaulted, beat, and imprisoned him: *et hoc petit quod inquiratur per patriam*, and the defendant likewise. And both issues were tried, and verdict for the plaintiff generally, and entire damages. And now it was moved in arrest of judgment, that here was a discontinuance by the plaintiff himself; for, as it is, Garth and his wife have said nothing as to the imprisonment, and the taking of the buttons; nor had the plaintiff replied any thing thereto, but they are wholly

omitted in the issue, and therefore the defendants ought not to have been charged with damages for that, but the jury ought to have severed the damages, and to have charged Robinson and his wife and Richmond for the damages for those matters upon the (general) *not guilty* to the whole, they being found guilty of the whole, and to have charged Garth and his wife with the battery by themselves, because thereto they only had pleaded, and thereupon only is the issue joined as to them. To which after several debates in several terms it was answered and resolved by the Court, that the plaintiff having charged them jointly with the whole entire matter, if one of them committed the battery, another the imprisonment, another took the buttons, yet being all done at one time, they are all guilty of the whole, and shall be all charged with the whole damages: and if several damages had been given, the plaintiff could have had only one of them, and should have made his election *de melioribus dampnis*. And if it should be as the defendant would have it, the plaintiff would have two several damages for the battery, the one against Garth and his wife, and the other against Richmond and Robinson and his wife, whereas they all ought to **[325]** be charged together with the whole, 11 Co. Rep. *Heyden's case*. And as to the discontinuance, that is cured by the verdict by the statute 32 H. 8, c. 30, which says, that after verdict the Court shall proceed to judgment, notwithstanding any discontinuance: so that let the discontinuance be either on the part of the plaintiff, or of the defendant, it is all one, Roll. 2 Rep. 161. *Playstow* vers. *Jennings*, 11 Co. Rep. 6. *Gomersale's case* cited in *Heydon's case*, Hob. 187. *Freeston* versus *Boyer*, Cro. Ja. 353. *Watts* versus *King*. Whereupon judgment was given for the plaintiff. Levinz of counsel for the plaintiff, Lutwyche for the defendant.

BUCKLY *against* WILLIAMS.

S. C. 2 Danvers 50, pl. 14. 2 Ventris 61, who reports the judgment to be for the defendant.

Covenant for quiet enjoyment. Breach assigned, that such a one entered by a title prior to the defendant's deed to the plaintiff is good although not shewing what title the stranger had. Alleyne 19. Noy 50. Yelv. 30. 4 Co. 80. Styl. 67. Cro. Car. 1, 5. Cro. Ja. 315, 425, 444. 1 Rol. Ab. 430, pl. 14. 1 Roll. Rep. 397. 1 Ventris 184. 2 Ventris 61, 62. 1 Lev. 301. 2 Lev. 37, 194. 2 Saund. 178, 179. 1 Mod. 101. 2 Mod. 213. 3 Mod. 135. 5 Viner Ab. 167.

Covenant upon articles, whereby the defendant covenanted, that the plaintiff should enjoy a close quietly for a year, whereupon the plaintiff put in his beasts, and Knolls (who had a title to the premisses by virtue of a certain lease to him thereof made before the making of the articles aforesaid) entered upon the plaintiff and expelled him; and afterwards, viz. such a term, &c. brought an action of trespass against him for putting his beasts into the said close, on which such proceedings were had, that Knolls recovered against the now plaintiff 20l. damages, and 17l. costs, whereof the defendant had notice; and so for the not quietly enjoying, the defendant had broken his covenant: and issue thereupon, and verdict for the now plaintiff. Whereupon it was moved in arrest of judgment, that the breach was not well assigned, for that he does not shew what title Knolls had; and it may be, the title which he had was under the now plaintiff himself, and there having been a suit wherein the title of Knolls appeared, the plaintiff ought to have shewn it; for now it lies in his own knowledge. But *non allocatur*; for the title of Knolls cannot be supposed to be under the now plaintiff; for the declaration is, that Knolls had a title by virtue of a demise made to him before the making of the articles to the plaintiff; and let the title be derived from whom it will, yet it being before the articles made with the plaintiff, the covenant is broken, according to *Proctor and Newton's case*, Trin. 23 Car. 2, B. R. Rot. 856, where on the like breach assigned as here judgment was given for the plaintiff; the roll of which case was now brought **[326]** into Court; and upon view thereof, after divers motions, judgment was given for the plaintiff. Levinz of counsel for the plaintiff.

IN B. R.

GLOVER *against* COPE.

S. C. Shower 84. 4 Mod. 80. 1 Salk. 185.

Covenant to repair a copyhold runs with the land. 3 Term Rep. 398.

Covenant, and declares, that the lord of the manor of Hackney granted the copyhold in question to one Hockenall, and that Hockenall according to the custom of the manor demised it to the defendant for 21 years, and that he covenanted to repair it; and that the said Hockenall afterward surrendered the reversion to another Hockenall, who surrendered it to the plaintiff, and assigns a breach in not repairing the messuage after the reversion came to the plaintiff. The defendant pleads, that before the reversion came to the plaintiff, he assigned the term to Picks, who entered and is possessed, whereof the plaintiff had notice. To which the plaintiff demurs, and two points were made in the case; 1. Whether this covenant should run with the reversion by the common law? 2. If not, whether the assignees of a reversion of a copyhold should be within the stat. 32 H. 8, 34, which says, *that all grantees of reversions shall have the same or the like actions and entries for conditions as the grantors might have.* And for the first point it was urged, that covenant lies in this case at common law, as appurtenant to the land, as 42 E. 3, 3. Covenant to perform divine service to him and his servants in his chapel. 9 H. 6, 16. Debt for rent by the assignee of a reversion. 5 H. 7, 19. Debt for rent or for waste by the lord upon an escheat. Mich. 25 Car. 2, *Langhor* against *Williams* adjudged that covenant lies against an assignee to repair. Cro. Cha. 137, *Bayly and Offord*, a covenant that if lessee be distrained, to deduct it out of the rent, it shall go to the assignee of a term. 5 Co. Rep. *Dean and Chapter of Windsor*, and *ibid. Spencer's case*, and the action lies against the lessee, notwithstanding the assignment, it being brought upon the express covenant. Cro. Cha. 188, *Batchelor* against *Gage*, and *ibid.* 580. *Norton* against *Acklane*, and Cro. Ja. *Brett* against *Cumberland.* And for the second point it was argued for the plaintiff, that assignees of the reversion of copyholds are within the stat. 32 H. 8. Against which it was objected, that copyholds were not **[327]** within that statute; 1. For the meanness of their estate, of which the statute does not take any notice; nor are they comprised in the general words of Acts of Parliament, and therefore the Statute of Bankrupts mentions them in particular; and by Cro. Cha. *Rowden and Malster's case*, they are not within the Statute de Donis. 2. For the prejudice to the lords. Whereto it was answered for the plaintiff, that before this statute copyholds were well known at the common law, as Litt. sect. 77, ex 7 E. 4, per Danby, 21 E. 4, per Brian. Kel. 77, & 21 H. 7, & 12 E. 4, 7, and since the statute, as Owen 73, a copyholder makes a lease, this shall bind the heir, which proves he is in by descent, and not by the admission. The heir may have trespass, ejectment, or may surrender before his admission. As to the second objection it was agreed, that they are not included in Acts of Parliament by general words in cases where the lord shall be prejudiced thereby, and therefore they were named by particular words in the Statute of Bankrupts, and a particular provision made therein against the lord's being prejudiced: but where no such prejudice is to the lords, they are comprised in the general words, *lands*, *tenements* and *hereditaments*, Mo. pl. 276. 3 Co. Rep. *Heydon's case*, 4 Co. Rep. 26, so they are within the stat. 32 H. 8, made the same session of Parliament against buying of pretended titles, and by 9 Co. Rep. *Podger's case*, they are within the statute of 1 H. 7, of Fines, and 6 Co. *Dean and Chapter of Worcester's case* 13 El. against long leases made by ecclesiastical persons, so within the stat. 27 El. against Fraudulent Conveyances, and also within the stat. 31 H. 8, of Monasteries, made at another session of the same Parliament; and a reason is there given, because great part of the realm consists in copyholds; and in the case of *Wentworth and Peables* lately in this Court, it was adjudged by Hale and the whole Court, that they are within the Stat. de Donis, contrary to the opinion in *Rowden and Malster's case;* and Justice Dolben remembered another case before Hale Ch. Just. at a trial in Middlesex, where he would not permit it to be found specially, so as to make it a question whether they were within the Stat. de Donis. But on the other side were cited *Swinnerton's case* in Hob. Hobart's opinion, and *Millor's case*,

Hob. 170, 179, and Cro. Cha. 24, *Platt* against *Plummer*, where a special verdict is found on this point, but nothing further done; and Cro. Ja. 395, *Beale* against *Brasier*, where it is adjudged, but without argument, that copyholders are not within that statute. And after this case had been argued here **[328]** several times, Holt Chief Justice, as I heard, was of opinion, that copyholds are not within that statute; but now it seems that the whole Court were of a contrary opinion, for they gave judgment for the plaintiff, which I apprehended to be upon both points, for that they did not found it upon either point only, as I observed. Levinz for the plaintiff upon the last argument.

PYE QUI TAM, &C. *against* THE HUNDRED OF WESTBURY.

Oath that he was robbed by four persons unknown, seems sufficient within the statute. *Ante* 320. *Post* 347.

Case upon the Statute of Winton, and declares in all points according to the statute, only in setting forth the oath before the justice of peace he swore, that he was robbed by four persons to him unknown. And whether this was sufficient upon the statute of Eliz. which appoints the oath? was the question; it saying, that he shall make oath that he did not know the persons, nor any of them; and the matter being found specially, it was objected, that the oath here was not sufficient; for perhaps though he might not know all the four, yet he may know one of them, and Noy 20, *Bateman* against *The Hundred of* ——— was cited, where the like oath is held insufficient by three Judges against one; and to this opinion Justice Powell at this time inclined, but Just. Rokesby to the contrary held, that if he was robbed by four persons unknown, all the four were unknown to him. But no Ch. Just. being yet made, it was adjourned.

[329] EASTER TERM, IN THE FOURTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

Sir George Treby made Chief Justice of C. B.

No Chief Justice being made till the latter end of this term, nothing memorable was done in this Court, all things staying in expectation of Sir George Treby the Attorney-General to come up to the place of the late Lord Chief Justice Pollexfen. And at the latter end of this term he came up Chief Justice.

[330] TRINITY TERM, IN THE FOURTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

HUNLOCK *against* PETRE.

S. C. Lutw. 963. Nel. Lutw. 305, 306. 2 Danv. 570, pl. 4.

In *formedon* upon the plea of non-tenure in general, without a disclaimer, the demandant may maintain his writ for his damages. 1 Mod. 181, 182. Co. Lit. 102. 2 Bulstr. 15. 1 Roll. Ab. 630, 631. 2 Lev. 30, 31. Com. Dig. Abatement, F. 15.

Formedon in reverter. The tenant imparls specially, and then pleads nontenure generally. The demandant maintains his writ, that he is tenant. Whereupon the tenant demurs; and now it was argued for the tenant, that the demandant cannot maintain the writ, no damages being to be recovered; but upon such a general nontenure pleaded he may enter: but where damages are to be recovered in any real action, he may maintain the writ for recovery of his damages; and cited Litt. sect. 691, and Coke Commentary thereupon, who says, if the tenant in a *formedon* pleads that he is not tenant, or disclaims, &c. judgment shall be, that the tenant shall go without day, and the demandant may enter, and shall be remitted. Whereto it was answered and resolved by the whole Court, viz. Treby, Nevile, Powell and Rokesby,

upon consideration of the books hereafter mentioned, that Litt. and Coke are not to be understood of a simple plea of nontenure, but of a nontenure with a disclaimer, as the pleadings usually were in Littleton's time; for upon a simple plea of nontenure, suppose the tenant had no freehold, but had a reversion in fee, should the demandant recover the fee, whether in the tenant, or in any other? Certainly, no; for nothing is disowned by the simple plea of nontenure, but **[331]** only the freehold, which perhaps is true, and yet he has the reversion in fee. Should his reversion be thereby lost, and the demandant remitted thereto? No, surely; but when he disclaims, or pleads nontenure and disclaims, the demandant shall be remitted to the whole, because he had disclaimed the whole; and that the pleadings about Littleton's time were not simple pleas of nontenure, but with disclaimer also, see 36 H. 6, 28, 29, *formedon in descender* against two; one pleads nontenure, the other disclaims, the demandant may enter by the disclaimer of the one, because it cannot vest in the other, by reason of his pleading nontenure: 13 H. 7, 28, the tenant pleads nontenure, and also disclaims. 22 H. 6, 44, on a plea of nontenure in dower the demandant maintains his writ, and yet no damages are in dower, except the husband died seised, and in that case it does not appear he did so. 4 E. 4, 38, *formedon* in reversion; the tenants plead nontenure, and also disclaim, the demandant could not maintain his writ. 6 E. 3 and 5. 4 E. 1, *in formedon* the tenant disclaims, the demandant or plaintiff shall not maintain his writ, but enter. Fitz. Dow. 8, the tenant pleads nontenure, yet the demandant maintains his writ, though it does not appear that the husband died seised. 11 H. 4, 16. 7 H. 6, 17. Bro. Nontenure 23, 47, in a *scire fac'* to execute a fine, the tenant pleads nontenure, the demandant maintains the writ, and yet no damages are in the *scire facias;* and the constant practice at this day upon nontenure pleaded is for the demandant to maintain his writ, if he will, as Trin. 14 Jac. 1, in this Court, *Pitt* against *Staples*, 1 Bro. 151, & Pasch. 21 Jac Rot. 49, in Gulston's Office, & Mich. 12 Jac. 1, Rot. 221, in Bro. Office, Hern's Plead. 536. Rast. Entr. 363, and the last edition of Co. Entr. 325. In a *formedon*, issue was taken on the nontenure. And for pleading nontenure and disclaimer together, see Rast. Entr. 224, 225, 561. And for pleading of simple disclaimer, see Rast. Ent. 28, 276. Whereupon judgment was given that the tenant should answer over. Levinz of counsel for the demandant, Lutwyche for the tenant.

[332] BARRUDALE *against* LORD CUTTS, AN IRISH PEER.

Writ of protection with an exception. 3 Blac. Com. 289. 5 Term Rep. 688.

Assumpsit against him by his taylor for work done, and process to the exigent; whereupon at the return thereof a protection was brought into Court under the Great Seal for staying the outlawry, *for that he is detained in our wars in Flanders, to continue for one year if he in our service should so long remain and continue beyond sea: and therefore we will that he be quieted from all suits, pleas, &c. except pleas of dower unde nihil habet, quare impedit, assize of novel disseisin, and attaint.* And now two exceptions were taken to the writ; 1. For that pleas before *justiciariis nostris itinerantibus* is not in the exception as the register is. But *non allocatur;* for those *iters* have been long discontinued, and it shall not be intended of *iters circa forestas.* 2. That the writ is not allowable on his coming in upon the exigent, which is the King's suit; and there are not any such words in the protection as *licet tanget nos;* but *non allocatur*, for the writ of protection is allowable for him who comes in upon the exigent, though not for him who comes in on the *cap. utlagat.* Hob. 115, *Shirlie's case.* And the protection was allowed.

LORD PETRE *against* THE UNIVERSITY OF CAMBRIDGE AND WOODROFFE.

S. C. 2 Lut. 1117, 1120. Nel. Lut. 349, 350.

The King's pardon of a recusant convict tolls the disability to present, notwithstanding the omission of the word *convict* in the stat. 3 Ja. 1.

A *quare impedit* for the church of West Harmingfield. The university pleads the statute of 23 El. of 20l. per month forfeited by popish recusants for not coming to

church, and another stat. 29 Eliz. which enacts that recusants for not rendering themselves to the sheriffs before the next sessions after proclamation, shall be convicted; and that the plaintiff was indicted at such a sessions, and proclamation was made, and that he did not render himself to the sheriff at the next sessions, whereby he was convicted, and then pleaded the statute of 3 Jac. 1. Whereby it is enacted, *that every person who shall be a popish recusant convict shall, during the time that he remains* **[333]** *a recusant* (not saying convict) *be disabled to present to any church, and that the chancellor and scholars of the university shall present during the time that he remains a popish recusant convict.* And that the plaintiff remained so convicted, whereby the university presented the other defendant Woodroffe, and Woodroffe pleads in disability, that the plaintiff *responderi non debet*, and then pleads the statutes 23 & 29 El. and another clause in the stat. 3 Jac. 1. That popish recusants convict shall be as excommunicated, disabled, &c. and demands judgment *si respondere debet.* The plaintiff, as to the university's plea, pleads the pardon 4 Jac. 2, whereby he pardons *inter alia* all judgments and convictions for not coming to church, and produces an exemplification thereof out of the Chancery, where it is enrolled. Whereupon the university demurs. And as to Woodroffe's plea the plaintiff demurs specially; for that the defendant did not bring in any record of the conviction with an *hic in Curia prolat'.* And upon argument the Court gave judgment against the defendant Woodroffe; that he should answer for two causes. 1. He pleads the statute as made 29 El. whereas the Parliament commenced in 28 Eliz. and to that time the Act shall refer, as is observed, 4 Inst. 7, and Co. Entr. 569, it is so pleaded, and so 4 Leon. 80. 2. The statute is not well pleaded; for the statute is, that they shall render themselves *before* the next sessions, and he pleads that he did not render himself *at the* next sessions; and notwithstanding this he may have rendered before the next sessions. But then as to the matter in law, touching the university, the Court did not agree at this time; for though they agreed that the pardon of K. James had pardoned the conviction, yet as to the words in the middle of the sentence, some would have them to be taken absolutely by themselves, viz. that he having been once convicted *should be disabled as long as he remained a recusant*, although the conviction be pardoned, and that he shall be disabled as long as he remains a recusant, and has not conformed; but other Judges inclined, that *recusants convict* should be intended throughout the sentence, although the word *convict* be omitted in the middle of the sentence. But afterwards Trin. 5 W. & M. this point was also agreed by Nevile, Powell, & Treby Chief Justice against Rokesby, that the pardon had not only pardoned the conviction, but also restored the party to his ability, notwithstanding he had not conformed; **[334]** for the word *convict* is to be intended throughout the whole sentence (though an omission thereof be in the middle of the sentence) it being inserted both in the beginning and also in the end of the paragraph. Also the plea of Woodroffe is ill for the cause assigned upon the demurrer; *for he who pleads a disability by record, ought to bring in the record or a certificate thereof sub pede sigilli immediately*, as in excommengement, the certificate of the bishop under his seal; in outlawry, to plead the outlawry with a *hic in Curia prolat';* and by 3 H. 6, 15, *one shall not plead a record in abatement or any other dilatory plea, without having it in Court:* and as to the objection, that the justices of the sessions have no seal, it was answered and resolved, that it might be removed into Chancery by *certiorari*, and from thence sent hither by *mittimus.* And afterwards in Trin. 5 W. & M. Woodroffe having pleaded the same plea with the university, judgment was given for the plaintiff. Levinz for the plaintiff, Fuller for the defendant.

GOODWIN *against* BLACKMAN.

[Overruled, *Denn d. Burgess* v. *Purvis*, 1757, 1 Burr. 330.]

Ejectment of the tenth part of a messuage in D. and S. the whole lying in D. only, the evidence does not support the declaration. 1 Stra. 695, *contra.* Com. Dig. Pleader, S. 26. 1 Bur. 330. Denison, Just. *calls this a strange case.*

Ejectment on a demise of Vandenbenden of the tenth part of a messuage in the parishes of St. Katharine Coleman-Street and St. Gabriel Fenchurch-Street, and at the

trial at Guild-hall before Nevile Justice, it appeared on the evidence, that the whole messuage lay in the parish of St. Katharine Coleman-street, and no part thereof in the parish of St. Gabriel Fenchurch-street. And Nevile Justice being strongly of opinion that the plaintiff had failed in proving his declaration, it was made a case for the opinion of the Court, but a verdict was given for the plaintiff with a stay of the judgment till the opinion of the Court was had in the matter. And now it was moved by Levinz for judgment for the plaintiff; for if one brings ejectment of an acre of land in D. and S. and the whole lies in D. he shall recover: or if a man brings ejectment of an acre of land in D. and part thereof lies in S. he shall recover for that part which lies in D. Plowd. Comm. 429 b. If a man has a title to the 4th part of an acre only, and he brings ejectment for the whole acre, he shall recover the 4th part. Cro. Eliz. 13. Ejectment of 100 acres, and proves a title by lease of 40 acres only, he shall recover the 40 acres, which cases the Court did not deny: but in this present case the most part **[335]** of the Judges held, that the declaration here being precisely of the tenth part of an entire thing, viz. of a messuage, the evidence did not maintain it. *Quære* the diversity, and see 44 Assize 27. Assize brought of a mill, and it is found that the plaintiff had an antient mill which fell down, and he erected a new one; the greater part whereof was in the place of the old one, and another part thereof on the defendant's land; and yet he recovered such part of the new mill as was erected upon his own soil, though he did not recover the whole mill.

NOBLE *against* HOLHEAD.

Assumpsit for money received as well before as after the day of the promise, ill *in toto* where verdict and entire damages.

Assumpsit on three several promises; two of them were good, and well laid, but the third was laid thus; and whereas the defendant (such a day, year, and place) was indebted to the plaintiff in 13l. 10s. for so much money of the said plaintiff, and of divers other persons *to the plaintiff's use* then before *and afterwards* had and received, he promised, &c. After verdict for the plaintiff, on issue *non assumpsit*, and entire damages, it was moved in arrest of judgment by Levinz, that the declaration was ill in the third promise, viz. that such a day he was indebted to the plaintiff in monies to the plaintiff's use received(1) *antea & postea*. And the damages being entire, he cannot have judgment for any part; wherefore judgment was stayed.

[336] MICHAELMAS TERM, IN THE FOURTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

CHAMBERS *against* WARKHOUSE.

Trover de catulis & catellis, not saying of what sort, and *una amphora saporis*, good.
Cro. Car. 391. 1 Lev. 201. 1 Lev. 99. Ray. 215. 1 Sid. 98.

Trover among other things *de sex catulis, quatuor catellis, & una amphora saporis.* After verdict for the plaintiff, and entire damages, it was moved in arrest of judgment by Levinz, that *catulis* signifies *whelps, catellis little whelps* of any sort, either of dogs, bears, &c. and *non constat* of what kind they here are, and no property can be of *whelps;* also the word *saporis* signifies *savour*, whereof no action lies, and the damages being entire no judgment can be given; but the Court on the first motion ruled judgment for the plaintiff, *nisi causa, &c.* for they would intend them *dog-whelps*, and trover had been maintained for a dog. And as to the word *saporis*, they would intend the damages to be given for the *amphora*, and nothing for the word *saporis*. But afterwards it was moved again, and the following authorities were cited *pro & con* in the case, Hob. 283. Trespass for taking *de uno cane venatico*. Dy. 306. Trover does not lie of a hawk, except it be shewn to be reclaimed. Cro. Car. 544, *Sir Martin Leister*

(1) The translation takes no notice of these words in the original. "*Puis le jour del promise. Et le declaration est pour monies receu.*"

against *Home* accordingly. But Cro. Car. 18, *Sir Francis Vincent* against *Lesney*, trespass lies for striking his hawk, without shewing he was reclaimed. Cro. Ja. 262, *Grimes* vers. *Stacke*, trover lies of musk-cats and of monkies, because they are merchandize; and for the same reason **[337]** *it has been adjudged, that trover lies of negroes*, Cro. Ja. 345, *Wadhurst* against *Damme*. Trespass for killing his mastiff; and *ibid.* 463, trespass for taking his greyhound and collar. 2 Inst. 655, in the time of E. 1, trespass for taking his two greyhounds. Ow. 93, *assumpsit* to deliver a dog. Cro. Eliz. 125, 126, property in a dog. Roll. 1 Abr. pag. 5, sect. 5, that trover lies of a spaniel; and afterward judgment was given for the plaintiff.

THE KING *against* THE BISHOP OF NORWICH, RICHARD HIDE AND EDMUND BOUGHTON.

Notice or no notice of a simoniacal agreement not necessary. *Ante* 16, 83, 115, 206.

Quare impedit of the church of Hopton Wafers in the county of Salop, and declares that J. S. was seised of the advowson, and presented Wheeler, and granted the next avoidance to Charles Boughton, and that the church avoided by the death of Wheeler, and then shews the stat. 31 El. c. 5, of Simony; and that the church being void, it was corruptly agreed between a friend of Charles Boughton, and on his behalf, and one Taylor, that Charles Boughton should present Hide, and that Taylor should pay to Richards 20l. a year for six years, if Hide should so long live; and that in pursuance of this agreement Taylor became bound to Richards in 200l. for payment of the 20l. per annum; which obligation was made to the use of Charles Boughton; and that immediately thereupon Charles Boughton presented Hide, and he was thereupon *de facto* instituted, &c. which by virtue of the said statute was void, and so it belonged to K. Charles II. to present, and then derives the Government to the now King and Queen, and their right now to present; and that the defendants hindered them, &c. Hide with a protestation to the agreement and the obligation pleads, that he had no notice of the agreement at the time of the presentation, or at any time before; whereupon the Attorney-General demurs for the King. Boughton also with a protestation to the agreement and the obligation pleads, that the other defendant presented him freely, and traverses the corrupt agreement. Whereupon issue was joined; and now upon arguing the demurrer, and consideration of the books of Cro. Ja. 385. *The King* against *The Bishop of Norwich*, Cro. 533. *Booth* versus *Potter*, Cro. Car. 330. Mich. 9 Car. I, *Bawderocke* versus **[338]** *Mackaller*, 3 Inst. 154, it was resolved by the whole Court, viz. Treby, Nevile, Powell and Rokesby, that the notice is not material, but only the corrupt agreement; for the notice is very difficult to be proved in such cases, and the patron may entrust a friend, as in this case, to make the agreement; and before notice thereof given to him, may present upon an assurance by certain signs between them that such an agreement is perfected. Whereupon they gave judgment for the plaintiff upon the demurrer, but execution to stay 'till the issue tried. Levinz for the plaintiff, Pemberton for the defendant.

COTTEREL *against* MATTHEWS.

In an action for words where the first words are laid positively, the last words shall be taken positively also; although they come under a *cumque*. 2 Lev. 193. 2 Show. 17, 294, 413. 2 Jo. 197. 4 Bac. Ab. 512.

Case, *quare cum* the plaintiff was a good subject, &c. the defendant April 1, *quarto regni Regis nunc* falsely and maliciously said to the plaintiff, *Thou art a perjured knave. Cumque etiam postea Apr.* 2, he said, *Thou art a cheating rogue, and a perjured knave, and hast cheated all men that ever dealt with thee.* After verdict for the plaintiff, upon issue *not guilty* and entire damages, it was moved in arrest of judgment by Lutwyche, that the last words are not laid affirmatively and positively, but by way of recital, with a *cumq;* he said these words, and he cited several cases, where in trespass, battery, &c. when alledged *cum* the defendant did such a trespass, battery, &c. that after a verdict

the judgment had been stayed: whereto it was answered, and at another day resolved by the Court, that this being an action on the case, and the first words being laid positively, the last words shall be taken positively also, and the *cumq; etiam* taken for *porro*, or *moreover;* and so they are often in dictionaries; and a case was cited in B. R. which is entered. Mich. 28 Car. 2, B. R. Rot. 123. 2 Lev. 193, between *Mors and Thatcher*, where in such a case in an action for words, and the last words laid as here, viz. *cumq; etiam* he said, &c. they were on divers motions there so taken for *porro;* and divers classick authors were cited for that purpose. Whereupon the plaintiff in that case had judgment. And of **[339]** that opinion on the second motion were the whole Court, viz. Treby Chief Just. Nevile, Powell and Rokesby in this case, and gave judgment for the plaintiff. Levinz of counsel for the plaintiff.

CARTER *against* MADGWICK.

[See *Boddington* v. *Robinson*, 1875, L. R. 10 Ex. 273.]

Indenture of bargain and sale to one and his heirs in the premisses. *Habendum* to the bargainee in tail after the death of the bargainor. The indenture shall enure upon the premisses, and shall pass the estate to the vendee directly by the premisses. 14 Viner Ab. 149. Co. Lit. 21 a. Note 2, 183, 299.

Ejectment, and upon *not guilty* and special verdict, the case was; Parker seised in fee 18 Decemb. 2 Jac. by indenture between him and John Bennet his grandson, the lessor, in consideration of affection and 5s. granted, bargained and sold to the lessor and his heirs the tenements in question, *habendum* immediately after his death to the lessor and the heirs of his body, with divers remainders over; which indenture was inrolled within six months; and the said Parker the same day by another indenture also enrolled, upon the like consideration, granted, bargained and sold to the lessor and his heirs other lands, *habendum* immediately after his death to the lessor and the heirs males of his body, with divers other remainders over; after which the said Parker enjoyed all the lands in both the indentures his whole life, without interruption, and died; after whose death the mother of the lessor, being the daughter and heir of Parker, entered; upon whom the lessor entered, and made the lease to the plaintiff: and upon the first argument at the Bar in Trin. term last, and consideration had of the books, Co. Lit. 158. Hob. 171. Mo. pl. 187. Cro. Eliz. 254. It was adjudged by the whole Court, viz. Treby, Nevile, Powell and Rokesby, that although the *habendum* of a future freehold be void, yet the grant in the premises being expresly to him and his heirs, the indenture shall enure upon the premisses, and shall pass the estate to the vendee directly by the premisses, and the continuance of the possession by the grantor for his whole life afterwards was tortious, and shall not alter the case; although perhaps he thought and intended that nothing should pass 'till after his death: *for his intent could not alter the law, and make a future freehold good, and a present freehold void.* Levinz for the plaintiff.

[340] MICHAELMAS, 3 JAMES II.

DASHWOOD *against* FOLKS.

Declaration in debt upon a writing obligatory.

Middlesex, to wit.—Simon Folkes, late of Greys-Inn, in the county aforesaid, Esquire, otherwise called Simon Folkes, of Greyes-Inn, in the county of Middlesex, Esquire, was summoned to answer Samuel Dashwood, gentleman, of a plea that he render to him one hundred pounds which he owes to him, and unjustly detains from him, &c. And whereupon the said Samuel by Thomas Cantrell his attorney saith, that whereas the said Simon, upon the 23rd day of May, in the first year of the reign of the lord the now King and the lady the now Queen, at Westminster, by his certain writing obligatory granted himself to be holden to the said Samuel in the said one hundred pounds, to be paid to the said Samuel when thereto he should be requested, nevertheless the said Simon although often requested the said one hundred pounds to the said

Samuel hath not as yet paid, but the same to him to pay hitherto hath refused and still doth refuse, whereupon he saith that he is prejudiced, and hath sustained damage to the value of ten pounds, and therefore he brings his suit, &c. And produces here in Court the writing aforesaid, which testifies the debt aforesaid, in the form aforesaid, the date of which is the day and year aforesaid, &c.

And the said Simon in his proper person cometh and saith that the Court of the lord the now King and the lady the now Queen here ought not to have cognizance of the plea aforesaid, because he saith that he the said Simon and one Thomas Gooding, Esquire, are, and at the day of the suing forth of the original writ of the said Samuel, and long before were Clerk of the Treasury and Warrants, and Keeper of all the Writs and Records of the lord the now King and the lady the now Queen, in the Court of the said lord the King and the said lady the Queen, before the King and Queen themselves; [except the making up of records for Nisi Prius in the said county of Middlesex, and transcripts and certificates upon writs of error, and receipts and files of queriturs and attachments in the same Court, and the keeping of records of attainder] and a minister of the said Court, and that he the said Simon together with the said Thomas **[341]** continually hath the care and custody of the said Treasury, warrants, writs and records in the said Court of the said lord the King and the said lady the Queen, before the King and Queen themselves, [except as before excepted] by reason whereof the continual attendance of the said Simon in the said Court of the lord the now King and of the lady the now Queen, before the said King and Queen themselves, for the benefit and advantage of the said lord the King and the said lady the Queen and of their liege subjects is required; and the said Simon according to the duty of his said office is bound to continual attendance in the said Court of the said lord the now King and of the said lady the now Queen, before the said King and Queen themselves. And the said Simon further saith, that according to the liberties and privileges of the said Court of the said lord the now King and of the said lady the now Queen, before the said King and Queen themselves and their predecessors, for such clerks of the Treasury and warrants, and for such keepers of the records and writs, and for the other officers, clerks, and ministers of the said Court, from the time whereof the memory of man is not to the contrary, used and approved of in the same, such clerk of the Treasury and warrants and keeper of the writs and records in the said Court of the said lord the now King and of the said lady the now Queen, before the said King and Queen themselves, or any officer, clerk, or minister of the said Court, upon any pleas or complaints [pleas of freehold, felony and appeal only excepted] ought not, nor for the whole time aforesaid have been accustomed to be drawn or compelled against their will to answer before any justices of the said lord the now King and of the said lady the now Queen, or of their predecessors, or other Judges Secular whatsoever, except only in the said Court of the said lord the now King and of the said lady the now Queen, before the said lord the King and the said lady the Queen, and their predecessors. And the said Simon further saith that he against his will, and against the said liberties and privileges of the said Court of the said lord the King and the said lady the Queen, before the said King and Queen themselves, in the manner and form aforesaid by the said Samuel is impleaded, and this he is ready to verify; wherefore he doth not apprehend that the Court of the lord the King and of the lady the Queen of the Bench here will or ought to take any further cognizance of the plea aforesaid against the said Simon, &c.

And the said Samuel saith, that the said Simon ought not to be admitted to say that the Court of the lord the now King and of the lady the now Queen here ought not to have cognizance of the plea aforesaid, because by protesting that the said Simon, on the day of the suing forth of the original writ aforesaid of the said **[342]** Samuel, and long before did not attend, and now doth not attend the said office of clerk of the Treasury and warrants, and keeper of the writs and records in the said Court of the said lord the now King and the said lady the now Queen, before the King and Queen themselves, but for the whole time aforesaid hath entirely neglected to attend to the said office; for plea the said Samuel saith that after suing forth of the original writ of the said Samuel, to wit, at Westminster in the county of Middlesex, a certain writ of the lord the now King and of the lady the now Queen of *capias* of and in the plea aforesaid, issued against the said Simon to the then Sheriff of Middlesex

directed, by which writ the said then sheriff was commanded that he should take the said Simon if, &c. and safely, &c. so that he should have his body here, to wit, from the day of Easter last past in fifteen days to answer to the said Samuel of a plea wherefore with force and arms at Westminster he broke the close of the said Samuel, and other wrongs, &c. to the great damage, &c. and against the peace, &c. and also of the said plea of debt upon the demand of one hundred pounds, at which day here came one John Pye, of Furnivals-Inn, London, gent. and one Thomas Folkes, of Bury St. Edmund, in the county of Suffolk, gent. in their proper persons before Henry Pollexfen, Knight, and his companions, justices of the Bench here, and at the instance of the said Simon acknowledged, and each of them acknowledged that he was indebted to the said Samuel in two hundred pounds, which sum of two hundred pounds they the said John and Thomas for themselves and their heirs willed and granted of the lands and chattels of them and each of them should be made, and to the use and behoof of the said Samuel should be levied, under this condition, that if it should happen that judgment in the Court here in the said plea of debt for the said Samuel against the said Simon should be given, then that the said Simon the said debt of one hundred pounds, and also all damages which to the said Samuel against the said Simon by occasion of the detention of the said debt in the said Court here in the said plea of debt should be adjudged, should satisfy or render his body in execution of such judgment to the prison of the Fleet, as by the record thereof in the said Court remaining more fully appears, whereupon because the said Simon by reason of the premisses hath acknowledged the jurisdiction of the Court here of the plea aforesaid, the said Samuel prays judgment if the said Simon ought to be admitted to **[343]** say that the Court of the lord the now King and of the lady the now Queen here ought not to have cognizance of the plea aforesaid, &c.

And the said Simon saith that the said plea of the said Samuel above by replying pleaded, and the matter in the same contained, are not sufficient in law to preclude the said Simon from saying that the Court of the lord the now King and of the lady the now Queen ought not to have cognizance of the plea aforesaid, and that he the said Simon to the said plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land to answer in any manner, and this he is ready to verify; wherefore for want of a sufficient replication of the said Samuel in this behalf, the said Simon therefore prays that the liberties and privileges aforesaid be allowed to him, and that he from the Court of the said lord the now King and of the said lady the now Queen here in this behalf may be dismissed and discharged, &c.

And the said Samuel because that he above hath pleaded sufficient matter in law to preclude the said Simon from saying that the Court of the said lord the now King and of the said lady the now Queen here, ought not to have cognizance of the plea aforesaid, as before prays judgment if the said Simon ought to be admitted to say that the Court of the lord the now King and of the lady the now Queen here ought not to have cognizance of the plea aforesaid, &c. And because the justices, &c.

DASHWOOD *against* FOLKS.

Privilege may be pleaded after bail put in. *Post.* 398. 2 Salk. 544. Com. Dig. Abatement, D. 9.

Debt on obligation. The defendant pleads privilege of the King's Bench, as *custos brevium* of that Court. The plaintiff replies, that thereto he ought not to be admitted, because upon the return of the *capias* the defendant had put in special bail, viz. A. and B. Whereupon the plaintiff demurred: and now it was argued, that by putting in of special bail he had submitted to the jurisdiction of the Court, as if he had imparled. But it was resolved by the whole Court, that the putting in of bail is no submitting to the jurisdiction of the Court, whether it be general or special bail; for until the bail be put in, he is not **[344]** in Court to plead any thing, nor is the plaintiff obliged to declare against him; wherefore his plea of privilege was allowed.

NICHOLAS *against* CHAPMAN.

S. C. Post. 361.

Release of all demands generally upon an award refers to the time of the submission only.

Debt on obligation dated May 5, 1690, conditioned to perform the award of A. and B. *ita quod* it was made &c. before September 20 following. The defendant pleads, that the arbitrators in fact made an award the 19th of (1) December, that the defendant should pay to the plaintiff 10l. at or upon the first of November following; and that then the parties should release the one to the other all demands; and that the defendant after the submission, viz. 1 Aug. did such a trespass to the plaintiff. The plaintiff replies and sets forth the award, and assigns a breach in non-payment of the 10l. to which the defendant demurs: and now it was argued by Pemberton, that the award was void; for that nothing was awarded to the defendant but only the release, and that is void, being to be made the first of November, which is after the submission, and will release not only the trespass committed after the submission, but also the bond of submission. To which it was answered for the plaintiff, and adjudged by the Court, that the award was good; for 1st. It is pleaded to be made *super præmissis*, and a release of all demands 'till the time of the submission is a good performance of the award; for although the release is to be made on the first of November, it is not to release all demands 'till the first of November, but only all demands 'till May 5, when the submission was, which is all that is to be intended by this release; otherwise it would be in express words that it should be of all demands 'till the first of November, Hutt. 29, *Allaboyer* against *Clifford*, & Mich. 26 Car. 2, C. B. *sed intrat.* Pasch. 36. Rot. 512, where it was so held by the whole Court as to this point; but there were other exceptions taken, yet judgment was given for the plaintiff. And Roll. 1 Abr. *nu.* 1, 2, 3, page 260, was cited accordingly. And upon that judgment error was brought in B. R. and error assigned that the **[345]** sheriff had not returned any pledges *de prosequendo*. But upon motion here in Trinity term 5 W. & M. the sheriff was permitted to amend the return, and if the plaintiff would not proceed further upon the writ of error, it was ruled he should have costs for the amendment; but if he proceeded further in the writ of error, he should have no costs for the amendment. Levinz for the plaintiff in the original action, and also in the motion in this Court.

IN B. R.

CARTER *against* CALTHORPE.

S. C. 4 Mod. 152.

Adhuc in the declaration refers to the time of the plaint. *Ante* 246.

Error of a judgment in Hull-Court, where the case appeared on the record to be this. The plaint was entered there the 15th of December, 2 W. & M. and process was returned at the next Court, held Jan. 28, at which Court the plaintiff declares, that the defendant erected an edifice there, whereby the lights in an ancient messuage of the plaintiff were *obstupat' & obstruct'* until the levying of the plaint, *et adhuc existunt.* The defendant there pleads *not guilty*, and the cause continued here 'till May 7, and then it was removed by *hab' corp'* and *certiorari* into B. R. and thereupon all further proceedings in that Court ceased. But afterwards it is there entered, viz. *postea ad Cur' villæ præd' tent' coram majore, &c.* (not saying at what day) *venit* the plaintiff, and brought a *procedendo*, and prayed it to be allowed, which to him was granted. Wherefore at the plaintiff's petition *præcept' est per majorem, &c. ad eandem Cur' ballivis* to return a jury; and thereupon a trial was had for the plaintiff generally, and 40s. damages, and 2d. costs, and judgment there entered for the plaintiff. On which error was brought in B. R. and assigned, that it appears by the record that the action

(1) September.

commenced the 15th of December, when the plaint was levied, and the declaration was not 'till Jan. 28, and then he declares of the continuance of a nuisance *adhuc*, and so declares for damages since the suit commenced, and so are they given by the jury (*i.e.* generally) and so for a longer time than they ought to have done. And at first Holt Ch. Justice seemed to incline to this opinion. But Dolben and Eyre were always contrary, who held that the *adhuc* in the declaration refers to the time in the plaint, for the declaration refers to the plaint, and the declaration and the plaint as to that **[346]** purpose are all one, and like the day of Nisi Prius, and the day in Bank. And the case of *Hent* against *Burton*, Mich. 1 Jac. C. B. Rot. 42, was cited; where in case for a nuisance, as here, and the plaintiff there declares as here, *adhuc obscurat' existit*, and after verdict it was moved in arrest of judgment, and after divers motions ruled to be good. *But* thereto the Ch. Justice answered, that it does not appear upon the record that there was a writ brought at one time, and the count at another time, as here it so appears, and perhaps there was no original sued at all. Whereto it was replied, that that could not be intended, for they always there (*i.e. in C. B.*) proceed upon an original, which is also cited in the count, viz. such a person *summonit'* or *attachiat' fuit ad respondend'*, &c. which supposes that the defendant has been summoned or attached before he comes into Court, and yet all the precedents there are *adhuc debet, adhuc detinet, nondum solvit*, &c. and for authorities in point were cited Co. Ent. 246, 247, in *error* on *adhuc contradicit;* and there, though it does appear that the writ was brought 15 May, 30 Eliz. and the count is not 'till Trin. 31 Eliz. the judgment was affirmed. And *ibid.* 290, in Norwich-Court, a count 18 Septemb. on a plaint levied 13 Septemb. Rast. Entr. 350, the like upon error of a judgment in the Tower-Court; and 1 Saund. 87, 97, in Bristol-Court, a count 20 Jun. on a plaint levied 18 Mar. and judgment affirmed. Co. Entr. 11 b. and 13 a. in case for stopping his way, whereby *adtunc & adhuc* he lost his way. Co. Entr. 14, 15, *Holland* against *Lovell*, in case for disturbing his foldage, although in the writ the disturbance is laid *adhuc*, and in the count he lays it *usq; impetration' brevis & adhuc perdidit*, yet a verdict and entire damages was for the plaintiff. Whereupon the whole Court now inclined for the defendant in the writ of error, *but adjourned it. Note*, It does not appear at what day the Court was held when the *procedendo* was brought and allowed, and the award of the *venire facias* was *ad istum Curiam;* also the *venire facias* was awarded by the mayor, &c. and says not *per Cur'*, nor when the Court was held: but of these matters no notice was taken. Levinz of counsel for the defendant in the writ of error.

[347] HILARY TERM, IN THE FIFTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

BEARECROFT *against* THE HUNDREDS OF BURNHAM AND STONE, IN THE COUNTY OF BUCKS, IN THE EXCHEQUER.

Amendment after issue join'd and trial ready at the Bar. *Ante* 345. *Post.* 361. 1 Term Rep. 782. 6 Term Rep. 543. *Ante* 320, 328.

Bearecroft being Receiver-General of Taxes for the county of Worcester sent towards London by the Worcester-carrier 4000l. and sent divers servants with the waggon to guard it. The waggon was robbed *in diversis hundredis* of Burnham and Stone; for which Bearecroft brought his action against the hundreds, and declares of an assault and robbery done to himself, he being then at Worcester 50 miles from the place where the robbery was committed, and declared that he made oath that he did not know any of the persons; and the trial being ready to be at Bar the jury appeared at the day, but for other business it was adjourned to another day, and before the day to which the adjournment was, the mistake in the declaration being espied, the Court was moved to amend the mistake, and to declare of a robbery on the servants, and of oath made by the servants who had also made oaths of the robbery, &c. And upon great debate and hearing counsel on both sides at several days, and view of two precedents, the one *inter Chisly and Becket*, in B. R. *intrat'* Hill. 2 W. & M. Rot. 432, in an action for false return of a member to Parliament on the stat. of H. 6,

where the plaintiff declared on **[348]** a custom of Bedford to elect *per majorem, ballivos & burgenses.* And the issue was joined, and brought to the Assizes to be tried, but there it being discovered, that the custom was to elect *per major' ballio' burgenses & liberos homines,* the plaintiff withdrew the record; and although the issue was entered of record in Court, the plaintiff moved to amend his declaration; and upon great deliberation and hearing of counsel, seeing that the time limited by the statute for bringing the action was elapsed, and so the action lost, if it were not amended, the Court ruled it should be amended, and so it was, notwithstanding the great rasures, obliterations and interlineations it made in the record, as it would also do in this case, the year for bringing the action being now passed, and the Court here, viz. Sir Robert Atkins, Lechmere, Turton and Powell ruled the declaration should be amended, notwithstanding the opposition of the defendant. The other precedent produced was Trin. 16 Car. 2, C. B. where in a *quare impedit,* after issue joined, the replication was amended.

STONE *against* BALE.

Debt on an obligation dated the 20th of October, but first delivered the 20th March, good.

Debt on obligation, and declares, that March 20, 34 Car. 2, the defendant by obligation dated Octob. 10, 33 Car. 2, *sed primo deliberat'* 20 Mar. 34 Car. 2, became bound, &c. The defendant pleads, that upon the said tenth of October, when the obligation bears date, there was no such person *in rerum natura* as the plaintiff. To which the plaintiff demurs: and now upon argument it was adjudged by the whole Court for the plaintiff: they agreed where the plaintiff declares on a date he cannot afterward reply that it was *primo deliberat'* at another day; for that would be a departure, and so are the books to be intended, Co. 2 Rep. 4 b. and 1 H. 6, 1 b. there cited; for *prima facie* every deed is supposed to be made the same day that it bears date. But where the date is mistaken, the party may declare, or in his first plea plead, that by a deed bearing date such a day, but *primo deliberat'* at another day, the party granted, **[349]** or became bound, &c. For God forbid, when a deed is duly made that by negligence or mistake of the clerk in writing the date, the party should lose the whole benefit of the deed, and be without remedy; and so are Dy. 307 a. 315 a. Cro. Eliz. 773, 890. 5 H. 7, 27 a. to be understood upon this difference. Levinz of counsel with the plaintiff.

[350] EASTER TERM, IN THE FIFTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

ELLIOT *against* CHAMBERLAIN.

He keeps a whore in his house suable in the Spiritual Court. Writ of consultation awarded. Cro. Cha. 339. 1 Sid. 248, 433, 1 Jo. 44. 1 Mod. 23. 2 Roll. Ab. 296, 515. *Ante* 119. 2 Salk. 692, 693.

A prohibition was prayed and granted last term to the Ecclesiastical Court on a libel for calling the plaintiff there *rogue* and *rascal,* and saying *that he kept a whore in his house;* whereupon a sentence was there for the plaintiff. From which the defendant there appealed to the Arches; and there the sentence was affirmed and remanded; whereupon he appealed to the delegates, and for non-prosecution there the cause was again remanded. After which he obtained a prohibition here. And now on a motion to discharge the prohibition, it was insisted for the plaintiff in the prohibition, that the words in themselves are only words of heat and scolding; and that therefore the Ecclesiastical Court ought to be prohibited, though it be after sentence. To which it was answered, that whoredom is an ecclesiastical offence and scandal, and punishable by the Ecclesiastical Court only. And the defamation for those words is also only examinable there: and to say, that he *kept a whore in his house* shall not be taken as if he did not know that she was a whore, but shall be taken according to common intendment, *that he kept a whore in his house, as a whore;*

especially after sentence: and so held the Court, and granted a consultation. Levinz for the defendant in the prohibition.

[351] Sir George Hutchin's Case.

King's Serjeant by accepting of a Judge's place, loses his place of King's Serjeant, not of a serjeant.

Note, He having been the King's Serjeant, and after made one of the commissioners for the custody of the Great Seal, and after discharged of that employment, insisted, that his right of King's Serjeant remained not extinct by having been one of the Keepers of the Great Seal, being collateral to the coif, no more than a serjeant's being made a Judge, though he be after degraded from his place of a Judge, extinguishes his place of a serjeant. For determination whereof the Lord Keeper Sommers convened the Judges. And there it was resolved by all, that he being one of the keepers had extinguished his place of King's Serjeant, as acceptance of a Judge's place extinguishes his place of King's Serjeant, as had been many times resolved before; but neither acceptance of a place of keeper or Judge extinguishes his place of a serjeant. Whereupon he was forced to get a new patent to be King's Serjeant.

Sands qui tam, &c. *against* Sir Josiah Child, Franklin and Leach.

S. C. 4 Mod. 176. 1 Salk. 31. 1 Danvers 6, pl. 9.

Case on the statutes for suing in the Admiralty, for a matter done upon land. 6 Mod. 13. 1 Ventris 47. 1 Mod. 18. 1 Sid. 444. 2 Keble 567, 604. 2 Lev. 27. *Ante* 258. 1 Salk. 10. *Post*, 362. 2 Salk. 440. 5 Mod. 340, 341. 1 Sid. 320. Show. 29. 2 Saunders 260. 2 Bulst. 323. Rastall, 23 b.

Case on the statutes 13 R. 2, c. 5. 15 R. 2, c. 3, and 2 H. 4, c. 11, for suing in the Admiralty for a matter done on the land, and declares that Dec. 13, 34 Car. 2, the plaintiff was about to go from the port of London with the ship named The Commerce of London, being in his possession, loaden with merchandizes, partly his own, and partly of divers other merchants, to merchandize for them, being to have of the others a fifth part of the profits; and that the said 13th of December the defendants prosecuted a suit in the Admiralty for stay of the said ship, till security given that they should not go to traffick with infidels within the limits of the charter of the East-India Company; and Decemb. 14, the defendants procured the said ship to be arrested by process of the Admiralty at Purfleet in Essex, and there detained her till Apr. 1, 36 Car. 2, whereby the plaintiff lost the profit of his voyage. The **[352]** defendants plead in abatement, which was over-ruled, and then they plead *not guilty;* and on trial of the issue Franklin was found *not guilty*. And as to Child and Leach a special verdict found the charter of the East-India Company, 3 Apr. 13 Car. 2, whereby they are incorporated, and have the sole trade to the East-Indies granted to them with a prohibition therein to all others from trading with the infidels there, under the penalty of forfeiture of the ship and goods; and that the plaintiff and others, merchants, had fitted out the ship Commerce with goods to go to the East-Indies, to traffick with infidels within the limits of the East-India Company; whereupon Child, governor of the company, and Leach their solicitor, petitioned the King in Council for stay of the said ship; whereupon there issued an Order of Council to the Admiralty to stay it by the process of that Court, on which the Admiralty-process did issue accordingly, and the ship was thereby stayed, and voyage lost, *prout, &c.* and that all this was done by the defendants as agents of the said company, and they as agents paid all the fees of the prosecution: and if *guilty*, damages for the plaintiff *in duplo* 1500l. and costs 53s. 4d. And thereupon after divers arguments in C. B. judgment was there given for the plaintiff, that he should recover the 1500l. and the 53s. 4d. costs *in duplo*, and also costs *de incremento* 167l. *in duplo* 334l. *in toto* 1840l. and 50l. to the King: and that the defendants *capiantur*, and the plaintiff in *miseri-*

cordia as to Franklin. Whereupon the defendants immediately brought their writ of error in B. R. where all the matters which had been before argued in C. B. were again several times argued in B. R. viz. 1. That this whole affair being transacted on behalf of the company, the action ought to have been brought against the company, and not against the defendants their servants. But all this was over-ruled by both the Courts; for 1. This is not like the case in Godbolt 383, where one sued in the Admiralty for another by a warrant of attorney, as his agent; for here it is not found that they had any warrant of attorney, and they must have done this on their own heads. 2. If it had been done by warrant of attorney from the company, yet that would not excuse the matter; *for the warrant of no man, not even of the King himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact.* **[353]** 2. The finding of the company's charter is not material; for admitting their charter to be legal (which was not now debated) yet it would not excuse them for suing in the Admiralty against the law and the statutes; but if any person shall invade their charter, their remedy is by actions in the Courts of Common Law. But the validity of their charter was neither opposed nor defended either in this Court, or in the Common Pleas. The third question made in this Court, and also in C. B. was, if this matter be a suit in the Admiralty within the statutes, or not? For, for the defendants it was insisted, that it was not a suit there: 1. For that there are no parties plaintiffs and defendants, but only a process to stay the ship. 2. That this process was sued by the King's proctor, and by the command of the King himself in Council, who has power to stay ships, and to grant embargoes, and that this is no more than an embargo on this ship. 3. That this is only a prohibition to traffick with infidels, which the King may well do, they being perpetual enemies, 2 Cro. *Michelborn's case*, and Co. Rep. 7, f. 17 a. But to this it was answered for the plaintiff, 1. That suits in the Admiralty are oftentimes against the ship itself; and so it was in this case, and yet it is a suit, and Child and Leach are the prosecutors in the suit, and Sands is the party grieved; and the stat. 2 H. 4 gives an action and double damages against the prosecutor for the party grieved, so that this is a suit within the words of the statute, and such an one as the statute intended to remedy. 2. Although the suit in the Admiralty be in the name of the King's proctor, and by command of the King himself, yet all this is done by the procurement and prosecution of Child and Leach; and they, as prosecutors, paid the fees, &c. And 3. It is very true that the King has the power to grant embargoes in time of danger for security of the realm, Mo. fol. 892, and in point of State; but the matter here is not such, but only a procurement to stay a ship upon a private and particular account, that the ship should not go to traffick within the limits of the East-India Company, and not in case of dangers from foreign princes, or for injuries done by them to the King's subjects. And if the plaintiffs do any thing against the privilege of their patent, they have thereof a remedy by prohibition or action at the common law; and they ought not to sue in the Admiralty for things done upon the land, as are the patent, and **[354]** the provision and the furnishing of the ship in this case. 3. As to prohibiting traffick with infidels, it is only the saying of my Lord Coke in both the books cited; and if no commerce should be with infidels, they would never be converted: and it is a disparagement to the Christian religion to think that they should rather be converted (*i.e.* perverted) by infidels, than that infidels should be converted by them. But that argument appears to be only a pretence in this case; for the restraint is only as to infidels within the limits of the East-India Company, so that they are at liberty to traffick with all other infidels throughout the world. A fourth matter on which the defendants insisted was, that Sands having partners in the goods, he could not sue alone, but that all the others ought to join; and that for two reasons: 1. The damage and loss of the voyage is as well to his partners as to himself. 2. If they sue severally, then the King shall have several ten pounds; whereas the statute gives only one 10*l.* for an offence. Whereto it was answered for the plaintiff; 1. That the ship which is the principal was in the possession of Sands only, and so was the property of it also for any thing that appears in the verdict; and the process is only against the ship; and although divers other merchants had goods in the ship, yet it does not appear that they were part-owners therein, but that each of them had a several property in

the several goods, and not a joint-interest; and some part of the goods appears to be the several goods of Sands, and he was to have an advantage from the traffick of all the goods of the others, viz. the fourth part of the profits. And suppose the interest to be joint, yet upon the plea of *not guilty*, Sands shall recover alone for his part. And if the defendants would have had advantage thereof, they ought to have pleaded it in abatement. And as to the second objection upon this point it was answered, that the King can have only one fine in this action; and if in another action by another person (supposing the King ought not to have but one fine for the whole) if another fine be set, the defendant may shew this fine in excuse thereof. But the counsel argued (to which the Court said nothing) that as the damage is several, so are the offences several; and upon each several suit by each several person the King shall have a several fine, as Dy. 351 a. b. where the tenant makes a fraudulent deed to deceive the lords or creditors, each lord shall have the value of the **[355]** beasts, although he shall have but one for his heriot; and so upon the statute Phil. & Mar. for driving distresses above three miles, one takes the goods of divers persons by distress, and drives them above three miles, he shall lose 5l. to each of those divers persons, although the distress was but one, and taken at one time; and for an authority in the point that each party grieved may sue only by himself, was cited Dy. 159, 160, where two are sued in the Admiralty, the one alone may have an action for it; and *Swanton and Gillhill's case* there cited: and it would be mischievous if it were otherwise; for perhaps the others will not join, or will release, &c. The last matter moved was, that as well the damages as the costs, and also the costs *de incremento* were double. But thereof the Court made no doubt, upon consideration had of 4 Inst. 138, and Co. 10 Rep. 116 a. being a case upon these very statutes. Nor was there much doubt made upon any of the matters moved, except only on that question, whether the matter was a suit in the Admiralty? Whereof Holt Ch. Justice at first doubted; but afterwards in Mich. 5 W. & M. the judgment in C. B. was affirmed by the whole Court. Levinz of counsel for Sands in both the Courts.

SHAFTO *against* POWEL IN THE EXCHEQUER.

A decree in equity obliges an executor in equal degree at least with a judgment at common law. 1 Vernon 143. 2 Vernon 37, 88. 6 Term Rep. 385.

A *scire facias* against the defendant executor of J. S. upon a decree in the Exchequer against J. S. for money. The defendant pleads, that the testator was indebted to him upon an obligation, and that he had paid himself before the *scire facias* brought, or any notice of the decree. This case having been heard before, it was ruled by Lechmere and Turton Barons, against the opinion of Baron Powell, that it was no bar: and now upon a rehearing before all the Barons, Atkins Chief-Baron agreed with Lechmere and Turton, against Powell, that it was no bar; and that a decree in equity obliges an executor in equal degree, at least, with a judgment at common law.

[356] TRINITY, 4 WILLIAM & MARY.

PANTON *against* ISHAM.

Declaration upon the custom of the realm for negligently keeping fire, whereby, &c. 1 Mallory 193.

Middlesex, to wit.—Justinian Isham, late of Lampert, in the county of Northampton, Baronet, was attached to answer Dorothea Panton, widow, of a plea that whereas according to the law and custom of the kingdom of England of the lord the King and of the lady the Queen hitherto used and approved of, every man and woman of the said kingdom of England is bound safely and securely to keep their fire by day and by night, lest through default of good keeping of such fire, any damage should in any wise happen to any person of the said kingdom; wherefore the said Justinian his fire at the parish of St. Martin in the Fields, in the county of Middlesex, in so negligent and careless a manner kept, that for default of due care of the said fire, certain

houses, edifices and buildings of the said Dorothea there, of the value of one thousand pounds, were burnt and destroyed, to the great damage of the said Dorothea, and against the custom aforesaid, &c. And whereupon the said Dorothea by Thomas Goodall her attorney complains, that whereas according to the custom of the kingdom of England of the lord the King and the lady the Queen hitherto used and approved of, every man and woman of the said kingdom of England is bound safely and securely to keep their fire by day and by night, lest through default of due care of such fire any damage should in any wise happen to any person of the said kingdom, nevertheless the said Justinian upon the 6th day of May, in the 1st year of the reign of the lord the now King and of the lady the now Queen of England, &c. his fire at the said parish of St. Martin in the Fields in so negligent and careless a manner kept, that for default of good keeping of the said fire certain houses, edifices and buildings, to wit, six stables, six hay-lofts and three lodging rooms of the said Dorothea there of the value, &c. were burnt and destroyed, to the great damage, &c. and against the custom, &c. whereupon she saith that he is prejudiced, and hath sustained damage to the value of 1000l. and therefore she brings her suit, &c.

And the said Justinian by Charles Draper his attorney comes and defends the force and injury when, &c. and says that he is not guilty of the premisses above charged upon him, as the said Dorothea above complains against him, and of this he puts himself upon the country; and the said Dorothea doth the like. Therefore the sheriff is commanded, &c. that he cause to come here on **[357]** the octave of the Holy Trinity twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. Afterwards at the day and place within contained, before George Treby, Knight, Chief Justice of the lord the King and the lady the Queen of the Bench here, Adam Baynes, gent. being associated to him according to the form of the statute, &c. comes the within Dorothea Panton, widow, by the attorney within mentioned, and the within written Justinian Isham, Baronet, although solemnly called, comes not but makes default; therefore let the jury whereof mention is within made be taken against him by default; and the jurors of that jury being called come, who being elected, tried and sworn to speak the truth of the matters within contained, say upon their oath aforesaid, "that before the said time in which it is supposed that the said six stables, six hay-lofts, and three lodging rooms of the said Dorothea within mentioned in the within written declaration were burnt and destroyed, to wit, upon the first day of April, in the within written first year of the reign of the said lord the now King and of the said lady the now Queen, the said Dorothea Panton was seized in her demesne as of fee, of and in the said six stables, six hay-lofts, and three lodging rooms, with the appurtenances, situate and being in the within written parish of St. Martin in the Fields, in the county of Middlesex aforesaid, and so being seized thereof, she the said Dorothea afterwards and before the said time in which, &c. to wit, upon the said 1st day of April, in the 1st year aforesaid, demised to the said Justinian Isham, Baronet, the now defendant, one stable and one hay-loft aforesaid, with the appurtenances, to hold to the said Justinian Isham and his assigns, from the said 1st day of April, in the 1st year aforesaid, for one week from thence next ensuing, and so from week to week, as long as the said Dorothea and Justinian should will for the rent of eight shillings and eight pence of the lawful money of England for every week, so long as the said Justinian should have and hold the said stable and hay-loft with the appurtenances by virtue of the demise aforesaid. And that on the said 1st day of April, in the 1st year aforesaid, the said Dorothea demised five stables, five hay-lofts, and three lodging rooms, with the appurtenances, the residue of the tenements and premisses aforesaid, to five other persons for different terms and times as yet to come. And that on the said 1st day of April, in the 1st year aforesaid, the said Justinian Isham, Baronet, into the said one stable and one hay-loft with the appurtenances to him as aforesaid demised, entered and was thereof possessed; and on the said 1st day of April, in the 1st year aforesaid, the five other persons aforesaid into the five stables, five hay-lofts, and three lodging rooms with the **[358]** appurtenances as aforesaid demised, respectively entered and were thereof possessed. And the said Justinian of the said one stable and one hay-loft with the appurtenances so as aforesaid being possessed, by virtue of the demise aforesaid, as tenant to the said Dorothea, and the said five other persons of the residue of

the tenements aforesaid with the appurtenances so as aforesaid being possessed, by virtue of the demise aforesaid to them made as aforesaid, as tenants also to the said Dorothea, [the reversion of all and singular the premisses with the appurtenances belonging to the said Dorothea] upon the within written 6th day of May, in the within written 1st year of the reign of the lord the now King and of the lady the now Queen, a certain fire through the negligence of the said Justinian in the stable aforesaid to the said Justinian so as aforesaid demised, and then being in his possession by virtue of the demise aforesaid, happened to begin, and on the said 6th day of May, in the 1st year aforesaid, as well the stable and hay-loft aforesaid with the appurtenances demised to and being in the possession of the said Justinian, as the said five stables, five haylofts, and three lodging rooms with the appurtenances aforesaid, to the five other persons as aforesaid demised, and in their respective possessions then in like manner being, did burn down and totally destroy. But whether upon the whole matter by the jury aforesaid, in the form aforesaid found, the said Justinian is guilty of the premisses to him within charged, the jury aforesaid are entirely ignorant, and thereof pray the advice of the justices of the said lord the King and of the said lady the Queen at Westminster. And if upon the whole matter by the jury aforesaid, in the form aforesaid found, it shall appear to the justices of the said lord the King and of the said lady the Queen at Westminster, that the said Justinian is guilty of the premisses within charged against him, then the said jury upon their oath aforesaid say that the said Justinian is guilty of the premisses within charged against him, in the manner and form as the said Dorothea within complains against him. And then they assess the damages of the said Dorothea, by occasion of the burning down and destroying of the said one stable and one hayloft with the appurtenances to the said Justinian as aforesaid demised, besides her expences and costs by her about her suit in that behalf laid out, to fifteen pounds. And they assess the damages of the said Dorothea, by occasion of the burning down and destroying the residue of the premisses and tenements aforesaid with the appurtenances, besides her expences and costs aforesaid, to eighty-five pounds, and for her said expences and costs to twenty shillings. But if upon the whole matter aforesaid, by the jury aforesaid, in the form aforesaid found, it shall appear to the justices of the said lord the King and the said lady the Queen at Westminster aforesaid, that the said Justinian is not guilty of the premisses within charged against him, then the said jury say upon their oath aforesaid, that the said Justinian is not guilty of the premisses within charged against him, as the said Justinian Isham, Baronet, within by pleading hath alledged. But because the Court, &c.

[359] PANTON *against* ISHAM.

S. C. 1 Salk. 19. 1 Danv. 11, pl. 112.

In an action upon the custom of the realm for negligent keeping fire, a writ with *dampn' alicui alio* is as good as *dampn' alicui vicino*. Cro. Ja. 478. Cro. Eliz. 10, 461, 777. 5 Coke 13. 1 Roll. Ab. 1, 2, 454, 458. 2 Roll Ab. 566. 1 Viner Ab. 217.

Case, and declares on the custom of the realm, that every one ought to keep their fire so, that by default thereof no damage should happen to another; and that the defendant so negligently kept his fire, that *six stables*, *six hay-lofts*, and *three lodging-rooms* of the plaintiff were thereby burnt. The defendant pleads *not guilty*, and on a special verdict it was found, that the plaintiff was seised of the stables, &c. and demised one of the stables to the defendant for a week for 8s. and so from week to week at 8s. per week, as long as both parties should please, and demised the other five stables to divers other persons for divers terms yet to come, whereby they were possessed; and being so possessed, the fire, by the defendant's negligence, six weeks afterward begun in the stable demised to the defendant, and burnt the same and all the other stables, &c. And if for the plaintiff, for the plaintiff, &c. Damages 100l. and tax the damages severally, viz. 15l. for the stable demised to the defendant, and 85l. for the others, and costs 20s. And upon several arguments last term and this

term, judgment was given for the plaintiff for the 85l. and for the defendant for the 15l. and they resolved the writ to be good, though it were *alicui alio* (for which no damages should be) and not *vicino*, as was objected. 2dly, That for the stable demised to the defendant himself, no action lay; for the demise to him could be no more than a term for three weeks, and for the residue he was tenant at will, against whom no action lay for negligent waste, as 5 Co. 14, *The Countess of Shrewsbury's case.* But 3dly, As to the stables demised to the other, the action well lies, as if they were the stables of strangers, and not of the lessor; for as to them there is no privity between the plaintiff and defendant, but as to them they are as **[360]** nothing, or as to other persons. 4thly, Although the other stables, &c. were in lease to others, who may have an action as to the possession for their losses, yet the lessor may also have an action for the damages to his inheritance, as was formerly adjudged in this Court in the case of *Beddingfield* against *Onslow*, Hill. 36, 37 C. 2. Levinz of counsel for the plaintiff.(1)

HEYWOOD *against* FOSTER.

Damages and costs in a prohibition upon an attachment. 2 Jones 128. Raym. 387. 1 Ventris 348, 350. Cro. Cha. 237, 559. English stat. 8 & 9 Wil. 3, c. 11. Irish: 9 Wil. 3, c. 10.

Attachment upon a prohibition, and declares, that the defendant sued in the Ecclesiastical Court after a prohibition granted, for the profits of the office of register to the Archdeacon of Huntingdon, and judgment by default, and a writ of enquiry issued, and damages and costs taxed. And now it was moved in arrest of judgment by Lutwyche, that no damages and costs are to be given in a prohibition; and although in *Facy and Long's case*, as it is reported in Cro. Cha. damages and costs are given for the contempt in suing after the prohibition, he said he had searched the roll, and that no damages and costs are given: whereto it was said, that perhaps he had mistaken the roll; for there are two cases in Cro. Cha. by the name of *Facy and Long;* the one Mich. 7 Car. 1, B. R. pa. 237, the other Mich. 15 Car. 1, pa. 559, and it is in the case Mich. 15 Car. 1, B. R. where the damages and costs are given: and the same case is reported the same way, not only by Just. Croke, but also by Justice Jones, who was another of the Judges of that Court at the same time. And Hill. 30, 31 Car. 2, B. R. Rot. 488, in a writ of error out of Ireland, damages and costs are given in a prohibition for the contempt in proceeding *post prohibitionem Regiam*, and so in Mich. 19 Car. 2, B. R. Rot. 84, and Co. 2 Inst. 644, and Trin. 27 C. 1, damages were recovered in attachments on prohibitions. But both those last cases in B. R. were adjudged against the plaintiff for default of a venue. And in the case at Bar there was also a default of a venue, which was also moved in arrest, &c. in this case at the Bar. But thereto it was answered, that the imparlance-roll was well. Wherefore afterward in the same term the imparlance-roll was brought into Court, and the plea-roll was amended thereby, and then judgment was **[361]** given for the plaintiff for the damages and costs. After which it was moved, that the imparlance- roll was made since the first motion in arrest, &c. and after the exception taken. Whereupon the Court ordered it to be examined, with intent to punish the attorney for doing it, but not to stay the judgment. Levinz of counsel for the plaintiff.

(1) By the British stat. the 6th Anne, c. 31—and the Irish stat. the 2d Geo. I. c. 5—no action, &c. shall be maintained against any person in whose house or chamber any fire shall accidentally begin; or any recompense or satisfaction be made by such person for any damage occasioned thereby. And by the 2d section—nothing in this Act contained shall extend to any action, covenant or agreement between landlord and tenant.—*Vide* Co. Lit. 57 a. note 1. Mr. Hargrave's Comment upon the British Statute.

NICHOLAS *against* CHAPMAN.

S. C. *ante* 344.

Amendment of the sheriff's return after error brought. 3 Term Rep. 349, 750. 5 Term. Rep. 577.

Debt on obligation for performing an award, and judgment for the plaintiff, and error brought thereon and assigned, that no pledges *de prosequendo* were returned on the back of the writ: after which on motion in C. B. the sheriff was permitted to amend his return, and to endorse pledges, according to Mich. 3 H. 7, pl. 23, and Cro. Cha. 563, *Roe and Lond* against *Devys*. And a rule was produced, where it was so done in a case between *Boynton and Morgan*. But it was ruled by the Court here, that the (1) *plaintiff* should pay costs for the amendment, if the plaintiff in error would not proceed further in his writ of error: but if he proceeded further therein, that then the defendant in the error should not pay any costs.

[362] TRINITY TERM, IN THE FIFTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

WARD AND OTHERS *against* BRAMPSTON.

S. C. 1 Danvers 6, pl. 10.

Two church-wardens join in an action for a false return of a *mandamus*, held good. *Ante* 258, 352, 353. 2 Lev. 27, 238. 1 Ventris 167, 297. 2 Keble 838, 850. 2 Ventris 288, 291. 2 Leon. 12. 1 Lord Raym. 127.

William Wasdale and Henry Bannister brought an action on the case against Dr. Brampston, and declare on a custom of Chersey in Sussex, for the parishioners in Easter week to elect two persons to be church-wardens for the year ensuing; and that the plaintiffs having been elected according to the custom, the defendant being surrogate of the Bishop of Winton refused to admit and swear them into the office: wherefore they brought a *mandamus;* upon which the defendant falsly and maliciously returned a custom for the vicar to elect one of the said church-wardens, and therefore he could not admit both the parties, but was ready to admit one of them, and had offered so to do; *quorum prætextu* they could not take upon them the said office, to their damage 40l. The defendant pleads *not guilty*, and thereupon a verdict was for the plaintiffs; and it was moved in arrest of judgment, that the plaintiffs ought not to join in the action; for the tort or damage to the one is not tort or damage to the other, nor is the office of one the office of the other, and yet they have concluded, that by reason thereof they could not *suscipere officia sua præd.* But after divers arguments made in the foregoing Hill. and Easter-terms, judgment was given for the plaintiff by the whole Court. *For the mandamus and the whole prosecution and charge thereof was joint, and the office is no office of profit, nor is the* **[363]** *action brought for that, but for the unjust return, whereby they were put to the charge of the mandamus.* And note, that afterwards in Trin. or Mich. 8 W. 3, in an action brought by divers inhabitants of Hinly-Chapel in Lancashire against the register of the Bishop of Chester for denying to register a licence of the chapel for a conventicle, according to the stat. 1 W. & M. and making a false return on a *mandamus;* the register being sued for this by four or five of the inhabitants, they all joined in an action on the case for a false return: and after divers arguments in several terms it was adjudged, on a demurrer, that the action well lay by all of them jointly, and this by the whole Court, there being then a new Judge, viz. Powell jun. who at first doubted thereof. Levinz of counsel for the plaintiff in both the actions.

(1) The plaintiff in C. B.

MASTERS *against* MARRIOT.

Defendant sold plaintiff a horse for 8 guineas, and promised plaintiff that if he did not like the horse, and delivered him to one B. that B. should repay the plaintiff the said 8 guineas; and if B. did not repay, defendant would. Court held this was not a collateral contract to pay for the debt of another—but the whole was one entire contract upon the sale. No special request in such case. *Post*, 366.

Assumpsit, and declares, that the defendant sold to the plaintiff a bay gelding for eight guineas, and on the sale agreed, that in consideration the plaintiff had paid the defendant the eight guineas, the defendant promised to the plaintiff, that if he did not like the gelding, and delivered it to Barham to the defendant's use, that Barham should repay the said eight guineas to the plaintiff, and if Barham did not pay it, that the defendant would repay it on request: and that the plaintiff did not like the gelding, but delivered it to Barham, and requested him to pay the eight guineas, which he refused to do upon request; and he declares also upon an *indebit' assump'* for another eight guineas had and received to his use; and that the defendant not regarding the said several promises, *licet sæp' requisit'* had not repaid the said sums, to his damages 30l. And on *non assump'* and verdict for the plaintiff and entire damages, it was moved in arrest, &c. and argued several times, that the promise to repay the eight guineas, if Barham did not do it, was a collateral promise to pay in default of another; and the defendant was not a debtor, but only as a surety in default of Barham; and therefore a special request to the defendant ought to have been laid, and a *sæpius requisit'* is not sufficient, but there should be a notice that Barham had not paid, and a **[364]** special request to the defendant; for the promise by the defendant is, if Barham did not pay it, that he would pay it on request; and the damages being entire on both the promises, the plaintiff cannot have any judgment. But at last it was resolved by the whole Court, that this was not a collateral contract to pay a debt for another, but the whole was one entire contract upon the sale, and is no other in effect but that the plaintiff bought the gelding conditionally, that if he did not like him he should receive back his money, and the defendant received the money upon the same condition; and when the condition is performed by the dislike of the gelding, and the returning it to Barham, the bargain is void and at an end; and the money is in the hands of the defendant as a debtor to the plaintiff, as money received to the plaintiff's use, and Barham is no more than a servant to receive the gelding, and to repay the money; and by the not doing thereof, the defendant, as master, is the debtor. Wherefore judgment was given for the plaintiff, and affirmed in error. Levinz for the plaintiff in the original action.

HONOUR *against* BRADSHAW.

S. C. 3 Keble 151, 166.

A man marries the daughter of the sister of his first wife. Vaughan 206 to 250, 302 to 330. Hobart 181. Nel. Lutw. 342. 2 Jon. 118. Raym. 465. 5 Mod. 168. 2 Lev. 245.

A prohibition was prayed to the Ecclesiastical Court to stay a suit there against the plaintiff here, for that he had married the daughter of his first wife's sister, and the prohibition was granted to the intent to have a declaration thereupon, so that the lawfulness of the marriage might come in debate. See *Man's case*, Mo. pl. 1266. Cro. Eliz. 228. 4 Leon. 16. But I heard nothing further of this case.

[365] IN B. R.

WHARTON *against* LISLE.

S. C. 4 Mod. 183. 2 Danvers 594, pl. 5.

Flax, &c. in a garden, or common field. *Quære* if small tithes. 2 Inst. 640. 1 Roll. Ab. 633. Cro. Cha. 28. Cro. El. 467. Hutton 77, 78. Owen 74. Golds. 149, 150. Palmer 220, 222. 5 Brown P. C. 586. *It is the nature and not the quantity that makes the tithe great or small. Per Lord Hardwicke.* 2 Atkyns 364.

Trover of 20 cart-loads of flax, and on *not guilty* a special verdict found, that the plaintiff was impropriator of the parish church of Thorpe in Essex, and the defendant vicar; and that time out of mind, &c. the parson had had all great tithes, and the vicar all the small tithes; and that in the said parish are 650 acres of arable, and 750 of pasture; and that 26 acres of arable in the common fields there had been for eight years last past sown with flax by several persons, and that before those eight years no flax had been sown in the parish; and that the flax in question was sown by several persons in several parcels upon 26 acres of the arable, and the tithes set forth, &c. And if they are great tithes they find for the plaintiff, and if not, for the defendant. Holt Ch. Just. held them great tithes; and he did not allow any other difference, but that where flax, hemp, or other such things are sown and growing in gardens, or backsides, or orchards, &c. they are small tithes; but when they are sown and growing in the open fields, they are great tithes, be the quantity more or less. But the three other Judges, viz. Dolben, Gregory and Giles Eyre, held the contrary, and cited Lyndewode 192, *that small tithes in England consist of flax, milk, wool, honey, &c.* and Godolph. Repertory 198, 199, that *tobacco, hops, &c.* are in their nature small tithes, and so held the said three Judges; and there is no such quantity in this case as to alter its nature; and the doubt was, if it should be altered by reason of the quantity? wherein they did not agree; for some held, that let the quantity be what it would, yet they are small tithes, although growing in common fields: and though in the case of *Udal and Tindal* in Cro. Cha. 28, and Hutt. 78, it is admitted that the nature should be altered by the quantity, yet Ow. 74. Co. pl. 1277, and Cro. Eliz. 467, in *Beddingfield's case*, that is not admitted; and by the opinion of the said three Judges judgment was given that they are small tithes. Levinz of counsel for the plaintiff.(1)

[366] OLIVERSON *against* WOOD.

Assumpsit for money lent to defendant's use, not saying on his request, ill. 1 Saund. 32, 33. *Ante* 363. 1 Lev. 48, 289. 2 Lev. 198. 1 Keble 927. 2 Keble 10, 126. Com. Dig. Action on Assumpsit, F. 6.

Assumpsit, and declares, that whereas the defendant was indebted to the plaintiff in 20l. for wares sold. *Cumque etiam* in consideration that the plaintiff had sold other goods to the defendant, he promised to pay. *Cumque etiam* the defendant was indebted to the plaintiff in another 20l. for monies by the plaintiff lent to the use of the defendant (but says not, *at his request*) the defendant promised to pay it: after verdict for the plaintiff on *non assump'* and entire damages, it was moved in arrest of judgment, and the judgment stayed for this cause only, that the monies in the last promise were not said lent at the defendant's request; for it may be lent to his use, contrary to his desire. Dy. 272, *Hunt's case.* Where the master promised in consideration that the plaintiff had bailed his servant, to save him harmless, which being laid without a request was ill; but the case there put, of a promise upon the marriage of a daughter was admitted to be good, because for the apparent benefit of the father, it continuing. Also they agreed a case between *Tiere and Langly* lately adjudged in this Court; where the consideration was, that the plaintiff in an action had prosecuted a suit for

(1) By the English Act 11 & 12 W. 3, c. 16, five shillings an acre shall be paid for hemp and flax by way of tithe; but this shall not charge lands exempted by a modus.

the defendant, without saying at his request, and resolved good after two or three motions in arrest, &c. after a verdict, because it is necessarily to be so intended after a verdict; for otherwise it would be maintenance. Levinz for the plaintiff.

[367] OLIVER *against* THOMAS.

Stat. of Lim. pleadable *in assumpsit* by attorney for fees. 1 Saund. 37, 38. 1 Sid. 305. 1 Lev. 31, 48, 110, 143, 191, 273, 287. 2 Saund. 125, 126.

Assumpsit, by an attorney for fees and money expended, and labour and pains in prosecuting divers suits. The defendant pleads the statute 21 Jac. 1, of Limitations. Whereupon the plaintiff demurs: and it was argued for the plaintiff, that this action being by several counts, or declarations, whereof one only was for fees, and the others for money laid out, and labour and pains in the prosecution, the statute was not pleadable to that count which is for fees only, because it arises upon matter of record, viz. his being attorney of record. But by the whole Court, viz. Treby, Nevile, Powell and Rokesby it was held, that the statute is pleadable to the count for fees: for the fees are not of record, and a case was cited where it was so adjudged in this Court within two years before. Whereupon judgment was given for the defendant generally in the case at Bar.

[368] THOMPSON *against* HUNT.

Executor pleads several judgments. Plaintiff replies, and shews lesser sums due on each, and that he had assets *ultra*. Defendant rejoins, no assets *ultra* to satisfy the debts and judgments in the plea. Demurrer *inde*, rejoinder, held good. *Ante* 311. 1 Lut. 450. B. R. H. per A. 215. *Bank of England* v. *Morrice*. 5 Term Rep. 82. *By the British stat.* 4 *&* 5 *Anne, c.* 16. *Irish stat.* 6 *Anne c.* 10, *the plaintiff may be compelled in actions upon bonds to accept the sums in the condition with interest.*

Debt on an obligation against an executor. Defendant pleads several judgments obtained against him on several obligations made by the testator, and that he has not assets *ultra, &c.* The plaintiff replies as to the obligation of 200l. that it was on condition to pay 100l. and so to all the others severally, and that the defendant had assets to pay the plaintiff, and *ultra* to satisfy the said lesser sums, viz. at such a place. The defendant rejoins, that he had not assets *ultra* to satisfy the debts and judgments in his plea. Whereupon the plaintiff specially demurs, because the rejoinder does not answer directly to the replication, but ambiguously. And now it was argued by Pemberton, that the defendant ought to have rejoined only, that he had not assets *ultra* to satisfy the lesser sums, and not to make the penalty in the judgments parcel of the issue: for if he had assets *ultra* the lesser sums, he ought to pay the plaintiff. But it was answered and resolved by the whole Court, that the rejoinder was good; for the penalties are legal and due debts 'till they are satisfied, under which he may defend himself against other actions; for although in equity and conscience the lesser sums are only due, yet perhaps the plaintiffs in them will not accept the lesser sums in satisfaction of the judgments without a suit in equity: and if they would, or offered to accept the lesser sums, and the defendant would not pay them, the plaintiff might have aided himself by another manner of pleading, viz. that the party would and offered to accept the lesser sums, and the defendant would not pay them, but kept the judgments on foot by fraud and covin, and so upon the issue of fraud and covin the plaintiff might give in evidence such matter as would serve him to avoid the penalties; but he cannot aid himself by such a general manner of pleading as this is in the case at Bar. Wherefore judgment was given **[369]** for the defendant by the whole Court, viz. Treby, Nevile, Powell and Rokesby. But then it was prayed for the plaintiff, that he might replead; which was granted him by the Court, on condition that the defendant might also replead in bar, and plead more judgments if he had any to plead; but not otherwise.

[370] MICHAELMAS TERM, IN THE FIFTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

OSMAN *against* SHEAFE.

S. C. 2 Lut. 1205, 1209, 1210. Carth. 307. Nel. Lut. 242, 243, 378, 379.

I give and grant lands to my cousin and his heirs, to hold to him and his heirs, from and after my decease; if I die without a son of my body living at my decease; these words pass the interest when pleaded as a covenant to stand seised. 1 Lev. 59. 2 Lev. 9, 10, 213, 225, 226. *Post* 432, 443. 22 Viner Ab. 243. *Ante* 291. 1 Mod. 175. 1 Ventris 137. Sir Tho. Jo. 105. 2 Wilson 78. Com. Dig. Covenant, G. 2.

In replevin, the defendant makes conusance as bailiff of Daniel Wilmot, for that one Chapman seised of the lands, in which, &c. being gavelkind, granted a rent-charge of 14l. per annum out of the same, payable the 4th of June and the 4th of December to Taylor and his heirs; and that the said rent descended to Waller and her heirs, who Jan. 23, 30 Car. 2, covenanted to stand seised to the use of Sir William Brodman her cousin, and his heirs, if the covenantor died without a son of her body living at the time of her death; and that she died without any son of her body living at the time of her death, whereby the said rent came to Brodman; and that he in 1763 granted it to one Wilmot and his heirs, and that he died, and it descended to Daniel Wilmot and three others his brothers, and for 15l. 15s. the fourth part of the rent for four years and a half, ending the 4th of June, 1687, he makes conusance. The plaintiff demands oyer of the deed to Brodman, and it was entered *in hæc verba, viz. Know ye, that I Mary Waller for the affection I bear to my cousin Sir William Brodman, do give and grant to him and his heirs my rent of* 14l. *per ann. issuing out of, &c. To hold to him and his heirs from and after my decease, if I die without a son of my body living at my decease.* Whereupon the plaintiff demurs: and the only question was, whether this deed should **[371]** inure as a covenant to stand seised? And it was objected for the plaintiff that the deed was void, and can have no operation at all; not by way of use, because the intent appears to have it operate as a grant by the words *give and grant*, and then it cannot enure by way of use. See Co. Litt. 49 a. If the father enfeoffs the son by deed, with letter of attorney to make livery, and no livery is made, it shall not enure by way of use; and by way of grant it cannot operate, because no attornment was had. Also this would be to grant a future freehold or inheritance, reserving a particular estate to himself, which cannot be either by way of use or by the common law, 2 Roll. 789, *Pitfield* v. *Pierce*, where a man gave and granted his lands to his son after his decease; the deed was adjudged to be altogether void. Whereto it was answered for the defendant, that this case differs from *Pitfield and Pierce's case;* for there it is (in the very words of the grant itself) limited to commence after his death; here the grant is to him and his heirs in the premisses, *habend'* to him and his heirs after his death, where the estate is compleat in the premisses to pass a present fee, if any attornment or other execution had been; as was adjudged, Mich. 4 W. & M. in this Court between *Madgwick and Carter*, and that it might also pass by way of future use, to arise out of the estate of Waller *in futuro;* and in the mean time the grantor continued in his old seisin, as Dy. 274 b. to the use of himself and such wife as he should afterwards marry. Trin. 24 Car. 2, B. R. Rot. 703, *Pibus and Mitford's case:* covenant to stand seised to the use of the heirs males of his body, omitting himself, good. 2 Roll. 274, covenant, that when a man does such an act, the covenantor shall stand seised to his use, is good. And as to Co. Lit. 49, that a deed shall not operate by way of use when by the scope of the deed the intent appears to have it operate by the common law: certainly where by the deed it appears, that the intent was that the party should have the estate, it is more worthy consideration how to make his intent good by passing the estate, if by any legal means it may be done, than by considering the manner of passing it, to defeat his intent in the principal, viz. the passing the estate, than in the manner how it shall pass; and so has the law been often taken, as 3 Leon. 16. Tenant in tail makes a feoffment with a letter of attorney to make livery, the deed is enrolled, and afterwards livery is made, and it

was resolved that it should **[372]** pass by the enrolment, and that no discontinuance was by the livery made afterwards, and *Crossing and Scudamore's case*, Pasch. 23 Car. 2, in B. R. Rot. 871. Where a man granted, bargained and sold the land to his son with a clause of warranty, the deed is enrolled, but no money paid, yet it passed by the covenant to stand seised, notwithstanding the enrolment and the warranty: and so 2 Rol. Abr. 786, 787, *Tilb and Poplethwayt*, and Trin. 29 Car. 2, B. R. Rot. 90, *Coltman* against *Senhouse*, where the scope of the deed was of divers other matters, yet by reason of this clause in the end of the deed, *If I die without issue, I do give and grant the lands to J. S. the land in question*, adjudged *a good covenant to stand seised:* and Mich. 29 Car. 2, *Walker* against *Hull*. A man in consideration of marriage gave and granted to his intended wife the lands, and a letter of attorney was in the deed to make livery, and livery was endorsed on the deed, but no proof of livery made, nor any witnesses names subscribed to the livery; yet it was resolved after divers arguments, that this was a good covenant to stand seised; and *Sanders and Savile's case* is there cited, which Justice Rokesby now remembered to have been so adjudged, viz. a man seised of a rent grants it, to which grant another attorns, who was not tenant, and so no attornment; and although the intent appears to pass it by the common law, yet it was adjudged to be a good covenant to stand seised. By which cases it appears, that the Judges in these later times have had more consideration of the substance, viz. the manner of passing it. But it was adjourned. Pemberton for the plaintiff, Levinz for the defendant. And it was afterward adjudged for the conusant, *i.e.* the defendant.

[373] BLISSET *against* CRANWELL AND OTHERS.

S. C. 1 Salk. 226.

A devise to A. and B. and their heirs for ever, and the longer liver of them to be equally divided between them after my wife's death; these words create a tenancy in common. Cro. Eliz. 330, 347, 443, 695. Cro. Cha. 75. 1 And. 194. 1 Bulstr. 113. Lit. Rep. 46. 3 Leon. 19. Hetl. 29. 3 Co. 39. Golds. 182, 185. 3 Mod. 209. 1 Cha. Rep. 64. Co. Lit. 190 b. note 4. 2 Vesey 252. 1 Wilson 165, 341, 3 Brown P. C. 297. 4 Brown P. C. 224. Cowper 352, 660.

In ejectment tried at Kent-Assizes lately upon the evidence the case was such, before Treby Ch. Just. and it was agreed to be made a case for the opinion of the Court. Allen by his will devises the lands in question in these words; *I give and bequeath to my sons Richard and Robert, and their heirs for ever, and the longer liver of them, to be equally divided between them, after my wife's death, all that my messuage, &c.* The wife dies, and Robert devises his part to the lessor, and dies: and the only question was, if Richard and Robert were jontenants, or tenants in common of the inheritance? and in C. B. it was said for the plaintiff, that the last words in wills shall controul the former, as the last will will controul a former will; and although here are words of survivor in the middle of the will, that is no more than the law would have said, if those words had not been in the will; but *equally to be divided* in the end of the will makes a tenancy in common; and if they are not so taken, they can signify nothing, and they cannot be taken as surplusage (as the words of survivor may) for they are no more than the law implies without them; but the words *equally to be divided* have a signification not implied, and therefore ought to be understood as put into the will for some purpose, and that purpose is to make a tenancy in common: and it was said that thus all the words may be taken so as to stand together, viz. that they should be jointenants during the wife's life, and tenants in common after her death; and so the devise of the inheritance to the lessor is good, as is 2 Leon. 68, 69, *Brian* against *Cosins;* a devise of lands to three sons severally of several parcels, *and if they live to twenty one to them and their heirs*, they are several tenants 'till 21, and then they are jointenants. And this case is between children; and it is better for them to have several estates than joint, in respect of their posterity, which was the reason that equally to be divided made a tenancy in common at the first; see Cro. Eliz. 443, *Lewin* against *Dod*, and Sty. 434, *Torrell* against *Frampton*, a devise *to three sons, and their heirs respectively*, makes a tenancy in common. And that the **[374]** last words in

wills shall controul the former; see Plowd. Com. 541 a. Ow. 148. Co. Litt. 122 b. Yelv. 209, 210. The whole Court seemed at first to be all of opinion, that it was a jointenancy of the whole estate, as Treby Chief Justice was before the cause was tried. But it was adjourned; and afterwards Pasch. 6 W. & M. it was adjudged by Treby (having changed his opinion) with Nevile and Rokesby, to be a tenancy in common, Powell being of a contrary opinion. Levinz for the plaintiff.

SEDGWICKE QUI TAM, &c. *against* RICHARDSON.

S. C. 1 Lut. 198, 200.

In a penal action the demand was *quod reddat, dom. Reg. &c., &c. S. qui tam, &c.* and the issue was *non debet* to S. only; yet held good. 1 Vent. 122. 2 Keble 788. 1 Rol. Ab. 223. 1 Ander. 138. 1 Rol. Rep. 78. 4 Co. 13. Hetley 122. 2 Leon. 190. 3 Leon. 237. Dyer, 95, 159. 1 Jo. 261. Noy 22. Hobart 327.

Richardson was summoned to answer Sedgwick *qui tam pro domino Rege, &c. quod reddat dict' domino Regi & dominæ Reginæ, & Sedgewicke qui tam, &c.* 10*l.* and declares for the selling of two horses in Smithfield market, not being tolled, against the statute 31 El. c. 12, whereby he forfeited two several sums of 5l. whereby an action accrued to the said King and Queen, and to the said Sedgwicke *qui tam, &c.* the said several sums amounting to 10l. that yet he had not paid the same to the said King and Queen, and Sedgewicke *qui tam, &c. vel eorum alteri.* The defendant pleads, *quod ipse non debet prædict' Sedgwicke qui tam, &c.* the said 10l. nor any part thereof. And upon this issue tried, the jury found, *quod debet* the 10l. and gave damages and costs, &c. And now it was moved in arrest, &c. 1. That this action being for a forfeiture upon a penal law, no damages or costs ought to have been given. 2. That the issue is not well joined, or rather here is no issue at all; for the demand is of 10l. due to the King and Queen and Sedgewicke *qui tam, &c.* and the issue is, *non debet*, to Sedgewicke only: and for those causes the judgment was stayed 'till the plaintiff shewed cause. And at another day it was answered for the plaintiff to the first, where the penalty is certain, damages and costs are to be given, but not where the penalty is uncertain; as on the stat. Ed. 6. Treble damages for tithes, &c. no costs nor damages; otherwise where the penalty is certain, as Cro. Cha. *North* against *Wingate.* Jones Rep. 474. Co. Ent. 163, 164. Roll. Abr. 579. And to the second it was said, 1. The summons is to **[375]** answer to Sedgwick *qui tam, &c.* only. 2. The *de placito quod reddat* might have been so also, as appears Co. Entr. 363 b. upon the Statute of Mainten'; and Rast. Entr. 421 b. *per quod actio accrevit* to the prosecutor only. Rast. Entr. 430 *bis.* and Rast. Entr. 207 b. The summons is *ad respondend' Regi & parti qui tam, &c.* so the entries are in several forms, and each of them good. 3. The debt is entire to the King and party, so that if he owed it to the party, of necessity he owed it to the King; and the issue is found that he owed it to the plaintiff, and then by consequence to the King also; and the plea is *quod non debet* the debt, or any part thereof. 4. This issue does arise upon his own default, whereof he shall not take advantage, Hob. 9. Cro. Eliz. 914. Co. 5, *Nicholl's case.* Cro. Cha. *Knighton* against *Harvey.* And if it should be taken to be any discontinuance, that was remedied by the statute of 32 H. 8, c. which extends to actions upon penal statutes, they not being excepted; and therefore it is cured by the verdict: whereupon judgment was given for the plaintiff. Levinz of counsel for the plaintiff.

GALE *against* TILL IN B. R.

S. C. 4 Mod. 224. *Post*, 396.

Administrator shall not pay costs on a writ of error. *Ante* 60. 2 Lev. 165. 6 Mod. 92. 1 Salk. 207.

Gale had judgment in C. B. after a verdict against Till an administrator, who brought error thereon in B. R. where the judgment was affirmed. And the question was there, whether the plaintiff in the action should have costs on affirmation of the

judgment in the writ of error upon the statute of 3 Jac. 2. And that he ought to have costs were cited Cro. Cha. 219, *Atky* against *Herd;* and *ibid. Peccash's case*, Hutt. 78, 79. Latch. 221, this bringing the writ of error being his own act. The Court seemed of opinion that no costs should be; for he shall not find bail on the writ of error upon the same statute; but they would advise. Levinz of counsel for the plaintiff in the original action; who was satisfied with the opinion of the Court, and did not move it again.

[376] HUTCHINSON AND HIS WIFE *against* BROOKEBANKE.

Marriages in conventicles good. 15 Viner Ab. 260.

A prohibition was prayed to the Ecclesiastical Court on suggestion of 1 W. & M. whereby it is enacted, that no person dissenting from the Church of England, who takes the oaths mentioned in an Act of the same year, (viz. the new oaths of allegiance and supremacy) and subscribes the declaration mentioned in the statute 30 Car. 2, should be obnoxious to the penalties and forfeitures mentioned in the stat. 22 Car. 2, against conventicles, nor be prosecuted in the Ecclesiastical Courts for nonconformity to the Church of England, except it be for not paying of tithes, or other parochial or ecclesiastical duties; and further, that all marriages between dissenters (taking the said oaths and making the said declaration) solemnized before witnesses in the face of a congregation so licenced by the statute, should be good and valid in law; and that no persons should be presented in the Ecclesiastical Court for nonconformity to the Church of England in such marriages; and that the interpretation of all statutes belongs to the common law. And whereas the plaintiffs, being dissenters, had taken the said oaths, and made the declaration according to the statute, and were married in the face of their congregation in the presence of witnesses, according to the statute, and after banns published, according to the discipline of the said congregation, yet the defendant had libelled against them in the Ecclesiastical Court for incontinence and fornication between them, and compelled them to answer there, where they had pleaded all this matter; which the Court there refused to admit. *Note*, this was moved in Trin. term last, and day given to this term, and the Ecclesiastical Court stayed in the mean time. And now this term it was agreed a prohibition should go, and that the plaintiff should declare upon the prohibition; so that upon a demurrer the law might be tried. Pemberton of counsel with the plaintiff in the prohibition. Levinz for the defendant.

[377] IN B. R.

THE K. AND Q. *against* THE BISHOP OF LONDON AND DR. LANCASTER.

S. C. 4 Mod. 200. Parl. Cases 164. 1 Lord Ray. 23. 2 Salk. 559.

A parson made a bishop, the King shall present not only *hac vice*, but *toties quoties, &c. Post*, 382. Vaughan 19, 20. Davis 68. Pryn's History of Papal Usurpations, Tom. 3, pa. 13, 14. Puff. Quær. l. 8, c. 2, § 3. 6 Term Rep. 440. Cro. Jac. 691.

A *quare impedit* to the Vicarage of St. Martin in the Fields, *in com. Middlesex*, and counts that Henry, Bishop of London, was tenant in fee gross, and collates Thomas Lamplugh, who was created Bishop of Exeter, whereby it belonged to the King to present, and he presented Lloyd, who was made Bishop of St. Asaph: wherefore the King presented Tenison, who was afterward made Bishop of Lincoln, and so it belonged to the King to present by his prerogative, and that the defendants disturbed him. The defendants plead in abatement variance between the writ and the count; for the count says that the King ought to present by his prerogative, which is not mentioned in the writ: but *non allocatur;* for the writ is always general, and there is no other form, but the prerogative is always mentioned in the count; therefore a *respondeas ouster* was awarded; and then the bishop demurred upon the count. Dr. Lancaster pleaded in bar, confessing the seisin and collation of Lamplugh, and all the presentations alledged by the King, and then pleads the stat. 25 H. 8, of

Dispensations; and that Decemb. 20, 1693, Dr. Tenison was elected Bishop of Lincoln, and that Decemb. 22, 1693, the Archbishop of Canterbury granted to him a dispensation to hold St. Martin's *in commendam* till the first of July then next following; and that Decemb. 23, 1693, the King confirmed it, and Decemb. 25, 1693, Tenison was confirmed and consecrated; and avers, that the dispensation was not contrary to the Word of God, and that it was such as before the statute was made at Rome, and that Tenison held the vicarage till July 1, when by the limitation of the dispensation it became void; whereupon the Bishop of London collated the defendant Lancaster, whereby he was and yet is vicar. The King's attorney joins in the demurrer with the bishop, and demurs on the plea of Lancaster: and the points made in the case were three. 1. Whether the King had any prerogative at all to present to the church of a subject on the promotion of his clerk to a bishoprick? 2. Admitting he had, yet whether he had it *toties quoties*, as here he had it three times one after **[378]** another? 3. Admitting he had, yet whether his prerogative were not satisfied by the dispensation to Tenison? And it was argued for the King by Cowper, being one of the King's Counsel and the Queen's Solicitor; who on the first point said, that the King had certainly such a prerogative; that to argue it was to make that a question, which was without question; nor would he enter into the reasonableness thereof, it being *antient*, but would justify it by authorities, and cited 11 H. 4, 17. Cro. Eliz. 790, *Basset* against *Gee;* and *ibid.* 542, 601, *Armiger* against *Holland.* 2 Roll. 343. Mo. 399, *Wright's case.* Cro. Ja. *Woodly* against *The Bishop of Exeter.* Bro. Presentation to a Church 71. Vaugh. Rep. *Edes* against *The Bishop of Oxford.* Yet he confessed, that the *old* books were not so clear in the matter; and the reason was, for that till the time of H. 8, the King had not much to do with the creation of bishops, because they were always confirmed at Rome, but that since the time of H. 8, constant usage had been with the King; and that it is reasonable when the King presents a parson to a bishoprick, that he should have the presentation to his parsonage. To the second point he said, if the King had such a prerogative, that it should extend as well to the second, third, and all other times, as to the first time that he promoted the parson to a bishoprick. And to the third he said, that this dispensation could not serve for his turn, 1. Because it being before the consecration, the church was never void till July 1, but Tenison continued parson by his first presentment till July 1, this being a *commendam retinere.* See Vaugh. Rep. *Edes's case*, and 11 H. 4, 37. And 2. Because it does not exceed the *tempus semestre* above two or three days; and all the books agree that a *commendam per tempus semestre* is good for the supply of the church, because the patron has so long time to present, and is not obliged to present during the *temp' semestre.* Whereto it was answered by Serjeant Levinz for the defendants, as to the first, that the King had not any prerogative to present to the church of a subject on the promotion of his parson to a bishoprick; and there is little or no reason that he should have it for that he has promoted the parson; for the church is the patron's church, and it is reasonable he should have the presentation of such a clerk thereto, under whom he and his tenants and servants are to live, whose manners, doctrine, religion and conversation ought to be such as he shall approve: and if what is said be a reason, by the same reason if the King promotes **[379]** my chaplain of my family, or my bailiff, or other servant, he may impose another upon me. The King's prerogative is part of the common law, and has been time out of mind, &c. And though the common law has been sometimes altered in Westminster-Hall as to the methods and manner of proceedings, yet it cannot be altered as to the property or interest of any man without authority of Parliament. And although of late times some opinions and the practice has been to allow such a prerogative to the King, yet if it be not warranted by such authorities, it cannot be a prerogative, but is an encroachment upon the liberty of the subject; and yet such opinions have never been given without dispute and contradiction, even in these later times: and that antiently the King had no such prerogative is (plainly) to be collected; 1. Because no mention is made of any such prerogative neither in the King, nor the Pope, as certainly there would have been, if any such thing had then been. 2. There is no mention of it in the Stat' of Prerogativa Regis made in time of E. 2, nor in Staundford's treatise upon that statute. 3. And the 5 Ed. 2, 148, in the book imprinted (published) by Serj. Maynard, it appears that Hugh de Courtney brought a *quare impedit*, and counts, that the Countess of Albemarle

was seised and presented a clerk, who was made a bishop, and so derives title to the plaintiff to present. But there is no mention of the King's prerogative, or any presentment by him upon the parson's promotion to the bishoprick. 4. Nor is there any mention of any such thing in any of our antient books, as Glanvile, Bracton, Britton, Fleta, &c. nor in any of our year-books till the book of 11 H. 4, cited on the other side; which in truth does no way prove the King's title, but is contrary to it; for there the case is thus, the King makes a title to a prebend, for that it became void, it being the temporalties of a bishoprick, which were then in the King's hands: the defendant pleads, that the King had restored the temporalties, *absq; hoc* that it became void during the time the temporalties were in the King's hands; whereupon the King's attorney waved his declaration, and declared *de novo* on the Statute of Provisors; which proves that the King's attorney did not then imagine that the King had any such prerogative of presenting to the church of one promoted to a bishoprick, as is now claimed. For whether the temporalties were in the King's hands, or were they not, it would not, according to the present doctrine be material; for be it so, or not, the King now claims the presentment **[380]** upon all promotions, be the church of his own patronage, or of any other. It is very true, there are divers precedents in our antient books, whereby the King has presented to a church on his promoting the parson to a bishoprick; but all those were either as he was *patron*, whilst the temporalties of the bishoprick were in the King's hands, (he being the patron of all bishopricks) or as he was *lord*, whilst the true patron (by reason of infancy, or otherwise) was in the King's wardship; but not merely in point of prerogative to the church of a stranger till after the time of H. 8, thus in the 40 E. 3, 4, the Dean of York being made a bishop, the King there made a new dean, but it was by reason that the temporalties of the archbishoprick were then in the King's hands; so 41 E. 3, 5, 6, the King makes a prebend of Sarum, the temporalties of the bishoprick being in the King's hands; and 44 E. 3, the King makes a parson bishop, and then presents to the church, but it was for that the patron was in the King's wardship; so Fitz. Quar. Imped. The King makes a prebend of Wells, (on making the former prebend a bishop) but it was because the temporalties of the bishoprick were in his hands; and Co. 4 Inst. 356, 357 is the like case; which he observed was in point of patronage, and not of prerogative: and the cases cited on the other side are all in Q. Elizabeth's time and since, and the ground of them was, for that divers such precedents had been in the time of H. 8, as is said in the case of *Wright* cited on the other side, in Mo. pl. 522. But in Ow. Rep. of the same case, 144, it is said, that all the precedents cited were in the time of H. 8, and which being new, the Court had no great regard to them; which report was four years after the report thereof in Mo. so that it appears, that after four years consideration had, the Court were of opinion against the prerogative; and so is the same case reported in Cro. Eliz. and in the case of Woodly, Hutton Just. was against the prerogative; and although that Cro. in that case reports, that Hobart and Winch were of a contrary opinion to Hutton, yet in the same case as reported by Winch himself it appears, that he was of the same opinion with Hutton, and so was Hob. also, as there it seems; and though the judgment was in that case given for the King's clerk, yet that was not by reason the King's title was good, but because the plaintiff's title was ill, claiming by a grant of the next avoidance, whereto he made no good title. And in truth, this case as oft as it has come in question did never pass without difficulty and diversity of opinions, although in some later cases the **[381]** opinion for the prerogative has prevailed. But surely a right, which was a right of old time, is still a right, if it be not altered by some Act of Parliament; and for authorities against this prerogative there are Dy. 228 b. *Eliz. Sidny's case*, and Dr. and Stud. chap. 3, where he says, that if a church becomes void by death, *creation* or *cession*, the patron shall present; so is Ow. 144, by the whole Court; and there Walmsly says he had seen a case in the time of Ed. 2 so resolved upon debate; and so in 5 E. 2, in the case before cited out of Maynard. As to the second point, if the King has a prerogative, yet such a prerogative as is here claimed to present *toties quoties*, is not mentioned in any book, nor can there be any reason for it; for if so, the King might gain and hold in his hands, and the patrons lose their advowsons for ever; for the King having presented one, no more is to be done but to make him a bishop, and he may present

again, and so *in infinitum:* and then, when shall the patron have his advowson again? As to the third point, supposing there be such a prerogative, and that the King may present *toties quoties*, yet the King has here had his turn by the *commendam* of Tenison, being for more than the *tempus semestre*, or six months. *Commendams* were never of any good repute, neither in the common law, nor the canon law, and therefore are to be strictly taken, Da. 76, says, a church given *in commendam* is *quasi commendata;* and Hob. 144 cites the Council of Lions, and says, it was the last general council which gave any countenance to them, and that not to be above six months; and in the gloss thereon it is said, that the consent of the patron, and of all others who may be prejudiced thereby, ought to be had; and Hob. 155 says, that no mention of a *commendam* can be found in any of our year-books till 11 H. 4, and Hob. 144 enumerates three manners of *commendams;* 1 *Semestre*, which arises upon a natural equity, because so long time the patron has to provide. 2. For life, or a perpetual *commendam*. 3. *Limitatu*, being for years, or other certain time. The first sort are only allowed by the canon law and the Council of Lions, and are not to exceed six months, as Hob. 144 says. The other two were granted by the Pope *ex plenitudine potestatis*, for that being thought above the law, he could dispense with all laws, and what the Pope did before the stat. 25 H. 8, the King did after the statute as the Pope did before *ex plenitudine potestat' suæ prerogativæ;* and that when he here commends Tenison for more than six months, this was not done according to the canon, but by his prerogative, and shall serve for his turn. **[382]** Holt Ch. Just. and Just. Eyre were upon the first argument strongly of opinion for the King in all the points. Dolben was strongly to the contrary. But Gregory said nothing. And it was afterwards adjudged for the King in all the points without further argument.

The King and Queen *against* The Bishop of London and Birch.

S. C. 2 Salk. 540. 4 Mod. 200. 1 Shower 164.

The King has the like prerogative in churches newly erected, as well as in the old, to present on the promotion of the parson to a bishoprick. *Ante* 377. 6 Term Rep. 440.

A *quare impedit* of the Rectory of St. James, Westminster; and declares, that by Act of Parliament, 1 Jac. 2, it was enacted, that St. James in the Fields should be divided from the parish of St. Martin, and a church erected there; and that it should be a parish of itself; and that Dr. Tenison, the Vicar of St. Martin's, should be the present and first Rector of St James's parish, and the patronage of the advowson be in the Bishop of London, and the Lord Jermin *alternis vicibus;* the first rector after the vacancy of Tenison to be presented by the Bishop of London, and the next by the Lord Jermin and his heirs, and so *alternis vicibus* for ever: and that Tenison was promoted to the Bishoprick of Lincoln, whereby the said church was avoided, and that it belonged to the King to present *ratione prerog'*, and the defendants hindered him. The pleadings and demurrers were the same here as in the foregoing case; and the first and third points here were the same as in that, but the second point of *toties quoties* was not in this case. But a third point was in this case which was not in the other, viz. that this being a church newly erected by Act of Parliament, and the presentments thereto being specially appointed by the Act, viz. the Bishop of London to have the first, and the Lord Jermin the second; and so of the rest *alternis vicibus* for ever: and this being without any saving of the King's prerogative, *quære*, whether the King were not excluded from his prerogative in this case? For it was said, that an affirmative Act of Parliament, creating a thing *de novo* which was not *in esse* before, implies a negative, and shall be taken as if it had said, that the Bishop of London shall present, and not the King; as Hob. 289 and divers other books are; also the King shall be bound by this Act, being made for religion, though he be not expressly named. 5 Co. 24. 11 Rep. 67. Also the King and the bishop cannot **[383]** both present for the same turn; and the Act saying, that the bishop shall present, thence it follows that the King shall not present. And to this opinion Holt Ch. Justice at the first seemed to incline, but it was afterwards resolved, that this Act only directed

the method and turns of presenting between the patrons themselves, but did not exclude the King of his prerogative; as where lands are entailed by Act of Parliament, they are yet subject to such bars as other entailed lands are; and although this church be newly erected, yet the King having this prerogative in all churches before, he had it also in this when it was erected. *Note*, The same counsel were in both cases, and both were argued at the same time, and the same judgment was given for the King.(1)

MARCH *against* FREEMAN.

Defendant by bill sealed promised to pay 5l. per year for five years, debt brought on non payment of the first 5l. held good. 7 Viner Ab. 355.

Debt for 5l. and declares, that the defendant by bill sealed promised and agreed to pay the plaintiff yearly 5l. for five years at two payments, viz. 24 Jun. and 25 Decemb. the first payment to begin the 25th of December next after the date, for the maintenance of Eliz. Freeman, a daughter of the defendant; and that he had maintained Eliz. Freeman for one year ending the 23rd of June last past. The defendant pleads, *protestando* that Eliz. was not his daughter, for plea says, that the five years are not expired. Whereupon the plaintiff demurs; and it was resolved that the *protestando* was idle. But it was argued for the defendant (whereto the Court on the first and second argument inclined) that no action lay till all the days are past; as Co. Litt. 47 b. 292 b. F. N. B. 131 a. But for the plaintiff it was said, that this is not like to bills of debt, but this is a covenant to pay at several days, for which covenant will lie upon a breach at every day; as on a promise to pay at several days, an action may be for non-payment at each day, as Cro. Cha. 349, *Pecke and Ambler's case*, and divers other books, and constant experience is: *and in every case where a covenant is to pay a certain sum, the party may have either debt or covenant for the money;* and here the 5l. **[384]** per annum is for the maintenance of the daughter; and if it were not paid till the end of the five years, how should the daughter be maintained in the mean time? And the case depended till Hill. 5, 6 W. & M. and then judgment was given for the plaintiff by the whole Court, viz. Treby, Nevile, Powell and Rokesby. Levinz counsel for the plaintiff. See Hard. Rep. 178, *Nowell's case*, that covenant lies at the first day; but it is there quæried of debt.

[385] HILARY TERM, IN THE FIFTH AND SIXTH YEARS OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

IN B. R.

BENSON *against* SCOT.

S. C. 4 Mod. 251. 1 Salk. 185.

Custom was that a copyholder's wife shall have *free-bench* of all that her husband died seised: he surrenders to A. who is not admitted till after the copyholder's death, the wife shall not have *free-bench*. 2 Sid. 37, 61. Lane 20. 3 Bulst. 214. Sty. 146.

Ejectment of lands in Wethersfield in Essex, and on *not guilty* and special verdict found, the case was this; Samuel Scot (seised in fee of the lands in question, being a copyhold, where the custom is, that the wife shall have *free-bench* of all copyholds whereof the husband died seised) takes the defendant to wife, and afterwards Octob. 3, 1690, surrenders to Barbara Callard and her heirs, conditioned to be void upon payment of 70l. the 20th of August next following, and at a court held 1 Jun. 1691, this surrender was presented to be enrolled, but before admittance the surrenderor dies; and after his death the surrenderee is admitted. And the question was, if in this case

(1) If after the grant of the next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the King is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the King's presentee.—6 Term Rep. 439.

the wife should have her *free-bench?* And it was said for the defendant, that till admittance the copyhold remains in the surrenderor, Cro. Cha. 273, 783. *Burgoin* against *Spurling*, Cro. Eliz. 422. Yelv. 16. And then the husband died seised, and consequently the wife is within the custom; and though by the admittance after, the surrenderee is in from the time of the surrender, yet it was said for the defendant, that that was only a relation and fiction of the law between the parties, and to prevent (or make void) all mean acts of the surrenderor, **[386]** but not to prejudice the wife, who is a third person, as 3 Co. *Butler and Baker's case.* 2. That although the title of the surrenderee is to be computed from the time of the surrender, so is the title of the wife to be computed from the time of the marriage: for then was her title incepted, though perfected by the husband's death; so the title of the surrenderee is no more than an incepted title by the surrender, and only perfected by the admittance: so that the wife here had an incepted title before the inception of the title of the surrenderee, which was also perfected before the perfection of the title of the surrenderee, which was not till after the husband's death; whereas the wife's title was perfected by the husband's death. But Holt Ch. Just. and the whole Court held the contrary, and they denied that the wife had any incepted title by the marriage in this case, as wives have to their dower at the common law, but that she had only a conditional inception of a title, subject to the power of the husband of avoiding it by alienation, *which power the husband had not at common law; for he could not by alienation defeat the wife of her dower*, but without doubt the husband might here have precluded the wife from her *free-bench* by alienation; for she is not to have it except the husband died seised, which he did not in this case, by reason of the surrender; and they relied much on the case in Co. Lit. 19 b. a copyholder jointenant surrenders and dies before admittance, the survivor shall be precluded by the admittance afterward: and judgment was given for the plaintiff. Levinz for the defendant. Webb of the Inner-Temple for the plaintiff.

STOPP *against* PEACOCKE.

A modus in discharge is good.

A *prohibition* was prayed, and at last granted, on suggestion of a modus to pay for all the *tenants* and *occupiers* of the lands (so much) in discharge of tithes. On the first motion this prescription in occupiers was doubted by the Court. But at last, seeing it goes only in discharge, and not in claiming an interest, the prohibition was granted on consideration of *Cooper and Andrew's case*, Hob. 39, and *ibid.* 8, *Shelton* against *Mountague*, and Cro. Cha. 418, *Baker* against *Brereman.*

[387] EASTER TERM, IN THE SIXTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

SMARTLE *against* WILLIAMS, IN B. R.

S. C. 2 Salk. 245, 280.

A mortgage for years was enrolled, and having got into the possession of the defendant, the plaintiff was allowed to prove the mortgage-deed by a copy of the enrolment.

Ejectment of lands in Cornwall, and on issue *not guilty*, and trial at Bar, the case on the evidence appeared to be, that John Kendall, seised in fee of the Barton of Trevanion, mortgaged it in the year 1659 to Penoire for 500 years, which deed was enrolled in 1667, being then acknowledged before a Master in Chancery. And therein was the ordinary covenant, that the mortgagor should retain the possession till default of payment. The mortgagee assigns the term, being out of possession, to Buick. The executors of Buick assign the term to Tho. Kendall, who was the *cestuy que trust.* Tho. Kendall brought ejectment to recover the possession, and pending the action, assigns the term to Sir Charles Maddiford. Sir Charles Maddiford makes a mortgage thereof for 100 years to Henry Coventree, *without taking notice of the former*

mortgage by way of recital, but demised it to him by way of original mortgage, as if he were owner of the land in fee: after which the first mortgage-money is paid to Sir Charles by the mortgagor, and he assigns the original mortgage to him, and then he for a valuable consideration conveys the inheritance to the defendant Williams, and delivers to him the original deed of mortgage; and so the plaintiff, who claims as executor to Coventree, *had it not to produce*, but he produced a copy of the enrolment thereof to make out his title: and now divers matters were objected thereto for the defendant. 1. That the copy of the deed enrolled was **[388]** not evidence, because it being only a term it passed immediately, and the enrolment afterward is no more than as the enrolment of an obligation. But the Court over ruled this; for the acknowledgment of the deed by the lessor before the Master in Chancery is good evidence against himself, and against all who claim under him. 2. Objected, that the consideration of the first mortgage was not proved, but the consideration paid by Williams upon the purchase was proved, and so the first mortgage was voluntary and void as to him. But the consideration paid by Sir Charles Maddiford being proved on the assignment made to him, the Court held it sufficient to support the first mortgage-deed; for it was a deed executed, and the consideration paid by Maddiford on the assignment to him, before the defendant's purchase, made it a deed upon valuable consideration against the defendant who purchased afterwards, and thereby it became a mortgage upon valuable consideration, although it were not so at the first. [*Quære* of this, for the contrary has been held. And yet in *Progers and Laighan's case*, P. 15 Car. 2, B. R. it was held as here.] 3. It was objected, that all the assignments except the first, being made off from the land, and by the mortgagees only without joining the mortgagor, were void, the parties being out of possession at the times of the assignments. And it was argued, that the first assignment by the mortgagor was only good; for the mortgagor was by the covenant to retain the possession only till a default of payment, which made the mortgagor tenant at will to the mortgagee (after such default;) but when the mortgagee had made the first assignment, the tenancy at will was thereby determined, and the mortgagor by his retaining the possession afterward was a disseisor; and so all the assignments by the mortgagee being out of possession, without the concurrence of the mortgagor, were void; and the rather in this case, because Maddiford had brought ejectment before his assignment, and thereby has admitted himself to be out of possession both before and at the time that he made the assignment or lease to Coventree. But the Court, viz. Holt Chief Justice, and Giles Eyre held all the assignments good; for although the tenancy at will was determined, yet the mortgagor was tenant at sufferance, and not necessarily a disseisor; and the bringing the ejectment is no more than an admitting that he was not in actual possession, but does not admit an actual disseisin, and so they directed the jury, **[389]** who accordingly gave their verdict for the plaintiff, the lessee of the executors of Coventree, being the assignee or lessee of Maddiford. *Note*, Samuel Eyre, a Judge in the place of Dolben lately deceased, said nothing; and Gregory Just. was sick and absent. Levinz and others for the plaintiff.

POULSON *against* ——— IN C. B.

Statute of the 5th Eliz. appoints deeds of apprenticeships to be enrolled in the next town corporate. The King by charter creates the Trinity Company, and grants that they may take apprentices according to the statute—that their indentures may be enrolled by the company *non obstante* the said statute—resolved that the King cannot alter the place of enrolment.

Covenant, and declares on the statute 5 Eliz. that mariners may take apprentices, and that they shall be bound by their covenants, as apprentices in London are by the custom there, the indentures being enrolled in the next town corporate: and that King Charles II. incorporated all mariners by the name of The Trinity Company of Deptford-Strond, and that they might take apprentices according to the statute; and that their indentures should be enrolled by the corporation of the Trinity-Company, and that such enrolments should be good, notwithstanding the statute of 5 Eliz. and that the defendant was bound an apprentice to the plaintiff, being a mariner; and

that the indenture was enrolled before the Trinity-Company, and that the defendant departed from his service. The defendant demurs upon the declaration, because the enrolment was before the Trinity-Company, and not in the next town-corporate, according to the statute: and altho' that the *lien* (or obligatory force) of the covenant is by virtue of the statute (the plaintiff being a mariner) and no alteration by the patent but only the place of enrolment, which for the plaintiff was argued might be dispensed with by the patent, and *non obstante*, as the case is 2 R. 3, 11, a statute, that goods should be unladen at Calais, yet the King by a *non obstante* may dispense therewith, and allow the unlading at another place; and so when the King grants conusance of pleas, he may alter the place of holding the pleas, though he cannot alter the manner of the trial; yet it was resolved by the whole Court, that the King cannot alter the place of the enrolment, but it should have been according to the statute, otherwise the covenants should be according to the common law, and the apprentices not bound by them: and they gave judgment for the defendant upon the first argument. Levinz of counsel for the plaintiff.

HILARY, 5 WILLIAM AND MARY.

[390] NORDEN *again* FOX.

Bill against the warden of the Fleet for an escape.

Be it remembered that upon Thursday, the 25th day of January, in this same term came here into Court Catherine Norden, widow, by Charles Townshend her attorney, and exhibited to the justices here, her certain bill against Thomas Fox, Esquire, warden of the prison of the lord the King, and of the lady the Queen, of the Fleet, present here in Court in his proper person, in a plea of debt, the tenor of which bill follows in these words:—To the justices of the lord the King and of the lady the Queen of the Bench. Middlesex, to wit. Catherine Norden, widow, by Charles Townshend her attorney, complains of Thomas Fox, Esq. warden of the prison of the lord the King and of the lady the Queen, of the Fleet, present here in Court in his proper person, for this, that he hath not rendered to the said Catharine 304l. which he owes to her and unjustly detains. For this, to wit, that whereas the said Catharine heretofore, to wit, in the term of the Holy Trinity, in the 4th year of the reign of the lord the now King, and of the lady the now Queen, in the Court of the said lord the King, and of the said lady the Queen, before George Treby, Knight, and his companions, then justices of the said lord the King, and the said lady the Queen, of the Bench here, to wit, at Westminster, in the county of Middlesex, by the consideration of the said Court had recovered against one William Lenthall, Esq. by the name of William Lenthall, late of London, Esq. as well a certain debt of two hundred and forty pounds, as forty shillings, which to the said Catharine in the said Court of the said lord the now King, and of the said lady the now Queen here, to wit, at Westminster aforesaid, were adjudged for her damages by occasion of the detention of that debt, as by the record and proceedings thereof in the said Court here remaining more fully appeareth; which judgment as yet remains in its full force, vigour and effect, not reversed, annulled, or satisfied; and whereas also afterwards, to wit, in the term of St. Michael last past, in and by the said Court of the said lord the now King, and of the said lady the now Queen here, to wit, at Westminster aforesaid, before the said George Treby, Knight, and his companions then justices of the said lord the now King, and the said lady the now Queen, **[391]** of the Bench here, to wit, at Westminster aforesaid, it was considered that the said Catharine should have execution against the said William for the said debt and damages by the default of the said William, as by the record and proceedings thereof in the said Court here, to wit, at Westminster aforesaid remaining, more fully appeareth. And whereas also the said Catharine heretofore, to wit, in the term of St. Hilary, in the 4th & 5th years of the reign of the said lord the now King, and of the said lady the now Queen, before the said George Treby, Knight, and his companions then justices of the said lord the King, and of the said lady the Queen here, to wit, at Westminster aforesaid, by the consideration of the said Court had recovered against the said William Lenthall, by the

name of William Lenthall of London, Esquire, as well a certain debt of sixty pounds, as forty shillings, which to the said Catharine in the said Court of the said lord the now King, and of the said lady the now Queen here, to wit, at Westminster aforesaid, were adjudged for her damages which she had sustained by occasion of the detention of the said debt as by the record and proceedings thereof in the said Court of the said lord the now King, and of the said lady the now Queen here, to wit, at Westminster aforesaid, remaining more fully appeareth; which judgment last mentioned as yet remains in its full force, vigour and effect, not reversed, annulled or satisfied. And whereas also, afterwards, to wit, upon Tuesday after the octave of St. Martin last past, the said William then being in the custody of the said Thomas, then and from thenceforth hitherto being warden of the prison of the Fleet; he the said William by the said Thomas, then warden of the said prison of the Fleet, by virtue of the writ of the lord the King, and of the lady the Queen, of *habeas corpus* to the said warden directed, was brought to the Bar here, to wit, at Westminster aforesaid, and thereupon the said William at the prayer of the said Catharine by her attorney aforesaid, then and there by the said Court was committed to the prison of the Fleet, in execution for the several debts and damages aforesaid, there to remain until, &c. by virtue of which committal of the said William to the prison aforesaid, in the form aforesaid made, the said William was in the custody of the said Thomas in execution for the several debts and damages aforesaid; and the said William, so in the prison of the Fleet aforesaid, in execution for the several debts and damages aforesaid, in the form aforesaid being, the said Thomas afterwards, to wit, upon the 20th day of January, in the 5th year **[392]** of the reign of the lord the now King, and of the lady the now Queen, he the said Thomas then being warden of the prison of the Fleet aforesaid, him the said William at the parish of St. Clement Danes, did permit to go at large wheresoever he would, the said Catharine of her debts and damages aforesaid not being satisfied; whereby an action hath accrued to the said Catharine to demand and have of the said Thomas, the said three hundred and four pounds; nevertheless the said Thomas, although oftentimes requested, the said three hundred and four pounds to the said Catharine hath not as yet paid, but the same to her to pay hitherto hath refused, and still doth refuse, whereupon she saith that she is prejudiced and hath sustained damage to the value of four hundred pounds, and thereupon she prays relief, &c.

Pledges of prosecuting, John Doe and Richard Roe.

And the said Thomas Fox in his proper person comes and defends the wrong and injury, when, &c. and saith that the said Catharine ought not to have her action aforesaid against him, because he saith, that the said William Lenthall in the declaration aforesaid named, after the said time of his pretended committal to the custody of the said Thomas, and before the day of the exhibition of the bill of the said Catharine in this behalf, to wit, upon the 10th day of January, in the 5th year of the reign of the said lord the now King, and of the said lady the now Queen, by the consent and license of the said Catharine then and there had, was permitted to go out and to escape from the prison of the Fleet aforesaid, out of the custody of the said Thomas, for which escape of the said William, and not another nor different, the said Catharine now hath exhibited her bill aforesaid, against the said Thomas; and this he is ready to verify; whereupon he prays judgment if the said Catharine ought to have her action aforesaid, thereupon against him, &c.

And the said Catharine saith that she by any thing before alledged ought not to be precluded from having her action aforesaid, because she saith that the said William of the proper injury of the said Thomas and without any notice thereof given to the said Catharine, upon the said 20th day of January, in the 5th year aforesaid, at the said parish of St. Clement Danes, was permitted by the said Thomas [being warden of the said prison of the Fleet as aforesaid] to escape and go at large out of the custody of the said Thomas wheresoever he would, and not by the consent or license of the said Catharine, as the said Thomas above by pleading hath alledged; and this she prays may be enquired of by the country.

And the said Thomas saith that the plea aforesaid of the said Catharine above by replying pleaded, is not sufficient in law to maintain **[393]** the said Catharine to have her action aforesaid against the said Thomas, and that he the said Thomas to the said

plea in the manner and form aforesaid pleaded hath no necessity, neither is he bound by the law of the land in any manner to answer, and this he is ready to verify: wherefore for want of a sufficient replication of the said Catharine in this behalf, the said Thomas prays judgment, and that the said Catharine may be precluded from having her action aforesaid, &c.

And the said Catharine because that she in her plea aforesaid, above by replying pleaded, hath alledged sufficient matter in law to maintain her the said Catharine to have her action aforesaid, against the said Thomas, which she is ready to verify; which matter the said Thomas doth not deny, nor to the same in any wise answer, but altogether doth refuse to admit the verification thereof, prays judgment, and her damages by occasion of the detention of that debt to be adjudged to her, &c. And because the justices, &c.

NORDEN *against* FOX.

Want of *prout patet per record'* cured by pleading over. *Ante* 311. British stat. 4 & 5 Anne, c. 16. Irish: 6 Anne, c. 10.

Debt for an escape against the warden of the Fleet, and declares that Lenthall was committed to him in execution upon three several judgments (but says not *prout patet per record'* of the commitment) and that the defendant permitted him to escape. The defendant pleads, that he permitted him to escape by licence of the plaintiff. The plaintiff replies, that he permitted it of his own wrong, and not by licence of the plaintiff. Whereupon the defendant demurs: and now it was argued for the defendant, that the declaration was ill, because it does not say *prout patet per record'* of the commitment; and that this is a matter triable by the record, and not *per pais.* Whereto it was answered, that that was cured by the plea over, which tendered an issue upon another matter, and thereby admitted the commitment; so that that is not now to be tried, but only the licence to escape; as want of a venue in a declaration is in another case cured by a plea of other collateral matter, which waves the matter issuable in the declaration; and so it was ruled in this Court within two or **[394]** three years past before Pollexfen Chief Justice, in the case of *Knighton and Moreton;* and of that opinion were the Court now, and ruled judgment for the plaintiff. Levinz counsel for the plaintiff.

HUNT'S CASE.

Trial of foreign matter in the county where the action is brought is good. 1 Ventris 10. 2 Keble 492.

Debt for rent in London of lands in Essex. The defendant as to part pleads *nil debet,* and as to the residue an entry and expulsion; on which they were at issue, and verdict for the plaintiff for the whole entirely, and damages: and now it was moved in arrest of judgment, that the issue as to the expulsion was local and to be tried in Essex, and for that the whole was tried in London, and the verdict being general and entire for the whole debt and damages, it is ill in the whole: but this point having been determined last term in the Exchequer-Chamber in a writ of error on a judgment in B. R. between *Briggs and Chew, intr.* Trin. 3 W. & M. B. R. Rot. 763, by the opinion of four Judges against three, that it being tried in the county where the action is brought, it is cured *by the new statute,* the Court here would not reverse the judgment, but affirmed it, although some of the most considerable of the Judges now here, and also three of the most considerable in the other Court, were of a contrary opinion. But in both cases the judgments were given rather by the greater number, than by any weight of argument. Levinz for the defendant.

STEPHENS *against* CORBEN.

Thou art a witch, and I will make thee suffer for it. These words held actionable. 1 Lev. 255. *Ante* 166. Cro. Ja. 255, 276. Noy 22. 1 Brownl. 2, 14. Godb. 34, 341. Hut. 13. 2 Brownl. 276. All. 6. Sty. 5, 59. Hobart 129. Cro. Eliz. 312. 1 Rol. Rep. 86. 1 Rol. Ab. 47. 1 Sid. 53, 386. 1 Jo. 325, 397. Ray. 35. Cro. Cha. 141, 261. 1 Leon. 336. 1 Lev. 148. *Ante* 166.

Case for these words, *Thou art a witch, and I will make thee suffer for a witch.* After verdict for the plaintiff, and 5l. damages, it was moved in arrest of judgment, that the words are not actionable: that *witch* only, is not has been divers times adjudged, and *I will* **[395]** *make thee suffer for a witch* are not; for it is not said *suffer death;* and it may be intended by a citation into the Spiritual Court, which was the usual way before the statute, or it may be by *ducking* in the water, as the common people use to try people suspected of witchcraft. But hereto it was answered and held by Rokesby and Nevile Justices, that the words shall be taken as they are usually understood among neighbours in the country; to *suffer* is intended to *suffer death;* as they usually say, *How many suffer at this Assizes?* which is intended *suffer death?* And thereto Treby Chief Justice after it had been twice moved inclined. And afterward upon a case cited in this Court, Pasch. 26 Car. 2, *Thou art a clipper, and thy neck shall suffer for it,* it was adjudged actionable, although it was in that case objected, that *clipper* was uncertain, it may be of cloth or any other thing; and *thy neck shall suffer for it,* which may be by pillory, &c. Yet all together, they were adjudged actionable, because in common parlance it is intended *clipper of money.* And so here at the last judgment was given for the plaintiff by the said three Judges; but Powell was of a contrary opinion; because words shall be taken *in meliori sensu,* and the word *suffer* is wholly uncertain what manner of *suffering* was intended.

CLENCH *against* CUDMORE.

S. C. 2 Lutw. 1181.

Copyholds not within the stat. 12 Car. 2, c. 24 of Guardians. Hutton 16, 17. Kelw. 186. F. N. B. 143. Vaughan 180.

In replevin, upon long and intricate pleadings, and not well pleaded, the Court resolved one point only (without any regard to the other defects in the pleadings) viz. that a copyholder is not within the stat. 12 Car. 2,(1) to dispose of the custody of his infants, but that the custody shall be to the lord, or others, according to the custom of the manor, as to the copyhold lands, for the prejudice that may otherwise be to the lord, and for the meanness of the estate.

[396] THE KING AND QUEEN *against* TUCKER IN B. R.

S. C. P. C. 186. 4 Mod. 162.

Judgment in high treason reversed because the judgment did not conclude *contra ligeantiæ suæ debitum.*

Error of a judgment upon an indictment of high treason against Tucker, for being in rebellion with Monmouth in the time of Jac. 2, because the indictment did not conclude *contra ligeantiæ suæ debitum;* and although that the treason and rebellion, and all the particular facts of the rebellion were fully and particularly expressed in the indictment, so that it appeared to be *contra ligeantiæ suæ debitum,* yet for that error the judgment after divers arguments in B. R. was *reversed,* although that divers precedents of attainders were produced in Court, where the indictments were as this is, with that omission in the conclusion, as Sir Henry Vane's, General Lambert's, and

(1) Irish, 14 & 15 Cha. 2, c. 19, § 6

three or four more. And thereupon error of this reversal was brought in the House of Peers, where this judgment of reversal was affirmed by one voice only.

GALE *against* TILL.

S. C. 4 Mod. 244. *Ante* 375.

In debt on a judgment *nil debet* pleaded. *Quær.* hereof.

Debt in C. B. upon a judgment in the same Court; and upon *nil debet* pleaded, the issue was tried before Treby Ch. Justice at the Guildhall, where the defendant gave in evidence that the judgment on which this action is founded was removed into B. R. by a writ of error, which is there pending. Whereupon a case was made to be determined by the Ch. Justice at his *chamber:* (the question being, whether this action be maintainable in C. B. after the record removed into B. R. by writ of error?) And it was there argued for the plaintiff, that the action well lies, and cited 1 Sid. 236, and 4 H. 6, 31 a. Debt in C. B. on a judgment in the same Court, the defendant pleads that the record was removed into B. R. and *respondeas ouster* was awarded; for *per Cur'*, the record remains here to all purposes, except only as to suing execution thereupon, and the *supersedeas* in such a case is only for staying the execution; and 18 E. 4, 6 b. **[397]** is the same resolution. But the Chief Justice held, that the action did not lie as it is laid, as upon a judgment in this Court, but that he ought to declare upon the whole matter, viz. of the judgment in this Court, and of the removal by the writ of error, and that the judgment is still in full force, *prout patet per record' inde in B. R.* and so are 18 E. 4, 7 b. and Bro. Debt 186. Wherefore he stayed the judgment; and accordingly afterwards in Trin. or Mich. 9 W. 3, in debt brought in this Court upon a judgment in this Court, after error brought, declaring on the whole matter, judgment was given for the plaintiff by the whole Court.

[398] TRINITY TERM, IN THE SIXTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

BAKER QUI TAM, &C. *against* DUNCALFE.

In actions *qui tam, &c.* attornies have privilege to be sued by bill. 1 Lutw. 192, 193. Cro. Cha. 10. Hutt. 82. Cro. El. 138. 1 Leon. 119. 3 Inst. 194. 1 Ventris 137. *Ante* 343. Cumberbach 319. Skinner 549.

Debt ad respondend' domino Regi & Baker qui tam pro domino Rege & seipso sequit' for 200l. on the stat. 23 H. 6, for executing the office of Sheriff of Hull above a year; and it is brought by original. The defendant pleads, that he is an attorney of this Court, and ought not to be sued except by bill. To which the plaintiff demurs; and it was twice argued in this and the following term: and for the plaintiff it was said, that this being the King's suit, an attorney has no privilege against him, but he may sue in what Court, and in what manner he pleases; as 9 H. 6, 44. Roll. Privilege 244. Rast. Entr. 206 upon this statute. Whereto it was answered and resolved *per Cur'*, that so it is where the suit is the King's suit alone, as *indictments, informations*, and actions by the King alone; but here, though the King is to have part of the money recovered, yet it is the suit of the party, though brought in the name of the King and him, and in this suit the party may be nonsuit, also he may have a *tales* without a warrant by the Attorney-General; but where the King alone has the suit, he cannot be nonsuit, nor can there be a *tales* without warrant of the Attorney-General; and this difference is taken 4 Leon. 46. Whereupon judgment was, that the writ should abate.

[399] TAYLOR *against* CLARKE AND DENNY.

A writ is directed to two coroners, one of them executes it, and permits an escape, the other has no notice of the writ; *quære* is he liable to the plaintiff in the writ? 6 Mod. 37. Shower 400.

Debt against two coroners of the county of Norfolk, and declares, that the plaintiff had recovered against one Nightingale, sheriff of the said county, 600l. and that a *cap' ad satisfac'* was directed to the defendants to take him, and that they arrested him and permitted him to escape. The defendants severally plead *nil debet*, and upon trial of the issue before Holt Ch. Just. by the evidence it appeared, that the writ was delivered to Denny only, and that he in person alone arrested Nightingale, and that Clarke had no notice nor had given any assent thereto, nor made any warrant for it, nor signed any return of the writ, nor did it appear that any return of the writ was made at all. But on the trial Holt Ch. Just. for that the coroners are but one officer in this ministerial office, directed the jury to find for the plaintiff, which they did accordingly; but for the hardship of the case and difficulty of the matter he offered, and afterwards at London signed, a *bill of exceptions*, comprising the whole matter: and now upon the bill of exceptions it was argued for the defendant Clarke, that he ought not to be charged for this act of his companion done without his assent or knowledge; for although in truth they both make but one officer, and ought to join in all ministerial acts, yet in this personal tort done by his companion without his assent or knowledge he shall not be charged, but the charge shall be laid upon him only who did the wrong; as Cro. Eliz. 175, the under-sheriff only, who embezzled the writ, is charged, tho' the sheriff alone is the officer of the Court. So Dy. 278 b. a deputy-marshal is charged for an escape; and Sty. 297, one of the sheriffs of London was charged solely, he alone permitting the escape: but *e contra* it was argued, that both being but one officer, the act of one is the act of both, and both are chargeable for the act of each, and 2 Mod. 23, *Nayler* against *Sharpless* was cited, where the Court did so incline. Treby Ch. Just. here inclined for the plaintiff, Powell inclined for the defendant; Rokesby doubted; and it was adjourned to be further argued. Levinz for the defendant, Rotheram for the plaintiff.

[400] STEINSON *against* HEATH.

Action upon the case for toll-traverse—good without shewing title or consideration. *Post*, 424, 425. *Ante* 90, 266. 1 Bur. 441. *Toll-traverse is good without consideration.* 1 Term Rep. 667, 670.

Case, and declares, that the plaintiff was possessed of a toll-traverse for passage on the Bridge of Ware, and that the defendant had carried so many *cart-loads* of *barley* over the bridge, the toll whereof (at such a rate by the cart) amounted to 40s. which the defendant had not paid, but refused to pay it, intending to defraud him, to his damage 10l. Whereto the defendant demurs generally: and now it was argued for the defendant, 1. That no such action lies for toll-traverse for passage through the high-way, without shewing a title and a consideration. 2. That this action is only for a non-feasance, viz. non-paying, for which an action of case does not lie, but debt, if any toll be due. To which it was answered, that the action lies without shewing the title or the consideration in the declaration, for it shall come in on the evidence, Cro. Ja. 43, 122. *Dent* against *Oliver*, Ow. 109. And as to the second, that case lies for *non-feasance*, as Cro. Cha. 446. *Moyler* against *Gray*, Hill. 2 H. 7, pl. 9, against my *shepherd* for negligent keeping my sheep; and 7 H. 4, 14, against my *carter* for negligent keeping my horses; and 11 H. 4, 82, 83, for not repairing a bridge by which I am to pass; 1 E. 3, 4, against a *champion, qui se retraxit;* and 22 H. 6, 46, 47, against a *chaplain*, for not reading prayers; 39 H. 6, 18, 19, against an *innkeeper*, who refuses to lodge me. But note, all those cases are for a tortious non-feasance, but this here is *quasi* a debt, for which there lies rather *debt* or *assumpsit;* and it was adjourned. Pemberton for the defendant, Levinz for the plaintiff.(1)

(1) A general *indebitatus assumpsit* will lie for tolls.—1 Term Rep. 616.—*Seward* v. *Baker.*

[401] MICHAELMAS TERM, IN THE SIXTH YEAR OF THE REIGN OF WILLIAM AND MARY. IN THE COMMON PLEAS.

THE LADY GERARD *against* THE LORD GERARD OF BROMLEY.

S. C. 5 Mod. 64. 1 Salk. 54, 253.

The wife shall be endowed of the *caput baroniæ*. *Ante* 84, 86, 96, 169, 220. *Post.* 437. Co. Lit. 30 b. 31 b. Glanv. lib. 6, c. 1. Bracton. lib. 2, fol. 92, 93, 96. Britton. c. 101, 103. Fleta. lib. 5, c. 22, 23.

Dower, and demands the third part of a capital messuage, called Bromley-Hall. The tenant pleads, that time out of mind, &c. it had been called as well by the name of Gerards-Bromley, as of Bromley-Hall, whereof Sir Thomas Gerard, Knight, 20 *Julii*, 1 *Jac.* 1, was seised in fee, and being so seised the said King James created him Baron Gerards de Gerards-Bromley, he then being resident and commorant with his family in the said capital messuage; and the said capital messuage then became *caput baroniæ suæ*, and ever since has continued to be the habitation of him and his ancestors, *& caput baroniæ*, and derives the title of the messuage and barony down to himself through divers mean descents, and demands judgment, whether the demandant shall be thereof endowed, it being *caput baroniæ?* And avers that he had assigned to the demandant *diversas terras magni annui valoris, scil. de* 400*l. per annum existen' tertiam partem* of the tenements of her husband, which she had accepted: whereupon the demandant demurs generally: and now it was argued for the demandant, that the ancient books which say that wives shall not be endowed *de caput baroniæ*, as Britt. 247 b. &c. and Co. Litt. 31 b. are to be intended of baronies by tenure, which are now extinct, and then were castles of defence; and that the King cannot by his creating **[402]** a man to be a baron deprive his wife of her dower. Whereto it was answered and agreed, that baronies by tenure are now extinct; but the reason of the privilege of the capital messuage of baronies by tenure and by creation is all one, viz. order and decency, and the honour of the realm, as Co. Lit. 31, cited on the other side; and it would be very indecent that a baron should not enjoy his capital messuage entirely to himself, but that the wife of his predecessor should have the third part thereof in common with him, and thereby a (perplexed) mixture of families and servants, and perhaps she may let it to an *innkeeper* or *taverner*. And as to the objection, that the King cannot deprive a woman of her dower, it was answered, that indeed he cannot do it directly, but by a mean he may do it, as he cannot directly privilege a man from arrests, but by making him a baron he may do it obliquely by that means: and no injury is done to the wife here; for although she shall not have the third part of the capital messuage, yet she shall have the value thereof out of his other messuages and lands, which will be more convenient both for the woman and the baron. But the whole Court were of the contrary opinion, and gave judgment for the demandant upon the first argument, yet it was after consideration had thereof for a term or two. (Levinz being for the tenant.) Whereupon a writ of error was brought in B. R. and there the judgment was affirmed; upon which a writ of error was brought in the House of Peers, which was the thing at first designed. But afterwards (as I heard) the parties agreed without having the judgment of that house.

[403] HOWELL *against* MAINE.

[See *Philliskirk* v. *Pluckwell*, 1814, 2 M. & S. 396.]

For a bond to a feme *before* coverture, the husband may sue alone. 1 Danvers 713. All. 3, 6, 37. Sty. 9. Lit. Rep. 13. *Sed contra apparent.* Moor 422. Com. Dig. Baron and Fem. V. W. X. 2 Wilson 423. 1 H. Blackstone 109. Per Marshall, Serjeant.

Debt was brought by the husband sole, upon an obligation to the wife before the coverture. The defendant demands oyer of the condition, which was to pay money to the feme, and then demurs on the declaration; and after divers arguments judg-

ment was for the plaintiff *per totam Cur'*, and a judgment was cited by Just. Powell, where, upon a judgment obtained by husband and wife, the husband sole sued the *sci. fa.* for the damages and costs recovered, and had judgment. See my *first* Rep. page 25, *Vane* against *Minshall*. Opinion according, and 1 H. 7, there cited.

PATRICK *against* JOHNSON.

S. C. 1 Lut. 259. Nel. Lut. 287, 288.

Execution sued after the year, not void, but voidable by error. Cro. Ja. 251. 2 Ventris 193. Nel. Lut. 470, 481.

Trespass, for that the defendant *simul cum, &c.* 17 *Ap.* 4*to* of the now King, at Melford in Suffolk did assault, beat and wound, and imprisoned him for 12 months. The defendant as to the *vi & armis and the wounding* pleads *not guilty*, and as to the *residue of the trespass, the assault and imprisonment and detaining* in prison, he says, that St. Edmund's Bury is an antient borough, and that the now plaintiff *within the jurisdiction of the Court of Record* of the said borough was indebted to him the defendant, and for the recovery thereof the now defendant impleaded him in the same Court, and found pledges to prosecute his suit, and that thereupon *taliter processum fuit in eadem Cur'*, that he had judgment and execution, which he delivered to the other defendants in the *simul cum*, being the bailiffs, who at D. *infra jurisdict' Cur' molliter manus imposuer'* upon him, and arrested and detained him in prison, *quod est idem residuum transgression' præd'* and traverses Melford *seu alibi extra jurisdict' Cur'*. The plaintiff demands *oyer* of the execution, which appears to be sued above a year after the judgment, and then pleads that no execution issued within the year, **[404]** upon which the defendant demurs: and it was resolved, 1. That the execution sued after the year is not void, but only voidable by writ of error; but that 'till it be reversed, it is a good justification. 2. It was resolved that this brief way of pleading a judgment in an Inferior Court by an *implacitasset*, whereupon *taliter processum fuit* that he recovered was good, though antiently it was otherwise practised; and Hill. 24, 25 Car. 2, B. R. it was so resolved by Hale and the whole Court, which case is entered in Easter or Trinity term of that year, Rot. 235. But there they plead a plaint levied, without which the Court there held the plea had not been good, for proceeding there without a plaint would be void, but by the *implacitasset* and pledges found, as the pleading is here, is tantamount thereto, and supplies it. And in Mich. 36 Car. 2, C. B. Rot. 825, *Adny* against *Vernon*, the pleading by *taliter processum* of a judgment in Worcester Court was adjudged good; but there also they commenced the plea with the levying of a plaint *super quo taliter processum fuit*. 3. It was objected, that the *molliter manus imposuit* did not answer to the battery; and the Court inclined that it did not sufficiently answer it, but that he ought to have pleaded that he resisted, wherefore they in their defence beat him, *which I wonder at;* for all justifications in such cases are as here, and the laying hands on him is a battery, if they had no warrant to excuse them. 4. It was objected, that the plea was ill, because in the *quoad residuum* he had omitted the battery, and only said *quoad residuum transgress. insult' & imprisonament'*, and so does not answer to the battery, which makes a discontinuance of the whole: to which the Court inclined. But thereto it was answered, that the *quoad residuum transgressionis* without more was a sufficient answer to all; for the whole is but trespass: and the Court agreed, that *quoad residuum transgressionis* had been sufficient to answer the whole; but when the defendant in the *quoad residuum* enumerates all the other particulars, but omits the battery, the battery is thereby excluded in the *quoad residuum*. But in answer to this was cited Mich. 26 Car. 2, B. R. *The King* against *Newton* in error upon a judgment in Chester for forging and publishing of a deed, the jury found the party guilty of the trespass and forgery aforesaid, omitting the publication; which was assigned for error, but resolved to be no error. For *de transgressione præd'* includes the whole, as in an action for trespass, assault and battery, if the jury find him guilty of the *trespass* and *assault* aforesaid the Judges **[405]** there said it was a good and sufficient verdict; for *de transgress. præd'* includes the whole; of which case you have a note in 3 Keb. 353. But he reports it as a motion, but in truth it was on a writ of

error, and it was resolved to be no error: and upon those two last exceptions the Court would advise; but the plaintiff being afterwards satisfied that those exceptions would not aid him, he to prevent judgment being given against him, discontinued his action. Lutwyche for the plaintiff. Levinz for the defendant.

SMITH *against* FRAMPTON.

Tenements are not put in view in this action but in assize, &c.

In *ejectment*, the defendant *venit & dicit* (without any defence) that the tenements *in visu posita tenent' de Johan' Nicholas Mil' ut de maner' suo de Gillingham*, and that the manor is *de antiquo dominico Coronæ Angliæ*, and that the tenements time out of mind have been *placitat' & placitabilia in curia ejusdem maner' per parvum breve de recto.* The plaintiff replies that they are copyhold parcel of the manor. Whereupon the defendant demurs. (Note, no notice was taken that the plea was without defence) and it was admitted that the copyholds being parcel of the manor, are pleadable at common law, and the freeholds held of the manor are only pleadable in the lord's court, 9 Ass. 2. 41 E. 3, 22 b. Bro. Anc. Dem. 6. F. N. B. 11 F. Sty. 197. 8 H. 6, 1 a. Trin. 2 H. 7, pl. 1. 2 Cro. 559. And although the replication be repugnant in saying *quod bene & verum est* that the tenements are held of the manor as the defendant has supposed, and afterwards saying they are copyholds, which are parcel of, and not held of the manor; yet for the fault in the plea by the words *in visu posita* judgment *quod respondeat ouster* was given for the plaintiff; for the tenements are not put in view in this action, but in assize, &c. And it seemed as if this plea was drawn by a precedent of a plea of antient demesne in an assise. Serjeant Gould for the plaintiff, Levinz for the defendant.

[406] GODBOLD *against* FREESTONE.

[Referred to, *Jacob* v. *Jacob*, 1898, 78 L. T. 455.]

An heir *a parte materna* limits several estates with reversion to his right heirs, it shall go to his heir *a parte materna*. 2 Salk. 591. *Ante* 94, 209, 233. Co. Lit. 12 b. Note (2). 5 Term Rep. 104.

Ejectment, and not guilty tried before Holt Chief Justice at Suffolk Assizes, he being of opinion for the plaintiff but doubting, a verdict was by his direction given for the plaintiff, but by consent of parties a case was made to be argued before him at his chambers at Serjeants-Inn, and according to his opinion there, either the judgment to be entered or the verdict to be stayed; and the case was this. A man seised of lands by descent *a parte materna*, makes a feoffment of all the lands to uses, viz. of Blackacre to the use of himself for life, the remainder to his wife for her life, the remainder to the heirs of his body on his wife begotten, the remainder to his right heirs. And of Whiteacre to the use of himself for 99 years if he so long lived, the remainder to trustees for his life, remainder to his wife for her life, remainder to his first and so to his tenth sons in tail, remainder to him and his heirs; the husband and wife are both dead without issue; and if the heirs *a parte paterna* or *a parte materna* should have the lands? was the question. And now upon argument at his chamber he changed the opinion he was of at the Assizes, and held that the heir *a parte materna* should have the whole; and he did not make any difference between the cases, though the one is to himself for life, and the other for years: and Co. Lit. 13, 23 was cited, that where one takes an estate to himself for years, the remainder to his heirs, this is a new estate in him and not the ancient reversion; otherwise when he takes an estate for life, the remainder to his heirs; and Hob. 33 & Dy. 134 a. 163, where it is held, that when a man seized *a parte materna* makes a feoffment, or levies a fine, &c. and expresly declares the use to him and his heirs; this shall be to the use of his heirs *a parte paterna:* otherwise where he does not expresly declare the use, but levies a fine, &c. without an express declaration of the use, there the use shall be the same it was before without any alteration. But on the other part were cited, 5 E. 4, 7. 2 Co. *Bingham's case*, that it is all one be the use expressed

or not; the word heirs shall be heirs of the same quality as before: and of that opinion was the Chief Justice, and ruled the *postea* to be delivered. But the heir *a parte paterna*, not being satisfied with this opinion, brought a new *ejectment*, which **[407]** is entered Hill. 6 W. 3, C. B. Rot. 306, where this whole matter was found specially, and there, upon argument and the authorities before recited, judgment was given by the whole Court, viz. Treby, Nevil, and the two Powels Justices, for the heir *a parte materna* for the whole: and they did not differ the cases where the estate was limited to the ancestor for years, or for life, the remainder to him in fee, for in both these cases the fee is the old reversion and shall go to the heirs *a parte materna*. Nor did they admit the difference where the use is expresly limited by the deed, or implied by law without any express limitation; but that in both cases the fee remains in the donor, and was never drawn out of him. And that it neither merged the estate for life or for years, but that both are preserved by the mesne remainders over, which come between those estates and the reversion, as was held in *The Earl of Bedford's case*, Poph. 3. Mo. f. 719. 2 And. Pasch. 179, pl. 17. Roll. 2 Abr. 418, the same case; where 'till John Lord Russel in whom the next reversion in tail was, both the term for years and also the reversion in fee stood distinct in the earl, viz. the term for 40 years and the reversion in fee; and in *Plunket and Holme's case, intrat'* Hill. 1658, Rot. 521, B. R. *sed adjornat'* Mich. 13 Car. 2, where a feme devised lands to her son and heir Thomas, and if he died without issue living Leonard, to Leonard and his heirs; but if he had issue living at his death, to him and his heirs, there the fee descending upon Thomas did not merge his estate for life, but it was preserved by the contingent possibilities coming between his estate for life and the fee; and seeing that Holt had before delivered his opinion the same way, no writ of error was brought, and so the case rested. Pemberton for the heirs *a parte materna*, Levinz for the heirs *a parte paterna* in both places.

[408] REEVE *against* LONG. IN THE HOUSE OF PEERS AFTER THE END OF THIS TERM.

S. C. 4 Mod. 282. Lex Testam. 407. Salk. 228.

[See *In re Wilmer's Trusts* [1903], 2 Ch. 420.]

Devise to A. for life, remainder to his first son in tail, &c. Remainder to B. &c. A. dies before any son is born, B. enters, and then a son of A. is born, his entry is lawful. Cro. Eliz. 878. Noy 43. 1 Co. 66. 2 Jon. 111, 172. 1 Sid. 47. Raym. 29, 427, 451. 1 Lev. 11. 3 Lev. 341. 4 Mod. 254. English stat. 10 & 11 W. 3, c. 16. Irish stat. 8 Anne c. 4. 5 Term Rep. 60. 1 Fearne's Essay, 455.

Error of a judgment in *ejectment* in C. B. affirmed in B. R. where on a special verdict in ejectment, the case was this. John Long being seised in fee devised the lands in question to Henry Long the eldest son of his brother Richard for life; the remainder to his first son in tail, remainder to all his other sons in the same manner, remainder to Richard the lessor of the plaintiff for life, remainder to his first and all his other sons in tail; with divers remainders over, and dies, Henry enters and was seised, but before he has any son born dies, leaving his wife great with child. Richard the lessor enters as in his remainder: and six months after the defendant, son of Henry, is born, and his guardianenters for him upon the lessor, who thereupon brings *ejectment:* and the cause being tried before Turton Baron of the Exchequer, this whole matter was found specially; and upon argument in C. B. judgment was by the whole Court given for the plaintiff for two causes, 1. For that this being a contingent remainder to the first son of Henry, and he not being born at the time the particular estate determined, it became void. 2. The next in remainder being the lessor, and he having entered before the birth of the first son of Henry, he was in by purchase, and shall not be evicted by an heir born afterwards, 5 E. 4, 6. 9 H. 7, 5, &c. whereupon the defendant brought error in B. R. where the judgment was affirmed by the whole Court; whereupon he brings error in Parliament where the judgment was reversed by almost all the Lords in Parliament, because it being a will they construed it according to the intent and equity and meaning of the parties, which they said could never be

to disinherit the heir of the name and family of the devisor, nor would they do it on such a nicety. But all the Judges were much dissatisfied with this judgment of the Lords, nor did they change their opinions thereupon, but very much blamed Baron Turton for permitting it to be found specially where the law was so clear and certain. Levinz for the plaintiff in the ejectment.

[409] HILARY TERM, IN THE SIXTH YEAR OF THE REIGN OF WILLIAM THE THIRD. IN THE COMMON PLEAS.

PERKINS *against* LAMBE.

On a judgment of *grand cape* personal notice is to be given of a writ of enquiry, &c. to the tenant of the land.

Dower, and upon default a *grand cape* issued, and suggested that the husband died seized, and thereupon a writ of enquiry of the value of the lands, and the inquisition returned 60l. damages for the lands; and it was moved to stay the filing of the writ of enquiry because no notice was given to the tenant of it, nor of the execution thereof: whereto it was answered, that in real actions no personal notice is to be given, but the tenant ought to take notice, because the writs, viz. the summons, &c. are always executed upon the land and not elsewhere; but *per Cur'*. The *grand cape* is a judgment, and thereby the suit is determined at the common law, and the damages for the value of the land is but an addition by the Statute of Marlebridge, and sounds in damages only; and that personal notice ought to be given of the writ and of the execution thereof by enquiry, as is done in other cases of writs of enquiry; and for want of notice they discharged the inquisition, and awarded a restitution of the damages levied thereon. *Quære* hereof, for the practisers said it was not usual to give notice of executing a writ of enquiry in such a case of dower. *Nota*, this case was ruled two or three terms past, but was forgot to be reported till now.

[410] IN B. R.

PRIDE *against* THE EARL OF BATH.

S. C. 1 Salk. 120.

Evidence admitted to bastardize a son after the death of himself, his father and mother. Co. Lit. 244 a. Buller N. P. 114. 3 Mod. 164. Hargrave L. T. 479.

Ejectment upon a lease by Pride, tried at the Bar in B. R. before Holt Ch. Just. and Giles Eyre only in Court. Pride made a title to the lands in question as heir to George late Duke of Albemarle, viz. son of a daughter of one Monk the elder brother of the said duke, supposing that Duke George died without issue; the E. of Bath makes a title by a deed, and also by a will made by Duke Christopher son of Duke George. Whereto the plaintiff said, that C. was not the son of Duke G. but a bastard, because at the time of the marriage of Duke G. with Duke Christopher's mother she had a husband living to whom she was lawfully married, and so her marriage with Duke G. was void; and produced several witnesses who endeavoured to prove this. Whereto it was answered by the E. of Bath's counsel, that they ought not to be admitted to give such evidence to bastardize the issue after his death, and after the death of his father and mother, who were married in 1652, and lived together as husband and wife their whole lives after until their deaths, (without any question made) which happened not till 1663. And also Duke C. during his whole life was taken and acknowledged as his son and heir till his death, which was in 1668, and he was styled son and heir of Duke G. both in the settlement and in the will of Duke G. and enjoyed the estate accordingly, and so had the earl under him by the settlement and will of Duke C. till this present. Also, that Duke C. sat in Parliament, &c. as the son and heir of Duke G. and so was he styled in the patent made to him by King Charles II. and also in an Act of Parliament made to dispose of certain lands so settled upon him, which he could not dispose of without such an Act, and that therefore the

plaintiff should not be admitted to bastardize him after the deaths of himself and his father and mother; for this Court will not permit the Ecclesiastical Courts so to do, but in such cases have often granted prohibitions to them, as *Kenn's case*, 7 Co. 44. And that what they would not permit the Ecclesiastical Courts to do in such matters whereof they are the proper Judges, they themselves ought not to do. But it was answered by both the Judges, that if the matter objected was true, the marriage was null and void, and the jury might (enquire and) try such facts as would make it void, and they admitted the evidence; and afterwards upon a long trial and diversity of witnesses, the jury not being satisfied with the evidence gave **[411]** their verdict for the defendant the Earl of Bath. Levinz and others of counsel for the Earl of Bath.

HALL AND KEENE *against* POTTER IN CHANCERY, AND THE HOUSE OF LORDS.

Bonds and contracts for procuring of marriages, void. Shower P. C. 76. 2 Vernon 392, 445. 10 Mod. 445. Cha. Prec. 267. 1 P. Wms. 118, 496. 3 P. Wms. 66. 3 Atkyns 566. 1 Vesey 507. 2 Vesey 549. 1 Strange 240.

Thomas Thinne gave an obligation of 1000l. to Mrs. Potter, conditioned to pay to her 500l. within three months after he should be married to the Lady Ogle, a widow of great fortune and honour, being the daughter and heir of Josceline Percy the last Earl of Northumberland of that name: and in debt on the obligation issue was taken that they were never married, (he being afterwards killed) and a verdict for Potter against Hall and Keene, who were Thinne's executors; whereupon they brought their bill in Chancery, surmising that it was a void contract, it being for procurement of a marriage of Thinne to the Lady Ogle, she being a person of such great honour and fortune; and they insisted principally on two things: 1. That nothing was done by Potter but only advising Thinne to apply himself to Brett who had a great interest with the lady and her friends, and some small matter expended for Thinne's entertainment, and so no sufficient consideration was for the obligation. 2. If there were, yet such contracts for procuriug of marriages are of dangerous consequence, and tend to the ruin of families, and divers precedents were produced where such contracts have been set aside in equity, (but in all those precedents there appeared some circumvention in the case, excepting one about 11 Ch. 1, decreed by the Lord Keeper Coventry). But thereto it was answered by Potter, that here being no fraud, circumvention, or ill practice, used in this case, but only advice, the contract was not illegal; for advice is as lawful in such cases as in other cases if it be without fraud or ill practice; and here none is proved. Also this marriage was convenient (*i.e.* suitable) in respect of their estates, for though the lady was heiress to a very great estate, yet it was in reversion, and depending upon two jointures for a great part of it; and Thinne's estate was great in possession, viz. 10000l. per annum, and he a gentleman of a great family though not of the nobility, and if any advantage were in the case it was to Thinne, and therefore his executors had no reason to complain of the matter; **[412]** and divers cases have been adjudged in the Courts at common law, where on such contracts the parties have recovered their recompence, if the contracts were duly made without fraud or circumvention; and particularly one touching a marriage between Foster and Ramsey within two or three years past, where the defendant Foster promised to the plaintiff in the action 50l. if he would procure Ramsey a widow to marry him, whereupon he brought an action for the 50l. after the marriage, and recovered the whole in damages, which verdict being set aside for imperfection in the declaration, the plaintiff brought a new action and amended his declaration and recovered all the said 50l. again in damages, and had it paid him; both which trials were before Holt Chief Justice at Guildhall, and there being no fraud or circumvention in the case, there was no doubt made of the legality of the contract: and of that opinion was the Lord-Keeper in Chancery, and upon a re-hearing discharged an order made by the Master of the Rolls to the contrary, and dismissed the plaintiff's bill; whereupon he pleaded to the House of Peers, and upon hearing the cause there all the Lords but three or four were of opinion, that all such contracts concerning marriages are of dangerous consequence, and not to be allowed; and they reversed the decree of dismission made by the Lord Keeper, and decreed the obligation to be void. Levinz and Potter in both cases.

[413] OKES *against* ANGE.

Prohibition to a suit for dilapidations after being barred in the Temporal Court for the same.

Prohibition of a suit in the Ecclesiastical Court for dilapidations, on a suggestion, that the plaintiff at another time had brought an action on the case in this Court for the same dilapidations *ad dman'* 100l. To which the then defendant (now plaintiff) pleaded tender of 10l. which was sufficient to repair the dilapidations. Whereon the then plaintiff (now defendant) took issue that the 10l. was not sufficient, and a verdict that it was sufficient, and judgment thereon had, which he now pleaded in bar in the Ecclesiastical Court, and they refused to receive it, whereupon a prohibition was here prayed and granted; for the plaintiff in the Ecclesiastical Court having been barred of dilapidations at the common law, it shall bar him from suing in the Ecclesiastical Court; and of that opinion were the whole Court of C. B. and granted the *prohibition*: but yet Treby Chief Justice doubting, it was adjourned to the following term.

BARGRAVE *against* ATKINS.

Award of several things whereof part is void yet good for the residue. Kyd upon Awards 116. 2 Levinz 3.

Debt on obligation, conditioned to perform an award of all controversies, &c. Defendant pleads no award. Plaintiff replies and sets forth an award that the defendant should pay to the plaintiff 7l. 10s. on the 11th of March next following, and also all the expences of a suit prosecuted by the plaintiff against the defendant, *& omnes rationabiles expensas* which the plaintiff *sustinuisset circa sectam prædict'*. And that there upon each party should make general releases to one another, and assigns a breach on the nonpayment of the 7l. 10s. Defendant rejoins, *nullum tale fecerunt arbitrium*. On which an issue was, and verdict for the plaintiff, and it was moved in arrest of judgment by Levinz, that the award is void; for nothing is awarded to the defendant but the release, and that is not to be made till the **[414]** rest be performed; and though the award is good for the 7l. 10s. which is certain, yet the expences of the suit, *and all reasonable expences* which the plaintiff has expended *circa sectam prædict'* is wholly uncertain and void as to them, and the award in that part thereof can never be performed, and so the release is never to be made; for it is to be made *superinde, &c.* And so held the Court in Hill. last, when it was first moved; but now in this term it being moved by Lutwyche for the plaintiff, and the case of *Pinkny* against *Bullock*, Pasch. 23 Car. 2, cited, where the award was to pay 10l. and the charges spent at the making of the award, and each to release to the other; though as to the charges it was void, yet on paying the 10l. it was adjudged he ought to release: so here: whereupon judgment was for the plaintiff.

[415] TRINITY TERM, IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM THE THIRD. IN THE COMMON PLEAS.

ZOUCH *against* THOMPSON.

Hilary, 7 William.

Writ of *scire facias* to avoid a fine of lands in antient demesne.

The lord the King hath sent to his justices of the Bench here his writ close in these words: William the Third by the grace of God of England, Scotland, France, and Ireland King, defender of the faith, &c. to his justices of the Bench greeting. Whereas by fine in the Court of the Lord Charles the Second, late King of England, of the Bench at Westminster, on the octave of St. Hilary, in the twenty-fourth year of his reign, before John Vaughan, John Archer, Hugh Wyndham, Robert Atkins, and William Ellis, Justices, and other faithful subjects of the said late King then there present, levied between Stephen Thompson, demandant, and John Sellon and

Elizabeth his wife, deforciants, of one messuage, forty acres of land, twenty acres of meadow, thirty-four acres of pasture, six acres of wood and common of pasture, with the appurtenances, in Elvetham Barnards otherwise Elverton, and Elvetham otherwise Elverton Sturmy, in the county of Southampton, they the said John and Elizabeth acknowledged the tenements and common of pasture aforesaid, with the appurtenances, to be the right of the said Stephen, as those which the said **[416]** Stephen hath of the gift of the said John Sellon and Elizabeth, and those they remised and quitted claim from them the said John and Elizabeth and their heirs to the said Stephen and his heirs for ever. And further the said John and Elizabeth for themselves and the heirs of the said John, granted that they would warrant to the said Stephen and his heirs the tenements and common of pasture aforesaid, with the appurtenances, against the said John and Elizabeth, and the heirs of the said John for ever. And for that recognition, remise and quit-claim, warranty, fine and concord, the said Stephen gave to the said John and Elizabeth one hundred and twenty pounds sterling, as by the said fine of record in our Court of the Bench before us remaining more fully appeareth. And now on the behalf of James Zouch, Esquire, now and at the time of the levying of the said fine, and from thence hitherto lord of the manor of Odham, with the appurtenances, in the county of Southampton aforesaid, which is of the antient demesne of England, as it is said we are supplicated, that whereas the said messuage and forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture, with the appurtenances, in Elvetham Barnards otherwise Elverton aforesaid, of the said tenements in the said fine contained, are held, and from the time whereof the memory of man is not to the contrary were held, of the manor aforesaid, and for the whole time aforesaid until and unto the levying of the said fine, were pleadable in the court of the said manor, according to the custom of the said manor, and not elsewhere. And the said messuage, forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture, with the appurtenances, by the fine aforesaid are put to the common law, to the great damage of the said James, and to the manifest danger of his disherison, and also in deceipt of the said Court of the Bench. And whereas after the levying of the said fine, the said Stephen Thompson and John Sellon and Elizabeth his wife died, and one Christopher Thompson is the son and heir of the said Stephen, and William Sellon is the brother and heir of the said Stephen, and one James Goodyer now is the tenant of the said tenements, with the appurtenances, as it is said: we being willing to provide convenient remedy for the said James Zouch upon the premisses, willing that to be done which in this behalf is just, command you that inspecting the fine aforesaid, and summoning before you those whom you shall think fit to be summoned, and hearing the reasons of the parties upon the one side and the other, you further cause to be done of and upon the annulling of the said fine as to the said messuage, **[417]** forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture, with the appurtenances, which of right and according to the law and custom of our kingdom of England you shall see fit to be done. Witness ourself at Westminster, the 23d day of January, in the 7th year of our reign. Reynolds. By the Lord Keeper of the Great Seal of England, at the instance of the plaintiff, received 6s. 8d. H. Hetherington. Afterwards, to wit, upon the 12th day of February, in this same term, comes here into Court the said James Zouch by James Field his attorney, and saith that the fine aforesaid was levied in the Court aforesaid of the said late King Charles the Second of the Bench aforesaid here, between the said Stephen Thompson, and John Sellon and Elizabeth, of the said tenements and common of pasture, with the appurtenances, in the manner and form aforesaid, as by the said fine of record in the court of the said lord the now King here remaining more fully appeareth. And that he the said James Zouch at the time of the levying of the said fine was and as yet is lord of the manor of Odham aforesaid, with the appurtenances, in the county aforesaid, which is of the antient demesne of the Crown of the lord the King of England. And that the said messuage, forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture, with the appurtenances, in Elvetham Barnards otherwise Elverton aforesaid, of the said tenements in the fine aforesaid contained are held of the manor aforesaid; and from the time whereof the memory of man

is not to the contrary, until and unto the levying of the said fine, were pleadable in the manor of the court aforesaid, according to the custom of the said manor, and not elsewhere. And the said messuage, forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture aforesaid, with the appurtenances, by the fine aforesaid are put to the common law, to the great damage of the said James, and to the manifest danger of his disherison, and also in deceipt of the said Court here; and that after the levying of the said fine the said Stephen Thompson and John Sellon and Elizabeth died, to wit, at Elvetham Barnards otherwise Elverton aforesaid; and the said Christopher Thompson is the son and heir of the said Stephen, and the said William Sellon is the brother and heir of the said John Sellon, and the said James Goodyer now is the tenant of the said tenements with the appurtenances. And this the said James Zouch is ready to verify, &c. whereupon he prays that the said fine as to the said messuage, forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture, with the appurtenances, may be reversed and annulled; **[418]** and that he to his court and to all things which he hath lost by occasion of the said fine, may be restored, &c. And because the justices here are ignorant whether the allegation aforesaid of the said James Zouch be true or not, and because it is necessary and expedient, that the said Christopher Thompson, William Sellon, and James Goodyer, for their interests in the said messuage, forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture, with the appurtenances, in this behalf should be forewarned, before that they should any further proceed to the annulling of the said fine, the Sheriff of Southampton aforesaid is commanded that he cause to come here from the day of Easter in three weeks the said Christopher Thompson, William Sellon, and James Goodyer, to shew if any thing, &c. wherefore the fine aforesaid, as to the said tenements with the appurtenances, by reason of the premisses, ought not to be reversed and annulled, &c. And further, &c. At which day, to wit, at the said three weeks of Easter here comes the said James Zouch by his attorney aforesaid, and the said James Goodyer by Samuel Grove his attorney, and the said Christopher Thompson by John Benn his attorney. And the said William Sellon being solemnly called upon the fourth day of pleading came not. And the sheriff, to wit, Richard Cowper, Esquire, now returns that the said William hath nothing, &c. nor is found, &c. And that the said Christopher and James Goodyer are attached by their pledges, to wit, John Den and Richard Fen; therefore the said William in mercy, &c. And thereupon the said James Zouch as before prays that the fine aforesaid as to the said messuage, forty acres of land, twenty acres of meadow, thirty-three acres of pasture, six acres of wood and common of pasture, with the appurtenances, by reason of the premisses may be reversed and annulled, &c.

Leave to imparl until the morrow of the Holy Trinity, and from thence until three weeks of St. Michael.

[419] ZOUCH *against* THOMPSON.

S. C. 1 Lord Ray. 177. 1 Salk. 210. 3 Salk. 35. But this point doth not appear.

A *scire facias* to reverse a fine in antient demesne, where the lord was not a party to the fine, lies not, but a writ of *disceit*. Cruise on Fines 299. 1 Salk. 210. 2 Wilson 17.

A *scire facias* by the lord of the manor, being antient demesne, against the heir and tertenant to avoid a fine levied of a messuage and lands held of the manor. The sheriff returns *nihil habet* against the heir, and *scire feci* against the tertenant, who comes in and pleads that the fine ought not to be questioned on a *scire facias*, but by an original writ of *disceit* sued out of Chancery; upon which plea the defendant demurs: and it was argued for him, that it may be done by *scire facias* on the record of the fine being in this Court, as well as by writ of *disceit* out of the Chancery. In *Thesaur' brev'* is such a precedent of a *scire facias* sued out of C. B. where the record of the fine was. And F. N. B. 99, G. H. A writ of *disceit* shall be had either out of

Chancery or C. B. at the election of the party. F. N. B. 105. *Audit quer'* on a judgment in waste given in C. B. the Court awarded a *scire fac'* out of that Court, and to proceed thereon, and not on the *audit' quer'*. So Old Nat' Brev. 57, a writ of *disceit* may be sued upon the rolls of the Court where the record is; and *ib.* 50. It is sometimes original, and sometimes judicial. Trin. 21 E. 3, pl. 5. By Shard, a writ of *disceit* shall be sued out of the Court where the record is. And as to the objection, that none may sue a *scire facias* upon a record, who is not party to the record, and that so is not the lord here: it was said, that in Mo. pl. 700, a conusor of a statute aliens part to one, and part to another, and execution is sued against one of them, he shall have a *scire facias* for contribution against the other; for though he was not party thereto, yet because he is grieved thereby, he shall have the writ. And the lord here is grieved by the fine, because thereby the land is become *frank-fee*. But after divers arguments the writ was abated by the whole Court, because the lord not being party to the record of the fine, a *sci' fac'* does not lie for him, but he ought to bring his original writ of *disceit*, and so he did afterwards, and reversed the fine.

HILARY, 5 WILLIAM & MARY.

[420] CRISPE *against* BELWOOD AND ANOTHER.

[See *Brecon Markets Company* v. *Neath & Brecon Railway Company*, 1872, L. R. 7 C. P. 567.]

Declaration in trespass, *vi et armis*.

Lincoln, to wit.—Maria Belwood late of Gainsburgh in the county aforesaid, widow, and Joseph Garner late of G——— in the county aforesaid, labourer, were attached to answer John Crispe of a plea, wherefore with force and arms the goods and chattels of the said John to the value of twenty pounds at G——— there lately found, they took and carried away, and other wrongs to him did, to the great damage of the said John, and against the peace of the lord the now King, and of the lady the now Queen, &c. And whereupon the said John, by Francis Johnson, his attorney, complains that the said Maria and Joseph, on the 1st day of May, in the 2nd year of the reign of the lord the now King, and of the lady the now Queen, at G——— with force and arms, &c. the goods and chattels, to wit, 120 fir deal boards of the said John, to the value, &c. there then found, took and carried away, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon he saith that he is prejudiced, and hath damage to the value of 20l. and therefore he produces his suit, &c.

And the said Maria and Joseph, by William Sampson their attorney, come and defend the force and injury, when, &c. and as to the coming with force and arms, say that they are not guilty thereof, and of this they put themselves upon the country, and the said John doth the like; and as to the residue of the trespass aforesaid above supposed to be committed, the said Maria and Joseph say, that the said John ought not to have his action aforesaid against them; because they say that one Willoughby Hickman, Baronet, at the said time in which the trespass aforesaid is supposed to be committed, and long before, was and as yet is seized of the manor of Gainsburgh, with the appurtenances in the county aforesaid, in his demesne as of fee, and that sundry messuages in the town and burgh of G——— aforesaid, in the county aforesaid, are held, and were held by burgage tenure of the lord of the said manor as of the said manor, within which manor and within the burgh or town of G——— aforesaid, in and upon the river Trent there, being a navigable river, there is had, and from the time whereof the memory of man is not to the contrary, there was had a certain wharf called a slaith, parcel of the said manor, very convenient for loading and unloading goods and merchandizes in and out of small vessels called keels, and other [421] vessels whatsoever, there at the said burgh or town, and accustomed so to load and unload such goods and merchandizes, and where the goods and merchandizes of every person could be loaden and unloaden. And the said Maria and Joseph further say, that the said Willoughby, and all those whose estate he hath and had as aforesaid, in his manor aforesaid, with the appurtenances, from time to time and from the

time whereof the memory of man is not to the contrary, have repaired, amended and maintained, and from the whole time aforesaid, have been used and accustomed to repair, amend and maintain the wharf aforesaid at their proper expences, as often as there has been need, and by reason thereof and for the support of the said expences, they have had and perceived, and for the whole time aforesaid, have been accustomed to have and perceive a toll, called a water-toll, of all goods or merchandizes in such small vessels and other vessels by the river aforesaid, within the manor aforesaid imported, and within the manor aforesaid unloaded, [except of the goods and merchandizes of the persons in such messuages so as aforesaid held in the burgh aforesaid, inhabiting and being resiant; and of goods and merchandizes other than corn and seed to be sold in the common mart or market of G—— aforesaid,] after the rates following, to wit, two pence by the ton for every ton of such goods and merchandizes, [corn and seed excepted,] and for corn and seed after the rate or proportion of two pecks for twenty quarters of such corn and seed; and for default of payment of such toll upon demand or request thereof they have been used and accustomed from the whole time aforesaid, by themselves their ministers or servants, the goods and merchandizes for which the said toll so was due and payable, or a reasonable part thereof in the name of a distress to take and detain until satisfaction should be made to them for the toll aforesaid, or such distress was replevied by the due process of law. And the said Maria and Joseph further say, that the said John who is not, nor ever was an inhabitant or resiant in any such messuage so as aforesaid being held in the burgh aforesaid, before the said time in which, &c. to wit, upon the day and year aforesaid, in the declaration aforesaid above mentioned, in small and other vessels by the river aforesaid, within the manor aforesaid imported, and within the said **[422]** manor unloaded, 120 tons of fir deal boards, not to be sold in the common mart or market aforesaid, whereof the fir deal boards in the declaration aforesaid specified were parcel: whereupon the said Maria and Joseph on the behalf of the said Willoughby and by his command then and there requested the said John to pay the toll in that behalf due, to wit, two pence by the ton for every ton of the said 120 tons of fir deal boards so imported and unloaded, but the said John, the said toll then and there refused to pay, whereupon the said Maria and Joseph, as the servants of the said Willoughby, and at his command at the said time in which, &c. the fir deal boards in the declaration aforesaid specified, parcel of the said 120 tons of fir deal boards, whereof the said toll was due and payable, and being as aforesaid, at G—— aforesaid, within the manor aforesaid, in the name of a distress for that toll took, and carried away as it was lawful for them to do; and the same in their possession there as yet detain, which is the same trespass whereof the said John above now complains; and this they are ready to verify; wherefore they pray judgment if the said John ought to have his action aforesaid thereupon against them, &c.

And the said John saith, that he by any thing by the said Maria and Joseph before alledged ought not to be precluded from having his action aforesaid thereupon against them, because he saith that the said Maria and Joseph on the day and year aforesaid, in the declaration aforesaid above specified, at G—— aforesaid, with force and arms, &c. of their proper injury, the said 120 fir deal boards of the said John, of the value, &c. there then found, took and carried away, against the peace of the said lord the now King, and of the lady the now Queen, as the said John above against them complains; without this that the said Willoughby and all those whose estate he hath and had as aforesaid, in his manor aforesaid, with the appurtenances, from time to time, and from the time whereof the memory of man is not to the contrary, have repaired, amended and maintained, and from the whole time aforesaid have been used and accustomed to repair, amend and maintain the wharf aforesaid, at their proper expences, as often as there hath been need, and by reason whereof and for the support of such expences have had and perceived, and for the whole time aforesaid have been used and accustomed to have and perceive a certain toll, called a water-toll, of all goods and merchandizes in such small vessels, and other vessels, by the river aforesaid, within the manor aforesaid imported, and within the said manor unloaded, [except of the goods and **[423]** merchandizes of persons in such messuages so as aforesaid held in the said burgh, inhabiting and being resiant, and of goods and merchandizes, other than corn and seed to be sold in the common mart or market of G—— aforesaid,]

after the rate following, to wit, two pence by the ton for every ton of such goods and merchandizes, [corn and seed excepted,] and for corn and seed after the rate or proportion of two pecks for twenty quarters of such corn and seed, and for default of payment of such toll upon demand or request thereof, that they have been used and accustomed from the whole time aforesaid, by themselves, their ministers or servants, the goods and merchandizes for which the said toll so was due and payable, or a reasonable part thereof, in the name of a distress to take and detain until satisfaction should be made to them for the toll aforesaid, or such distress should be replevied by the due process of law, as the said Maria and Joseph above by pleading have alledged, and this he is ready to verify; wherefore, because the said Maria and Joseph above acknowledge the trespass aforesaid, the said John prays judgment and his damages by occasion of the said trespass to be adjudged to him, &c.

And the said Maria and Joseph as before, say that the said Willoughby, and all those whose estate he hath, and so as aforesaid had in his manor aforesaid, with the appurtenances from time to time, and from the time whereof the memory of man is not to the contrary, have repaired, amended and maintained, and for the whole time aforesaid, have been used and accustomed to repair, amend and maintain the wharf aforesaid, at their proper expence, as often as there has been need, and by reason thereof, and for the support of the said expences, have had and perceived, and have been used and accustomed to have and perceive a certain toll, called a water-toll, of all the goods and merchandizes in such small or other vessels, by the river aforesaid, within the manor aforesaid imported, and within the said manor unloaded, [except of the goods and merchandizes of persons in such messuages so as aforesaid held in the burgh aforesaid, inhabiting and being resiant, and of goods and merchandizes, other than corn and seed to be sold in the common mart or market of G—— aforesaid,] after the rate following, to wit, two pence by the ton for every ton of **[424]** such goods and merchandizes [corn and seed excepted,] and for corn and seed after the rate or proportion of two pence for twenty quarters of such corn and seed; and for default of payment of such toll upon demand or request thereof, have been used and accustomed for the whole time aforesaid by themselves, their ministers or servants, the goods and merchandizes for which the said toll was due and payable, or a reasonable part in the name of a distress, to take and detain until satisfaction should be made to them for the toll aforesaid, or such distress should be replevied by the due process of law, in the manner and form as the said Maria and Joseph above thereupon by pleading have alledged; and of this they put themselves upon the country, and the said John doth the like; therefore, as well to try this issue as the said other issue between the parties aforesaid above joined the sheriff is commanded, &c.

CRISPE *against* BELWOOD.

Prescription for toll of goods set on land within a manor, is good as a toll. Traverse. Raym. 52. 1 Mod. 48, 105, 232. *Ante* 37, 160, 190, 307, 400. 1 Term Rep. 667, 670. Protestation unnecessary.

Trespass, for taking 120 deal boards of the plaintiff's, of the value of 20l. The defendant justifies, for that Sir Willoughby Hickman is seised of the manor of Gainsborough, within which manor is and time out of mind has been a wharf repaired by the lord of the manor, being upon the river of Trent, by reason of which the lord has had a toll of 2d. per ton of all merchandizes put on land within the manor (*not saying upon the wharf*) and for non payment to distrain a reasonable part of the goods; and that the plaintiff put on land within the manor 120 tons of boards, and refused to pay the toll, for which the defendant as servant to Sir Willoughby distrained the boards in question. The plaintiff replies *de injuria sua propria*, and traverses the prescription; whereupon was a verdict for the plaintiff; and it was moved in arrest of judgment that the prescription was void, and without consideration, because it is not for landing upon the wharf, but within the manor; and it was twice argued, viz. last Easter term by Wright for the plaintiff, and **[425]** Blencoe for the defendant, and this term by Lutwyche for the plaintiff, and Levinz for the defendant. And on behalf of the plaintiff it was said, that the landing not being upon the wharf, but

within the manor was no more than *toll-through*, and being without consideration was not good, as 22 Ass. 58. *Toll-through* without consideration is void. Mo. pl. 793. 5 H. 7, 10 a. and Trin. 24 Car. 2, B. R. Rot. 1472, between *Prideaux and Warne*. But on the other side it was said, that it is not like the cases of *toll-through*, but rather of *toll traverse* for passing over my lands, which by all the books cited on the other side appears to be good without any consideration or charge. For the ease, &c. by passing *traverse* my land is a sufficient consideration, and so here the landing within my manor is a sufficient consideration. And it may be intended that all the lands within the manor are the demesnes of the manor, for so they were at first 'till the lord divided them among his tenants, Spelm. Glos. 389. And supposing that those lands are not now parcel of the demesnes, but given to the tenants in fee, yet the prescription may have a reasonable commencement, viz. that when the lord divided those lands among his tenants, he reserved this toll for landing of goods to himself. And for the defendant were cited Kel. 152, *in quo warranto*. Prescription for toll for passing through his manor, allowed good, 5 H. 7, 10. Prescription to pay for passing over his land; and 3 Co. *Farmer's case*, prescription that none but the lord shall keep a bakehouse within the manor, good; and 1 Mod. 231, *James* against *Johnson*; prescription for toll for passing over his manor, held good; and of that opinion in the end were the whole Court, and gave judgment for the defendant. Then two exceptions were taken to the pleadings, 1. That the toll is not laid to be *manerio prædicto spectant'*. 2. The boards are laid to be of the value of 20l. and the toll amounts to 120 twopences, which is but 20s. and no protestation or averment is to the value of the boards, and so must be taken to be of 20l. value, and consequently an unreasonable distress. Whereto it was answered by the Court, 1. That *manerio spectant'* is only form, and it shall be intended; especially after verdict. 2. That the value is no more admitted here, than upon a not guilty, where it is always proved; also a protestation is only an unnecessary form, and if the distress be unreasonable, he has his remedy upon the statute.

[426] CHATER AND OTHERS *against* HAWKINS, EXECUTOR OF HAWKINS.

Before the Court of Delegates at Serjeants-Inn in Fleet-Street.

In the case of a will two of the witnesses being adjudged to the pillory for matters not infamous by the canon or civil law, their depositions in the Ecclesiastical Court were admitted for evidence by the Court of Delegates. 5 Mod. 74, 75. 2 Salk. 689, 690.

Hawkins being a prisoner in Newgate for opprobrious words spoken of the Mayor of London, and under some distemper of mind, but of a great personal estate, to the value of 10000l. made his will there, attested by several witnesses, and upon hearing of the cause in the Prerogative Court, sentence being there against the will and administration committed, the cause came hither by appeal *coram delegatis*, viz. Lloyd Bishop of Litchfield, Lloyd Bishop of St. Asaph, Treby Chief Justice of C. B. Rokesby a Judge of the same Court, and John Powell jun. one of the Barons of the Exchequer, with Dr. Oxenden and other civilians: where, for avoiding the testimony of two witnesses to the will, two records were produced, whereby they were severally convicted, the one for publishing a libel, and the other for singing a song against the Government, and both of them adjudged to the pillory; but no proof was of their having stood in the pillory, only the said records were produced; and after their examination in the Ecclesiastical Court, but before the sentence there, came the general pardon, whereby they were pardoned; and the question here was, whether their examination and testimony given in the Ecclesiastical Court shall be admitted for evidence? And, 1. It was admitted that they being convicted and adjudged to the pillory at the time that they gave their testimony in the Ecclesiastical Court, the pardon afterwards did not make their testimony good, if it were not good when it was first made. 2. That the judgment of pillory makes the infamy though they were never set in the pillory. But, 3. The great question of the case was, whether the conviction and judgment for those crimes should make

them infamous and destroy their testimony notwithstanding the judgment of pillory? For it was said on one side, that the books, as Britton, Co. 3 Inst. &c. which speak of infamy by the judgment of pillory, speak only of a judgment of pillory for such cases as import deceit and fraud; as cheats, &c. and that it is from the nature of the crime that the infamy arises, and not from the judgment. Whereto it was **[427]** answered, that it is the judgment upon which the infamy arises, and not from the nature of the crime; as if one be convicted of cheating, he is still a witness if he has not had judgment of pillory for it. 2. It was said, that pillory, although it infers infamy by the common law, yet by the canon and civil law (whereby they are to adjudge in this case, being of a will) does not import infamy except the cause for which it is inflicted be infamous: and herewith the civilians seemed to agree. And (after the counsel were withdrawn) for this cause only (as Rokesby and Powell afterwards told me) the matter itself not being infamous by the canon or civil law, the depositions of the witnesses were admitted for evidence, notwithstanding the judgment of pillory, by the whole Court, and the sentence in the prerogative reversed, and the will adjudged to be good.

BISHOP *versus* FOUNTAINE, BRADSHAW & TODD, IN CHANCERY.

Devise of a possibility not made good in equity. *Contra.* Fearne's Essay, 1st vol. 537, 543. Fearne's Essay, 2d vol. 522. 1 Hy. Blackstone 30. 3 Term Rep. 88.

Dr. Berry, seised in fee, devised the lands in question to Serjeant Fountaine and his heirs in trust, 1. To sell part for payment of his debts. 2. Till the debts paid, to pay 100l. per an. to his natural daughter Mary, and after the debts paid, 300l. per an. for her life; and if she have children, to convey successively to those children; if sons, at their full age; if daughters, to them all; but so as the husband she marries take the name of Berry. 3. For want of such issue, or if such issue die without issue, he devises Hemsworth and Kingly-Park, the lands principally in question, to be conveyed to the eldest son and heir of his nephew John Cater, and the heirs of such eldest son; and gives the said eldest son an annuity of 40l. per annum till such estate shall come to him; but if he claim any thing during the life of Mary or any of her issue, then both father and son to be excluded from having any thing out of his estate. The eldest son of John Cater was Anthony, who had two sisters, the defendants Bradshaw and Todd, daughters of John. Anthony died, and left issue John his son, who in the life of Mary devised the lands in question to the plaintiff, and died without issue. Mary after died without issue. The heir of **[428]** Fountaine conveyed the lands in question to Bradshaw and Todd, sisters of Anthony, and heirs of him and also of his father John. Bishop brings this bill to have the lands conveyed to him, supposing the equity to have this estate was vested in Anthony, and so well devised to him by John the son and heir of Anthony. But the Lord Keeper, assisted by the Chief Justice Treby, and Powell Baron of the Exchequer, after several arguments, and long consideration of the authorities cited on both sides, resolved that John had no estate devisable, but a mere possibility, during the life of Mary or any of her issue; and so the devise to the plaintiff void, and the lands well conveyed to the defendants Bradshaw and Todd, sisters and heirs of Anthony, and dismissed the bill, but without costs, provided he acquiesce, and give them no farther trouble in this Court.(1)

(1) In the case in 3 Term Rep. the testator gave his lands and hereditaments charged as in his will unto his brother T. L. until his son John or any other of his younger sons should attain the age of twenty-one years; and in case he should have no younger son that should live to attain said age, but should have only one son that should live to attain said age, then until such only son should attain said age upon trust, &c. And when and as soon as his said nephew John or any other of the younger sons of his said brother T. L. born or to be born should attain the age of twenty-one years, then he gave his lands and hereditaments charged as aforesaid unto his said nephew John, or unto such other son as for the time being should be a younger son of T. L. and should first attain his age of twenty-one

[429] MICHAELMAS TERM, IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM THE THIRD. IN THE COMMON PLEAS.

SANDERS *against* MARKE.

Debt lies on an agreement to pay the proportionable part of the charge of a suit at law, averring that such part came to a certain sum—for when the damages which were at first uncertain are by the averment reduced to a certainty, debt lies as well as covenant. Styl. 31, 133. Cro. El. 797. 1 Leon. 208. Ray. 14, 222. 2 Lev. 80. 2 Jo. 184. 2 Strange 1089.

Debt for 15l. 18s. 6d. and declares on a deed reciting that divers suits were like to arise between the Vicar of Shittlehampton and the plaintiff touching a *modus decimand' infra parochiam pred'*, and that the vicar had sued the plaintiff in the Ecclesiastical Court touching the same, which *modus* concerned all the parishioners; and the defendant being a parishioner agreed and promised to the plaintiff to pay and bear his proportionable part of all charges of the said suit and of all other suits by the said vicar touching that matter. And that the plaintiff in defence of the said suit and of all other suits by the vicar touching the said *modus* between such a time and such a time had expended 350l. And that the defendant had within the said parish lands of the yearly value of 53l. and that his proportion of the said charge amounted to 15l. 8s. 8d. whereof the defendant had notice, & *licet sæpe requisitus* had not paid it, *per quod actio accrevit.* The defendant pleads *non est fact'*, on which verdict was for the plaintiff, and it was moved in arrest by Darnell, 1. That debt does not lie upon this agreement, it not being certain what the sum to be paid shall be; but it ought to be covenant. And he said it was not like the case of *Johnson and Morgan*, Cro. Eliz. 561, an agreement by bill to pay such a debt as his brother owed, and avers **[430]** that his brother owed 40l. for there it was writ at the foot of the bill that the

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years, and to the heirs and assigns of such younger son for ever. And in case his said brother should have but one son that should live to attain his age of twenty-one years, then he gave the same to him, his heirs and assigns for ever, with remainder to T. L. in fee. The testator died in the year 1734, and left T. L. his heir at law, and J. T. L. and John L. his two sons then living; John L. died under the age of twenty-one years, J. T. L. married, and made his will, and thereby gave all his worldly estate, &c. unto his wife, and died in 1765 before his father T. L. who never had any other son; upon his death in 1785, the widow of J. T. L. brought an ejectment in the Court of Common Pleas, and there it was argued that J. T. L. had but a possibility which could not be devisable, since any interest which he had was liable to be defeated by the birth of a younger son of T. L. his father, before whom he died: but the Court of Common Pleas gave judgment for the widow, and a writ of error being brought in the Court of King's Bench, that Court affirmed the judgment of the Court of Common Pleas, and upon that occasion Lord Kenyon said, There are two kinds of possibilities, the one a bare possibility—that which the heir has from the curtesy of his ancestor, and which is nothing more than a mere hope of succession—such a possibility undoubtedly is not the object of disposition —the other a possibility or contingency like the present.—Executory devises are not naked possibilities, but are in the nature of contingent remainders, and there is no doubt but that such estates are transmissible and consequently devisable. Ashhurst, Just. said—The doubt appears to have arisen upon the word "having" in the Statute of Wills—and the old cases determined that a contingency like the present was not the subject of a devise—but that doctrine has been exploded in all the modern cases—the plain meaning of the statute is, that every person who has a valuable interest in lands shall have the power of disposing of it by his will. Buller, Just. said—It is a sound distinction which has been taken by my Lord Chief Justice between a bare possibility and a possibility coupled with an interest. Grose, Just. said—If the case in Levinz cannot be considered as law, the foundation on which the other cases is built is destroyed—and the modern cases have decided the other way—on the authority of which I think the point is now settled.

brother owed 40l. and though it is there said that judgment was given for the plaintiff, yet it appears afterwards in the same case, Cro. Eliz. 758, that the Court were divided, Walmsly and Kingsmill being for judgment for the plaintiff, but Anderson and Glanvill *contra;* and so here for the present judgment was stayed; but afterwards in the same term it being moved again, upon long debate judgment was given for the plaintiff: for when the damages which were at first uncertain are by the averment reduced to a certainty, debt lies as well as covenant.

CHAMBERS *against* MORE.

Continuances, essoigns, &c. may be amended on the plea roll before judgment. 1 Salk. 51. 6 Mod. 164, 269, &c. 1 Sid. 66, 243, 259. 1 Keble 191, 215. Ray. 440. 1 Lev. 150, 189. 1 Roll. Ab. 201. *Ante* 39, 152, 169, 345, 347, 361.

A *scire facias* was on a judgment obtained Pasch. 27 Car. 2, and the *scire facias* bore *teste* 25 Apr. 6 W. & M. returnable Trin. 6 W. & M. and now upon the record the entry is Trin. 7 W. 3, but no continuances were from Trin. 6 until Trin. 7. The defendant pleads a frivolous plea, upon which the plaintiff in the *scire facias* demurs. And now for the defendant it was argued, that the whole plea is discontinued for want of the continuances from Trin. 6 until Trin. 7, and that the cause was thereby out of Court, so that the plaintiff could not have judgment. And the case was argued divers times in this term, and the Court gave the plaintiff leave to enter an imparlance-roll with the continuances with intent to have amended the plea-roll thereby; but it was afterwards at last resolved by the whole Court that the plea-roll itself was amendable without any need of an imparlance-roll, for the continuances, essoigns, &c. are the acts of the Court itself, and the Court might at common law at all times before judgment amend their own acts although in another term; but their judgments they cannot amend in another term, but only in the same term by the common law: and for authorities were cited 4 E. 3, 9 b. (which was before any of the Statutes of Amendments) an essoign being the act of the Court, amended. 8 Co. 156 b. Essoigns and continuances being the acts of the Court are amendable by the Court at any time before judgment. 5 E. 3, 25. The entry of a continuance in a voucher to warranty **[431]** amended by the Court, it being the act of the Court. Cro. Ja. 212. That the default of a continuance cannot be objected before judgment, because the Court may enter it at any time before judgment. Whereupon the plea-roll was amended by the whole Court by a memorand. *quod alias, scil' term. Sanctæ Trin.* 6, *&c.* and the continuances all entered down to that of Trin. 7, and judgment given for the plaintiff. Pemberton and others of counsel for the defendant, Levinz and others for the plaintiff.

LODDINGTON *against* KIME.

S. C. 224. 1 Ld. Raym. 203. 1 Eq. Ab. Devises, pl. 23.

[Applied, *Ginger* v. *White*, 1742, Willes, 357. Not applied, *Southby* v. *Stonehouse*, 1755, 2 Ves. sen. 613. Applied, *Doe d. Davy* v. *Burnsall*, 1794, 6 T. R. 35. Referred to, *Thellusson* v. *Woodford*, 1805, 11 Ves. 139; *Doe d. Herbert* v. *Selby*, 1824, 2 B. & C. 930. Principle applied, *Crump* v. *Norwood*, 1815, 7 Taunt. 373; *Jack* v. *Fetherstone*, 1829, 2 Huds. & Brooke (Ir.), 334. Discussed, *Montgomery* v. *Montgomery*, 1845, 3 Jo. & Lat. 56; 8 Ir. Eq. R. 749; *Rider* v. *Wood*, 1855, 1 K. & J. 652. Commented on, *Warren* v. *Travers*, 1868, Ir. R. 2 Eq. 462. Referred to, *Sandes* v. *Cooke*, 1887-88, 21 L. R. Ir. 453.]

A devise as follows:—"As concerning my manors of P. and W. after my just debts and legacies paid, I devise them to E. A. for life without impeachment of waste, and in case he shall have issue male, to such issue male and his heirs forever—and after the death of E. A. in case he leave no issue male, the manor of P. to Sir T. S. and his heirs for ever. And as to the manor of W. in case E. A. die without issue male, I devise it to T. B. and his heirs for ever. And I earnestly desire my nephews

B. and S. to whom I have given the *inheritance* of my estate in P. and W. to take care of the payments of the rent charges, &c."—E. A. under the will has but an estate for life.—But are the subsequent limitations executory devises or contingent remainders? 2 Lut. 1205. 1 Sid. 194. 1 Lev. 59, 60. Ray. 82, 163, 330. Hobart 29, 38. 2 Leon. 70. 2 Jo. 99, 112. 2 Mod. 291. 9 Mod. 403. *Ante* 370, 371. Douglas 265. *Goodright* v. *Dunham* & 504 [note 2]. *Doe* v. *Fonnereau*. Fearne's Essay, 1st vol. 233, 342, 520, 547. 2d vol. 203, 224, 495. 2 Brown P. C. 7, 8, 13, 15. *Ante* 108.

Replevin brought of four cows taken in Eastfield, parcel of the manor of Silke-Willoughby in com' Lincoln'. The defendant makes conusance, for that Sir Thomas Bernardistone was seised in fee of the manor, and demised Eastfield to Sims, and because the cows were damage feasant there, the defendant as bailiff to Sims makes conusance. The plaintiff in bar says, that long time before such taking, one Evers Armin was seised in fee of the manor, and devised it to Armin Bullingham in tail, who licensed the plaintiff to put in the cows, *absque hoc* that Sir Thomas Bernardistone was seised in fee *modo & forma, &c.* Upon which plea issue was joined, and by a special verdict it was found, that Mar. 30, 1668, Sir Michael Armin was seised in fee of this manor, *inter alia* of the manor of Pickworth; and being so seised, made his will in these words, viz. *I desire my executors to take care of the payment of my debts; and because my debts and legacies are many, amounting to about* 4600*l. a perfect schedule whereof is hereto annexed, therefore I devise my lands in Orton and Buttolph-Bridge to be sold. And left that my personal estate be not sufficient, I give to my executors full power to receive the rents and profits of my real estate, in trust to pay my debts and legacies.* And in another clause: *If my debts and legacies being paid, Orton be not sold, I devise it to my servant Silvester for his life; but if it be sold, then Silvester to have a rent-charge of* 50*l. per annum out of Pickworth and Willoughby for his life; and I desire my executors to see it paid.* And in another clause afterwards **[432]** he says; *As concerning my manors of Pickworth and Willoughby, after my just debts and legacies paid, I devise them to my uncle Evers Armin for his life, without impeachment of waste; and in case he shall have issue male, to such issue male and his heirs for ever; but charged with* 25*l. per ann. of the* 50*l. per ann. to Silvester; and after the death of my uncle Evers Armin, in case he leave no issue male, the manor of Pickworth to my nephew Sir Thomas Stiles and his heirs for ever, but charged with* 25*l. part of the* 50*l. per annum to Silvester. And as to the manor of Silke-Willoughby, in case my uncle Evers Armin die without issue male, I devise it to my nephew Thomas Bernardistone and his heirs for ever, but charged with* 25*l. part of the* 50*l. per annum to Silvester.* Then he devises another rent-charge to one Bristow, and then it follows, *And I do earnestly desire my nephews Bernardistone and Stiles, to whom I have given the inheritance of my estates in Pickworth and Silke-Willoughby, to take care of the payments of the rent-charge.* Then he devises several other rent charges to several other persons for their lives, and then he again says: *I earnestly intreat my nephews Stiles and Bernardistone, to whom I have devised the inheritance of Pickworth and Willoughby, to take care they be paid.* And then he devises money-legacies to be paid after his debts, and then he says, *My debts are only these mentioned in the schedule.* Then the jury find the schedule of debts, and that it amounts to 4600l. and that after the making of the will Sir Michael mortgaged the manor of Pickworth for the term of 1000 years for 4000l. and that all the debts in the schedule are paid, and also the legacies are paid, but the last mortgage for 4000l. is still unpaid, and that after the death of Sir Michael, and after the debts in the schedule and the legacies paid, Evers Armin, in Hill. 1675, suffered a common recovery of both the manors to the use of himself and his heirs; and 19 Octob. 1677, devised both the manors to Armin Bullingham in tail, and Jul. 1, 1680, he died without issue male, and Sir Thomas Bernardistone entered into Silke-Willoughby, and was seised *prout lex, &c.* and demised to Sims *prout*, whereupon Bullingham entered and gave licence to the plaintiff *prout, &c.* And if Sir Thomas Bernardistone was seised in fee as the conusant has alledged, then they find for the **[433]** conusant; and if not, for the plaintiff. This case was argued several times at Bar, and two questions were made, 1. Whether any estate was vested in Evers Armin before the mortgage of 4000l. paid? 2. If not, then whether the recovery suffered by Evers Armin, and

the limitations of the use, and the devise made by him, were void? And it was resolved without any difficulty, that the estate was vested, for the debts were only to be paid before the vesting of the estate; for by several clauses and the whole scope of the will it appears that the debts to be paid by the provision of the will were the debts in the schedule only, all which were found to have been paid before the recovery suffered. But the great point was, whether Evers Armin took an estate-tail by the will, or only an estate for life? For it was said for the plaintiff, that although the first clause of the devise be to Evers Armin for his life, and in case that he had issue male, to such issue male and his heirs, it may be doubted whether Evers Armin took more than an estate for life with a contingent remainder in fee to his issue male, if he had any; and though thereto it was said that such devise to his issue male would be void for uncertainty what issue male he intended, and it was said that a devise to the issue male of a man had been adjudged void for that reason; yet by the subsequent clause, *And as to the manor of Silke-Willoughby, in case my uncle Evers Armin dies without issue male, I devise it to my nephew Bernardistone and his heirs, &c.* it makes the whole clear that Evers Armin had an estate-tail. Whereto it was answered, and at length resolved by the whole Court, that Evers Armin took only an estate for life. For, 1. The first limitation to him for life is without impeachment of waste, where the words *without impeachment of waste* were impertinent if he should have an estate-tail. See 2 Co. 23 b. where the exposition of a doubtful deed is made by these words. 2. By the first limitation the inheritance is not to him, but to his issue male and his heirs, 1 Co. *Archer's case*, and the words *his heirs* exclude the exception of uncertainty, for there must be an issue male and his heirs, and the issue male first born shall take the contingent remainder, and though there are twins, he who first comes shall take, as Esau and Jacob, although born at the same time, yet Esau had the birth-right, 1 Co. 95 b. limitation of a use to himself for life, the remainder to the use of his heirs, and the heirs females of the bodies of the said heirs, the heir took by purchase and had the inheritance, **[434]** and the ancestor only an estate for life. 3. It is two or three times mentioned in the will, *I earnestly desire my nephews Stiles and Bernardistone, to whom I have devised the inheritance of my estate, to take care of the payment of the annuities;* which proves his intent that Evers Armin was not to have any inheritance, but only for life, (and there was no probability of his having any issue, he being then above 70 years of age) but that the inheritance should be to Stiles and Bernardistone. 4. The last words, *And if Evers Armin die without issue*, are not to be taken substantively and absolutely, but relatively to what he had said before, viz. that if Evers dies without issue, that Stiles and Bernardistone should take the fee as was before appointed; and it cannot be intended that he by those oblique words would destroy by implication the estate expressly devised before to the issue male of Evers and his heirs, see Hob. A devise of all my lands in A. to B. and his heirs, and afterwards in the same will is a devise of all my lands in D. and *elsewhere* to C. and his heirs; those general words *elsewhere* shall not destroy by implication the express devise to A. before; so Dyer 173, a devise to one for life, remainder to A. and the heirs males of his body, and if A. dies without heirs of his body, &c. the word *heirs* shall not be taken generally, but such heirs as were mentioned before; viz. heirs males; so Dyer 130, 131, an express devise to one shall not be altered by words of implication to another, Cro. Eliz. 15, 16. Mo. pl. 269, the like case; so Mo. 801. Cro. Cha. 185, *Spalding* against *Spalding*, a devise to his son John, *and the heirs of his body in fee, and after the death of Alice his wife, if John die living Alice, then William shall be his heir; John dies living Alice, leaving a son:* William shall not have the land; for the words, *if John die living Alice*, in the latter part, shall be expounded by the first part, viz. *die without heirs of his body living Alice.* And after that the Court were agreed to give judgment for the avowant upon these points. Justice John Powel jun. of Glocester, raised another point, viz. that this was a contingent remainder to the issue of Evers and his heirs, and so are the remainders to Stiles and Bernardistone, and that all were destroyed by the recovery suffered by Evers Armin before they happened; and that they were contingent remainders, and not executory devises, he cited a case between *Plunket and Holmes*, Mich. 13 Car. 2, in B. R. whereupon this case was adjourned to be farther argued upon **[435]** this point; and afterwards it was twice argued upon this point, viz. whether it was a contingent

remainder or an executory devise? And afterwards, before any judgment given; the parties agreed and divided the estate.(1)

HILARY TERM, IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM THE THIRD. IN THE COMMON PLEAS.

REYNOLDSON AND OTHERS *against* THE BISHOP OF LONDON AND BLAKE.

The Act of Parliament concerning the union of churches in London, does not affect the title of the patrons, who if they had been usurped upon before the Act of Parliament, must recover their right by writ of right of advowson.

A *quare impedit* to present to the church of St. Andrew Wardrobe, and declares that by the Act 22 Car. 2, for rebuilding of London it was enacted, that the parishes of St. Andrew Wardrobe and St. Anne Blackfryers should be united, and St. Andrew Wardrobe to be the church to be rebuilt, and to be the parish-church, and that the patrons should present by turns, the first presentation to be by the patron of the church, the endowment whereof was of the greatest value, that at the time of the Act the endowment of the church of St. Andrew Wardrobe was of greater value, *quam dos prædict' Vicar' de St. Anne Blackfryers.* And that Jul. 1, 25 Car. 2, Cade the incumbent of St. Andrew Wardrobe died, and the King being patron presented Stoning, which was the first avoidance after the Act, and that Stoning died, whereby it belonged to the plaintiffs patrons of Blackfryers to present *ut in turno suo*, and that the defendants hindered them. The bishop says he claims nothing but as Ordinary, and Blake demurs upon the declaration, and now two exceptions **[436]** were taken to the declaration, 1. For that it is said that the endowment of the church of St. Andrew Wardrobe was of greater value, *quam dos prædict' Vicar. de St. Anne Blackfryers*, and there is no Vicarage of St. Anne Blackfryers mentioned before, and so they had failed in making their title; for if it does not appear which of the churches is of greatest value, it does not appear that the King has presented in his turn, nor that this turn belongs to them. Cro. Eliz. 824. Cro. Cha. 465, *Cholmly's case*, Cro. Ja. 149, *Jennings* versus *Markham.* That the *prædict'* where no such thing is mentioned before makes the whole void. 2. Supposing that the *prædict'* only is void, yet the declaration is not good; for *ecclesia* and *vicaria* are different things, the one is the whole rectory, and the other is a thing derived out of the rectory: and the statute speaks only of churches, viz. *that the first presentation shall be by the patron of the church whose endowment is of the greatest value.* And though it is afterwards said in the declaration, that the rectory is appropriate, and that they claim by a grant of the advowson of the vicarage to them, this will not serve them, it coming out of time, as in Plo. Com. 563. 15 E. 4 & 24 a. Hob. 71, 72. And the traverse ought to have been, *absque hoc* that the endowment of the church of St. Andrew Wardrobe was of greater value than the endowment *de prædict' Vicaria St. Annæ Blackfryers;* and this could not be, for that no *Vicaria de St. Annæ Blackfryers* is well alledged before in this part of the declaration upon which the traverse ought to be taken; and so the defendants are deprived of traversing that by which the plaintiff makes his title. But the Court ruled judgment for the plaintiff, and they held that the *prædict'* only was void, and not that the whole sentence was void thereby. 2. That though *ecclesia* and *vicaria* are different things, yet seeing upon the whole record it appears that the Rectory of Blackfryers is appropriate, the Vicarage of Blackfryers shall be taken to be a church within the Act. But then another exception was taken to the declaration, viz. that it does not appear therein that the plaintiffs, or any by whom they claim, had presented to, or ever were in possession of, the vicarage, and that such presentation ought always to be alledged in a *quare impedit.* Whereto it was said, that this case being on an union by an Act of Parliament which appoints that the patrons shall present by turns, and he of the greater value to present first, it needed not in this case. Whereto the Court said, that the Act did not intend **[437]** to restore a title to one who had lost it by usurpation, but to leave the title as it was before the

(1) Per 3 Wilson 240, and 2 Strange 804.—Judgment was given that E. A. had but an estate for life, and that the limitations over were contingent remainders.

Act; and perhaps here had been an usurpation, and then the usurper is the patron within the Act, and not the plaintiffs till they had regained their right by a writ of right of advowson; and thereupon it was adjourned to be farther argued, and afterwards judgment was given for the plaintiff upon this point, and affirmed in error in B. R. but both judgments were afterwards reversed by error *in domo procerum*.

DUNCOMB *against* DUNCOMB.

[Recognised, *Hooker* v. *Hooker*, 1733, Cas. *t.* Hard. 17; *Hodgson* v. *Ambrose*, 1780-81, Dougl. 343; 3 Bro. P. C. 416. Discussed, *Lemon* v. *Mark* [1899], 1 Ir. R. 445.]

Estate for life to W. remainder to J. S. and his heirs for the life of W. remainder to the heirs male of the body of W. the wife of W. shall not be endowed. *The estate to J. S. being an intervening vested estate and not a possibility.* Co. Lit. 42 a. B. R. H. per A. 15. *Hooker* v. *Hooker*. Douglas 343. *Hodgson* v. *Ambrose*. 18 Viner Ab. 416. 2 Bac. Ab. 126. *Vide* Fearne's Essay, vol. 1, 509, *suggesting a mode of conveyance to prevent dower attaching upon purchased lands. In a fine sur done, grant and render, the cognizee is but an instrument, who has a seisin only for an instant, which is not sufficient to entitle his wife to dower.* Cruise's Essay, vol. 1, 69.

Dower, and upon *nunquam seisie que dower* pleaded, and thereon a special verdict, the case was, William Duncomb tenant for life, the remainder to J. S. and his heirs for the life of William, the remainder in tail to William, viz. to the heirs males of his body, the remainder to George Duncomb the now tenant. William married the demandant and died without issue, and whether the demandant should be endowed? was the question; viz. whether the remainder to J. S. and his heirs for the life of William Duncomb be such an interposing estate between the life of William and the remainder to the heirs of his body, that the wife should not be endowed? And for the demandant it was said, that the whole estate was really in William, and the remainder to J. S. for the life of William was no more than a possibility; so that if William had committed a forfeiture, J. S. might take advantage thereof for preservation of remainders. But in the mean time the whole estate is executed in W. D. as in *Lewis Bowles's case* the whole estate-tail was executed in the father 'till the birth of the first son; and though by this possibility the estate for the life of William is not merged, yet the estate-tail is executed to such a purpose that the wife shall be endowed, as 50 E. 3, 4, 5. Tenant in tail after possibility of issue extinct, with a remainder to him in general tail, marries a second wife; she shall be endowed, though both estates stand distinct in the husband, but the Court upon the first argument hastily gave judgment for the tenant.

[438] TRINITY TERM, IN THE EIGHTH YEAR OF THE REIGN OF WILLIAM THE THIRD. IN THE COMMON PLEAS.

HATTER *against* ASHE.

S. C. Salkeld 413. 1 Lord Raym. 84.

A prebendary makes a lease for life, *habend' a datu*. It is more reasonable to expound the words so as to make the lease good, and therefore *a datu* held to mean a delivery, and thus to include the day of the execution of the indenture. Co. Lit. 46 b. 2 Salk. 625, 627. 1 Salk. 44. 6 Mod. 215. Aleyn 77. 2 Bulst. 83, 305. 3 Bulstr. 203. 1 Wilson 176. 2 Wilson 166. Powel Essay on Powers, 505. 1 Ld. Ray. 280. 2 Ld. Ray. 1242. Cowper 714. *In this last case, A. under a power reserved in his marriage settlement to lease for* 21 *years in possession, but not in reversion, grants a lease to his only daughter to commence from the day of the date; this was adjudged a good lease. Lord Mansfield commented upon all the authorities on this point, and concluded with saying: The ground of the opinion and judgment which I now deliver is, that "from" may in the vulgar sense, and even in the strictest propriety of language, mean either inclusive or exclusive. That the parties necessarily understood and*

used it in that sense which made their deed effectual; that the Courts of Justice are to construe the words of parties so as to effectuate their deeds and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning.

Ejectment by the successor of a prebendary, wherein upon a special verdict, the case was this: A prebendary makes a lease for life *habend' a datu;* and if it should bind the successor? was the question: and it was argued at the Bar three times in three several terms: and for the plaintiff it was said, that *a datu* is all one with *a die datus*, and 5 Co. 21, *Clayton's case*, and divers other cases cited to that purpose; also here the livery being the same day the indenture bears date, it was said the livery was void, because it could not expect, and the term not being commenced 'till the day after the date, the livery being made the same day the indenture bears date, it was made before the term had any commencement; and so it was void. 2. They said, that the lease was void, being a lease in reversion, and it being not to commence in interest 'till the day after the *making*, or the *date*, was not a good lease within the words of the statute of 18 Eliz. c. 10, which does not make any leases by ecclesiastical persons good, if made for more than 21 years from the time of the *making;* and here the time of the *making* and the day thereof is excluded; for the lease is not a lease from the time of the *making*, **[439]** nor to commence upon that day, but the day following. Whereto it was answered for the defendant, that in propriety of speech *datus* or *dated* in English is the very act of the delivery of the deed, for *datus* in Latin being participially understood signifies *given* or *delivered;* and *datus* substantively taken is in English the *date* or the *delivery*, which signifies the same thing; and in *Clayton's* the six months were the most extensively expounded for making of the deed good, viz. that it being enrolled within six months after the day of the date or *teste*, it should be good notwithstanding; and all the said day shall be taken exclusively according to common parlance so as to make the conveyance good; but to make construction of a word which has an equivocal sense, as here (the date may be taken either for the day the deed bears *teste*, and so exclude the whole day of the date, as in common parlance oftentimes the date of an indenture is taken for the day the indenture bears date, and by this exposition the deed would be void, or it may be taken in its proper signification, viz. the very date or delivery of the deed, and so the lease is good) so as to make the lease void is unreasonable; but it is more reasonable to expound the words, so as to make the lease good, and not to make all that the parties did when they made the lease void and to no purpose; and words shall always be so taken, *ut res magis valeat quam pereat.* And after that the case had been several times argued, and the authorities of Dyer 288 b. 5. Co. 2 *Clayton's case.* Latch. 61 Mo. pl. 128. Roll. 2 Abr. 520, 54. 1 & 3 Bulst. 177, 203. Mo. pl. 128. Dy. 286 a. Cro. Ja. 135, cited and considered, it was at last in this term adjudged by Nevil Justice and the two Justices Powel senior and junior, for the defendant, the Chief Justice Treby being now of the contrary opinion, though he also was at first of the same opinion; but now he had changed his opinion, and was not present when the judgment was given, having (as was thought) purposely absented himself. Note also, that Powell junior was at first of opinion for the plaintiff, but afterwards changed it and was for the defendant, even as the Chief Justice had done who had changed his opinion and became at last of opinion for the plaintiff; such a variety and change of opinion had there been in this case. Pemberton, Levinz, &c. for the defendant, Lutwyche, Birch and Wright for the plaintiff.

[440] STEPHENS *against* COOPER.

Repleader after a demurrer and argument thereupon. 40 Ed. 3, 15. 22 H. 6, 16. 5 Ed. 4, 8. 19 Ed. 4, 1. Dyer 117, 118. 1 Lev. 32. 2 Lev. 135. 6 Mod. 2, 3, 11, 102. *Ante* 20. 1 Salk. 216. 2 Salk. 579.

A *quantum meruit* by a chirurgeon for curing of a wound. The defendant pleads a tender of 2 guineas of the value of 45s. which was sufficient, *absque hoc* that he deserved more. On which plea the plaintiff demurred, and shewed for cause, that the traverse made the plea double, and was impertinent, and that no such value

could be set upon guineas; and the plea was adjudged ill, and a repleader ordered by the Court wherein the traverse should be omitted, and the plea be a tender of 45s. and issue taken on the sufficiency thereof. And so note, a repleader awarded by the Court after a demurrer and argument, which I have known denied divers times of late, and that no repleader should be after a demurrer, but only after an issue joined; and yet in former times repleaders have been allowed after demurrer, and so it was Hill. 26, 27 Car. 2, B. R. and a discontinuance was by Hale and the Court of B. R. permitted to be made by the plaintiff after a demurrer and argument; the record whereof is entered Mich. 26 Car. 2, B. R. Rot. 349.(1)

(1) In 4th Bac. Ab. 129, it is said that this and a similar case, *ante* page 20, have of late been denied to be law.

EPORTS in the COURT of KINGS BENCH at Westminster, from the XII. to the XXX. Year of the Reign of our late Sovereign Lord KING CHARLES II. Taken by JOS. KEBLE of Greys-Inn Esquire. The First Part: containing the 13th, 14, 15, 16, and 17th Years. 1685.

[1] De Termino Paschæ, 1661, An. 13 Car. II. in Banco Regis.

Foster, Chief Justice; Mallet, Twisden, Windham. *May* 1.

1. Gable *against* Forester.

Infant. In action upon the case.

Assumpsit on a promise to an infant, that if he paid money the def. will make surance, this is not void, but voidable at election of the infant, as *Dives and aningtons case.* If infant will permit J. S. to enjoy lands, J. S. will pay such a sum, is is good (and this on motion made in arrest of judgment) but the very promise is to infant, if he forbear suing the defendant, which is good cause of action be the omise void or true; and judgment pro plaintiff.

2. Robins *versus* Warwick.

signee. 1 Brownl. 20, pl. 86. In Dett 161. Br. 94. Dy. 307 b. pl. 70. 3 Cr. 851, pl. 7. 2 Cr. 112, pl. 10. Annuity Cr. 33. 6 H. 4, 7 b. pl. 33.

B. being seised in fee, demised to N. for 21 years, rendring 30l. per an. and after grants the rent without attornment to R. who brought debt against the lessee for is rent, and Powis moved in arrest of judgment, that this is only a rent seck, for ich he shall not have debt for want of privity, as on Com. 524. 7 Co. 23 of estate contract also; and it is [2] not the contract nor the estate alone, 9 H. 6, 13, pl. 1, r Paston. And by Justice Windham this grant is void, Co. Lit. 159 b. In case of ate for life there is not any remedy without seisin, but this is only a chattel, and bt is the proper remedy; and this is a personal thing with which the contract nains, Mallet ad idem. Twisden doubts, because this is a growing rent (and not termin) that therefore he cannot distrein there being no privity of estate, and one y have a rent sans remedy, and therefore debt nest necessary. Foster Ch. J. If grant had been with special attornment to charge the tenant, this might be, but if erwise, he much doubts. It was agreed, that annuity in this case lyeth not, &c. ere also if executors on the death of cestuy que vie (who never had seisin of ent-seck) shall have debt. Adjornatur.

3. DR. WITHERINGTONS CASE.

Mandamus videan. 216. Assize. Si fuit del formation cel Roy tenement may be present. For withdrawing his rent. 27 Ass. 20. 18 Ed. 3, 27, pl. 24. It was rul'd that a possessor sarjant del esglise precipe or formedon lay but against the evesq; or dean and chapter only a permittat 41, pl. 73, § 3. Simile.

Allen moved for mandamus for Dr. Witherington Fellow of Christ Colledge, because that although the university hath visitors, yet this doth not take away the jurisdiction of this Court (and a fellowship is a temporal living for life. Jones for the colledg said, that the colledg had particular statutes whereby they must judg; and he and Twisden Justice said, that the first president in this case was not above 10 years ago, but Arthur Trevor cited a president in the time of Ed. 3. Foster Ch. J. and Windham Justice said, that if they certifie cause of which they have the jurisdiction, the Court will remit it to them, and until they do wrong, it shall not be amended here, if it be according to their statutes or power. Adjornatur.

4.

Euidence.

Nota. That a printed copy de Private Act of Parliament or ordinance obsolete, was disallowed to be given in evidence by all the Court, unless it had been examined by the original.

5. ——— *versus* NEWCOMB.

Briefe d'enquiry.

Jones moved to stay the filing of a writ of enquiry on an especial plea pleaded, and issue taken, and a demurrer is after joyned, that being not tryed nor waved.

[3] 6. HEATH *versus* PAGET.

Assize.

In assize the recognitors must first appear, but shall not be demanded until the assize be arraigned per Curiam. The assize was for the office of clerk del Treasury and warrants a keeper of the writs & records of the Court of B. R. which was time out of mind used and approved. The Chief Justice of B. R. for the time being had a grant with all fees, profits &c. appertaining to any one person or two persons for term of their lives and the life of the survivor of them, and that B. R. is an ancient Court and the office an ancient office per custom grantable at the pleasure of the Ch. J. to any one or two persons, &c. Allen for the plaintiff arraign l'assize: Stroud senior for the def. demanded oyer of the writ, which was read, and also of the retorn of it, and this also was read; then he prayed that the recognitors be demanded, which by Foster Ch. J. is an admittance of the writ to be good, and therefore as on the view grant they had per Curiam a special imparlance; for the abatement of the former writ is not their faults, and this is for the advantage of the demandant that he should not be prejudiced by preposterous pleading. Adjornatur.

7. SIR RICH. TEMPLES CASE.

Priviledge. Siderf. 42, pl. 9.

Serjeant Maynard moved (that he being elect burgess for the Parliament that is to sit) after the time of tryal prefixe and retorned, may have his prejudice on affidavit, which the Court would not allow now, if he were arrest before the Parliament, he should not be delivered by them, but by the Parliament only, and therefore nothing was done. Also per Curiam the very indenture of return must be

the ground for the Court to proceed in this motion or a writ out of the Chancery. And by Maynard the priviledg goeth 20 days before the sessions of Parliament; ad quod non fuit responsum.

8. KEECH *versus* POTTS. *May* 2.

Prohibition.

Sir Ed. Turner Attorney of the Duke of York moved against prohibition to the Court of Admiralty, because the sentence by the assent of the parties is there given 8 years agon, but notwithstanding this, Foster Ch. J. and Twisden held, that the Court ought, ex debito justitiæ, to grant the pro-**[4]**-hibition where it appears to the Court, as here, that they have no jurisdiction, notwithstanding judgment there given, if execution be not actually done, which was agreed and prohibition awarded nisi.

9. THE INHABITANTS OF BROMELY AND EAST-MARSH AT BLACKWALL.

Sewers.

Johnson moved to quash an order of the commissioners of sewers of Bromely-Marsh, because made on a bare suggestion of one of the commissioners. 2. None of the quorum are mentioned. 3. It is not alledged that the defendants are chargeable: and Tourner to the same effect, that the order is felo de se, because it is said, that if J. S. only shall repair, he shall have x.li. allowed to him in respect of 80 that he hath expended. Wild Serjant contra, That the order is good, and this suggestion is but a complaint which may be made by any, and if a private man makes it of his own head, yet the commissioners may allow his expence; and though J. S. ought to repair, yet he was not bound to make it so ample; also Bromely would have a profit by it (and Twisden agreed, that contribution shall be made by him that hath any manifest benefit, but this must be on presentment of the jury) and although any six may make a presentment as well upon their own view, as when by a jury, yet here the persons appointed shall not make it. Also by Tourner this is done by the commissioners after that J. S. of his own head hath repaired the breach, yet per Curiam the danger being apparent and of necessity to be amended. As a house may be pulled down on danger of fire, and the order recited this, and the benefit of the marshes thereby: wherefore respit the award until view of a copy of the order. Windham Justice said, that the commissioners of sewers shall have as much favour as may be, and they would not quash it.

10.

Certiorari.

All the Court refused to grant a certiorari without special cause to remove judgment given of felony in Inferiour Court being but for delay.

11.

Tryals.

Nota. The Court will not award new tryals on the jurors gainsaying their verdicts, unless the Judge before whom it was, conceived the verdict to be given against the evidence per Curiam.

[5] 12. HORN *versus* QUASH.

Amendment. Hetley 119.

Stroud junior moved in arrest of judgment in action upon the case on promise because it is to pay arrearages on account of money of the defendant and this on the

plaintiffs own shewing, but per Curiam this shall be intended after verdict due to the plaintiff, and that it is the defendants only in custody. 2. Defendant pleaded non assumpsit & ponit se super patriam & predict the defendant similiter this per Curiam shall be amend.

13. BERNARD *against* EWEN.

Agreement. Hetley 107. 2 Cr. 613. Leonard 128, pl. 17. 2 Leon. 29, pl. 32. 2 Brownl. 11, pl. 10. Godbolt 333, pl. 426. Latch. 176. Perkins 14, pl. 62, 37. 2 Co. 360, pl. 21. 3 Bulstr. 154, pl. 64. 2 Bulstr. 265.

In debt on 2 Ed. 6, for not setting out tythes, the defendant as 2 Cr. 137. Hub. 170, pleaded agreement parol for the tythes with the parson as long as he shall be parson, this is good only for a year, though it be with the party who is a parishioner. But in issue on this agreement after verdict no repleader shall be, no more than in issue on payment on single bill, which in it self is not good: per Windham Justice, to which the Court accords: but Twisden said, If the issue on payment on single bill be found for the defendant, its doubtful if a repleader be not to be awarded: and he doubted whether the grantee cannot agree with the grantor of rent that he may retain his rent for several years, which Powis who moved for repleader conceived could not be good. Sed adjournatur.

14. STAMPTS CASE. Siderf. 40, pl. 2.

Mandamus.

Yorkshire Turner, on Dy. 109, opposed a mandamus for the office of steward of a court baron and leet, because 'tis but a private office, as a parish clerk, which Trin. 17 Car. 1, B. R. was denyed and therefore one shall not have this but only to be sworn when he is elected. And in *Trafords case*, Trin. 1655, for usher of a school in a colledge it was denied: also the steward of court baron hath fee for the which he may have assize. Wild Serj. There is none to whom the writ can be directed. Twisden Justice said, that in *Trafords case* it was expresly adjudged, that a mandamus would not lye for the steward of a court baron sole; but per Allen a leet is also the inheritance of a private person, which he may grant as he pleaseth: but, by the Court, the lord hath inheritance only in the profits, but the office is publick for execution of ju-**[6]**-stice: Windham, The proper remedy to remove a steward of court baron is an action upon the case; for this is private, and he is not Judge there, but the suitors, to which the Court accord. Foster Chief Justice, A leet is derived of the sheriffs tourn which is publick, and the mandamus is not for the profits, but for the place it self. Mallet, Steward of Copyhold Courts may administer oath, yet for that alone a mandamus shall not be granted; and it was denyed.

15.

Labourers.

Nota. Justices of the peace have conusance of apprentices bound by indenture or otherwise, as well by private persons as by the overseers of the poor: but the justices, per Curiam preter Twisden, may make provision weekly for them, as for bastards as for the time past, but not for time future above weekly: sed adjournatur.

16. RAWLINS *against* ———. *May* 3.

Slandre.

Action upon the case for slanderous words: I will indict R. Rawlins at the next sessions, and he shall lose his estate, and it shall go hard with him to save his life, but his estate he shall surely lose for marking of my sheep. Wild Serjeant moved in arrest of judgment after verdict in action upon the case for these words, because that some part of them are not actionable. Jones for the plaintiff, All the words together

amount to a charge of felony as well as if he had said, the plaintiff had committed such an offence for which he shall lose his estate. Apres.

17.

Record. Apres.

Nota. Per Twisden, The defend' in B. R. ought to bring in the postea when it is come into the office, but the plaintiff is to bring it in to the office and then give notice of it to the defendant, quod Wild neg. the course is as Twisden said.

[7] 18. KNIGHT *versus* DANCER. Ejectment.

Seisin.

In evidence to a jury it was observed, that temporal possession is given by induction without taking of esplees per Twisden and all. 2. The ejectment was 20 Apr. the Parliament began 25, and confirms the possession until the 25 December; yet by the Court that is intended only as to the perception of profits, quod Maynard pro def. neg. and by them they that are in void livings shall be adjudged incumbents ab initio, but not where there is a title in being, then it shall be only as to the profits. Twisden, If the ejectment had been after the Parliament and before the 25 of December, there the defendant may plead not guilty; but being begun before the Parliament, there is only a cessat executio by the Act till the 25 of December. But 3. Maynard moved for a special verdict, and the Court said, that they could not deny it to the Kings Serjeant. Also he said, that damages must be paid unto the time of the ejectment, which shall be contrary to the intent of the Act, sed Curia e contra. 4. Nota per Twisden, Original record must be brought in by the clerk himself, but a copy may be brought in by any one. 5. The title being to a rectory by Dr. Griffith lessor of the plaintiff by a presentation of the Earl of Shrewsbury who (as was proved by the roll of estreats of the clerk of assize signed by the Judge and delivered into the pipe and thereupon an inquisition and process made) was a recusant at that time; and this was allowed for good evidence, the very record of the Assizes at that time when the earl was found a recusant being burnt in the Temple, after in 1649, which was proved by Mr. Ceely keeper of them as associate to the clerk of assize, but he residing on the Nisi Prius side, was not required to answer to the particular time when this recusancy was found. 6. Primer possession (though it will not make a plenerty, as *Greens case* and *Sir H. Gaudyes case* Hub. 302, against the true patron yet) though it be void, and the collation to it also as to him, yet it shall be good against any stranger who hath no title; but this point being also waved, 7. fuit insist that the plaintiff having no title, the defendant is confirmed in by the Act of 12 Car. 2, but the main point insisted on was the conviction of the Earl of Shrewsbury, which Wild Serjeant pro plaintiff urged was not full upon 3 months between the 1 April and the 6 of September and time for two proclamations. 2. One of the estreat rolls was crossed of the like conviction as aforesaid, and was the ori-[8]-ginal of the estreats, the other being but a certificate thereof by the Judge (but both were signed by the Judge) which was warrant for the clerk of the pipe to proceed; and both rolls are delivered into the Exchequer upon the oath of the clerk of assizes, but the rolls are that plaint. for 3 months following 1 Apr. 17 Car. 1, that Crost. for 3 months apres 1 November the same year, whereas the conviction was 17 Car. 1, en September: but per Maynard, There being a conviction that shall remain till it be reversed by conformity, which Finch Sol. al R. admits as to the King, but as to any other person it ought to be good, or at least, not void. 8. It was agreed per Curiam and Maynard that summed up the evidence of the defend. that the Act 12 Car. 2 takes away any primer possession without title. Also that the recusant cannot avoid conviction (de facto only) until conformity. Wind. If one be indicted for recusancy 1 April and convicted 6 September, that may be good quod Curia neg. for the indictment must be for three months absence, which is not here; if it be otherwise, the recusant may avoid it; and per Twisd. and the Court he may do it before conformity by the statute, but not against the K. As Finch aforesaid: Allen pro defend. The conviction

may be by appearance and confession or otherwise, as well as upon proclamation quod Curia concessit. Also per Powis pro defendant, The conviction, if the recusant conform not, shall have relation to the indictment. And per Maynard pro defendant, The certificate of estreat is in July 18 Car. 1, for three months before the conviction, at that Assizes, which per Curiam relates to 17 Car. 1. Contra Maynard, who said, that the certificate relates only to the time of the making of it, being unde convictus est, which might be at any time before. Yet per Finch pro plaintiff le certificat is coram justiciariis pred. which shall be intended at the same Assizes. Also although the recusant himself cannot avoid it, yet the persons claiming under him may avoid any title made against him but his own recusancy. Sir Jeoffrey Palmer the Kings Attorney said pro plaintiff, that presentation by a recusant is presentation de facto to make a plenerty, as *Chancellour d'Oxfords case*. Twisden, That which is certified in the Exchequer by the clerk is only wanting of the record, but in evidence the jury may be satisfied that there is a record by other proof; but how two certificates of estreats should come in he knew not: the jury upon the whole was directed to find whether the earl was convicted or not per Curiam seriatim, and refer the rest to the discretion of the Court. The jury found the earl a recusant convict.

[9] 19. TITERTON *versus* BUXTON. *May* 4.

Trespass. Common.

Defendant justifie because of common ratione messua, g i, which Wilmot for the plaintiff said was not good: adjournatur.

20. JOHNSON *against* SAMWORTH.

Assumpsit.

Action sur ca. upon a promise in consideration that J. would pay to C. upon the instance of the def. that then if the defendant should afterwards play at any game, he would give the plaintiff 40l. the plaintiff alledged generally that the defendant did play for wine at a game call'd par & impar; the jury found pro plaintiff, Monday move en arrest de judgment: adjornatur.

21. THOMAS HOWARD. 30 Pl. 53.

Siderf. 41, pl. 7. Ch. de Pardon Br. 10.

He brought in the Kings pardon being after attainder of murder, which suggested, that upon the trial there was no evidence to prove it to be of malice fore-thought, and that the wound was not given by him but by another fled: also that the coroner found it but manslaughter, and the indictment, trial and removal were recited in it: also it was a pardon of 3 joyntly and severally by particular name, but not having a special writ of allowance (although the non-obstante was that it should be allowed, explained, &c. in all Courts, yet) per Curiam without a special command, the continual practice of this Court hath been not to allow it without a special writ. And Mallet said, This is sufficient for the prisoner but not for the Court. And per Twisden, That statute that saith such an act shall be allowed, that must be intended according to law; and the practice of the Court was affirmed by all the councel at the Bar: but on *Morgan & Egertons case* le Court agree, that the King may pardon murder per non obstante without special words (de murdris) which this wanted notwithstanding the statute and Stiles 377, pl. 819, *e contrà*.

22. WEDEN *against* BALDWIN, &C.

Devise. Siderf. 55, pl. 23.

In ejectment special verdict on not guilty, find that J. B. and his wife, and the heirs of the baron was seized of lands capite, and J. B. was seized of the soccage lands

in [10] question, and devised to his wife the remainder to H. B. in fee, &c. Powis for the plaintiff, The case is only lands in capite are granted to baron and fem for life, the remainder to him in fee; and he being seized of other lands soc-devised the whole, which he conceived good, 1. Because the husband dyed not tenant to the King nor had any thing in capite at the time of his death: for he dyed seized in fee only of a bare remainder expectant upon the life of the wife, 2 Co. 60, 61, for which he shall not pay any heriot, 24 Ed. 3. Heriot, f. 3, 5. Dy. 237. The wife being sole tenant, and therefore, 2. This remainder will not hinder his demise of this land, 9 Co. 96, 139 b. 134 b. Soccage, 2 Co. 92, 93. Such an heir shall not be in ward, 32 H. 8, cap. 1. This is the reason of the express proviso in the statute, because it was not so at c. law: but the stat. 34 H. 8, explanatory 10 Co. 81, of a remainder, must be intended of a remainder that is immediate to the particular estate as a reversion but not other: 7 Ed. 3, 51 b. pl. 29, neither was at c. law. Mr. Howel pro defendant was not ready, which J. Twisden rebuked, because it was in a concilium of the last term, and it is not expected that one should answer the objections of the other at the same time, but only shew their own judgments and leave the rest till afterwards. Also he said, that it is alledged that J. B. was seized of certain lands in capite, and doth not in all the verdict say how much, which is uncertain, and not helped by any special conclusion in the verdict: and if there be not two parts descended, this can never come in question; special conclusions will only help the faults of amendments of lives or matters of form, which the Court agreed: adjornatur. *Post.*

23. COOKER *against* GARDNER.

Prohibition.

Prohibition to the Great Sessions at Mongomery on suggestion put in writing, that the matter was without equity and only tryable at common law. And this although that Court should admit their jurisdiction, is sufficient for a prohibition per Curiam, but it appearing they had cognizance, it was denyed. *Post.*

24. CHAMBERS APRES. 62 Pl. 97.

Prohibition.

Allen moved for a prohibition to the Admiralty notwithstanding an appeal to the Commissioners Delegates, and sentence in that appeal in 1653 confirmed by Parliament. [11] Charleton shewed cause against it, but the Court would give no rule without the suggestion put in writing and answered to, but conceived that as the case is, that prohibition will not be granted pending the appeal (though a supersedeas to the Admiral jurisdiction) and so there was no sentence there at the time of the Act. Yet by Twisden, that is quoad executionem only; but the Act is general of all proceedings, &c. that they shall be confirmed: Goldsb. 119, pl. 4.

25. BRADFORD *against* BLOODWORTH.

Bankrupt.

In ejectment special verdict find that Sir J. Harison being seized, became a bankrupt; and in 44 and 45, and 46 and 49, at the sute of three several persons was utlawed: and in 48 Sir J. H. sold to the lessor of the plaintiff bona fide, and the jury have not found him that he was utlawed in 45 in fraudem creditorum, and to that intent; which by Wild Serj. pro pl. is necessary, for otherwise a man shall not be a bankrupt. Also the parties ought to have notice of his utlawry: also admitting both times 43, and 46, the last whereof is 7 years before the suing out of the commission, which was not till 1653.

Neud. for defendant, that the bankrupt Sir J. H. is within this Act 21 Jac. 5, for the sale by Sir J. Harison in 48 was within 5 years, which is sufficient to bring him within it. 13 Eliz. c. 4. The estate of persons in debt to the King, is subject from

the time of the debt due, which is like to the stat. of 21 Jac. 2. Co. 55, 26. F. N. B. 150 Q. The second reason is, that the creditors title is eign to the purchasers, and are first provided for by all the laws of bankrupts being, Com. 59. 1 Co. 131, for advancement of trade and shall be beneficially taken. 3. It is in the creditors election, as the case is, to take out a commission when they will, for the proviso being to take off the benefit of former laws, is like the Stat. of Limitations, which shall be so: as 4 H. 7 (Com. 379. 3 Co. 79) of Entry. It may be within 5 years or after. And *Sir John Lakes case* C. B. 4 Ca. 1, in battery of his servant the plaintiff shall recover for any battery within 6 years before the action and so, 1 Cr. 139. A 4th reason, This stat. being to bar rights, are like distinctive conditions, 8 Co. 90, which shall be taken strictly: and so if the bankrupt sell his lands within the 5 years, that shall save the creditors to 5 years after; else the soonest bankrupt is in the best condition, which is an inconvenience: for he might as well have purchased a day after he became a bankrupt, 1 Cr. 49. A 5th reason: The Stat. of Bankrupt by express pro-**[12]**-viso are to be construed beneficially, 1 Cr. 568. And though the first act of a bankrupt doth intitle the creditors yet, they are only bound by 5 years after notice of such act. Nor doth the purchaser incur any other hazard than he that buyeth a defective title: but the creditors can have no other remedy than this for their money. Mich. 1655, in C. B. Rot. 484, *Jellif* versus *Horn.* A grasier copyholder in fee 10 May 1643 became a bankrupt, and in 49 became a bankrupt again, and in 52 he doth sell on a commission in 51, which was 10 years after the first cause of bankruptsie; after argument al Bar & Bench adjudged for the creditors, that they had a good title against the purchasers. Per Curiam, The proviso is express, that the commission must be sued within 5 years after some time when he became a bankrupt; and his being so after the sale, that will not hinder, that if the commission be not sued within 5 years of his becoming a bankrupt, & then they can only defeat all sales made within the 5 years, but not afterwards: and upon this ground was the judgment aforesaid in the C. B. for that point was, whether if a man continue bankrupt 20 years, he is always lyable or no, which was adjudged for the plaintiff by all the Court. Nisi, &c.

26.

Reference.

Nota. While the pleadings are in paper, one may have reference to the clerk secondary, on a suggestion, that he will pay whatever is due; but after judgment nothing will be staid upon such motion.

27. *May* 6.

Error. Br. 55. Stiles 105, pl. 218. 8 Ed. 3, 38, pl. 29. Godbolt, 439, pl. 505.

Nota. If the roll be marked for a writ of error before execution done, the sheriff shall be excused for doing it before a supersedeas delivered; but this is sufficient to supersede the execution, per Twisden & Curiam.

28. NEGUS *against* REYNAL. Ejectment.

Monstr.

In evidence to a jury it was observed, 1. That a proof that there was a revocation is sufficient for the heir without the producing the deed it self, which was taken away by the defendant himself. 2. A lease recited in a release was admitted to be proved by the witnesses to the release without shewing the lease it self, which was imbesild by Herbert lessor of the plaintiff. 3. Bargain and sale not mentioning any money paid for consideration, may be helpt by averment, that money was paid, per Curiam. 4. The lands in question were **[13]** in the premisses and habend' of the deed, but not in the limitation of uses, and yet good, being parcel of the mannor.

29. CLEMENT *against* ———.

Retorn vic. In dett. F. 80. Simile p. 8, *supra.*

Maynard moved that Baily should bring in his bond because (by Twisd') action upon the case lyeth not against him for a false return but the Court said he should not be compelled to assign his bond without sufficient surety given him.

30. HEATH *versus* PAGET. *Ante* 3, pl. 6. Syderf. 40.

Abatement. Thelw' Digest'. 326.

The defendant pleads, that pending the assize the plaintiff took upon him the order of Kt. of the Bath, to which the plaintiff demurred. Finch for the defendant cited *Sir Simon Bennets case* 3 Car. 1. 1. That a baronet is a dignity, and though not in the stat. yet if it had, it is not within the word knight. Twisden: Kt. of the Bath shall not have 2 chaplains within the stat. Windham; Baronet is by patent. But *Portmans ca.* 1 Ed. 6, 7 Co. 27, cited by Finch, is express, that this being the parties own act, shall abate his writ: but whether Knight of the Bath shall be included within the general word knight, is the question. Twisden, The law takes notice of kts. batchelors, bannerets, (not of baronets) of the garter, and of the bath: et adjornatur. *Post.*

31. SIR RICH. TEMPLE. *Ante* 3, pl. 7.

Priviledge.

He brought in a writ of the Chancery (to allow his priviledge of a member elect for the Parliament) direct omnibus justiciariis, which, per Curiam, shall be intended of the justices of peace, and therefore they refuse to open it or read it. *Post.*

32. TUTTLE *against* PORTER.

Damages.

Trespass for cutting and carrying away, which the jury find and give intire damages, but say nothing of the pedibus ambulando, which by Allen for the defendant is a verdict for the corn only, whereof the plaintiff and defendant were tenants in common, and so it was to be divided; and the jury have not distinguished the parcels. Pepis for **[14]** the plaintiff, that pedibus ambulando shall be intended, which Curia dubitavit. Adjornatur.

33. GREEN *against* GREEN.

Slandre. 1 Cr. 25 r.

You are a rogue, a rascal, you are a Papist dog, and you said, you would kill the King; damages 150l. against the defendant a madman: and yet per Curiam this is treason notwithstanding the opinion of Coke 3 Inst. 14, that words are not treason; and therefore they would give judgment, unless the Judge of Assize before whom the trial was, will certifie that the dammages were excessive. *Post.*

34.

Amendment.

In ejectment where the title is material the plaintiff amended his declaration after plea (but while all was in paper) in the date of his action, without costs paying.

35.

Supersedeas.

If the records be not removed in reasonable time (though error be brought) yet the Inferiour Court may proceed, per Curiam.

36. CLARES CASE.

Mandamus.

Symson moved for mandamus to restore a fellow of Clarehal and had it nisi & Jones for the college in *Witheringtons case* waved the day that he had to shew cause, because he intended to make a retorn, otherwise it had not been granted until the case ended.

37.

Demise.

H. demised legacy to be taken out of the issues and profits of the land, trees, wood and timber, and after made his wife executrix, and after demiseth his lands, issues, and profits to her for the payment of his debts, &c. (without naming the wood, trees, &c.) yet good per Curiam: and the profits of all shall be to the same purpose, and not left to descend to the heir. As if land be demised for payment of debts, the executors may sell, though authority be not specially given them, but otherways if such device had been for legacies only, or for raising portions, &c. there had been no remedy but in Chancery against the heir.

38. BALL *against* BLACKMORE.

Prohibition.

Richardson moved for prohibition to the Admiralty, shewing the libel by which it appeared that the cause was intra fluxum & refluxum maris, of which (quære if they have cog-**[15]**-nizance) and it was granted nisi causa, &c. 1 Leonard 270, pl. 363.

42. SICLEMORES CASE.

Error.

The King assigns error of an indictment after demurrer and removal by direction of the Court, now after reversal he shall be tried de novo: and so it is if the King had demurred, and this error after the Act of Oblivion which pardons the first utlawry and fact; but this notwithstanding the Court awarded a tryal if the judgment be reversed. *Post.*

43. GARRARD *against* LISTER. *May* 7. Ejectment.

Forfeiture. Latch. 227.

In evidence to a jury at the Bar. Twisden, The lord after acceptance of rent cannot enter upon the lessee of a copyholder. 2. The lord leaseth the freehold of a copyhold to J. S. per Curiam this is good betwixt J. S. and the lord. 3. The lord may be admitted to give evidence for the lessee or copyholder, though the Court would have spared him had there been other. But it is strange, by Windham, that the lord should reserve a rent upon such a lease (though it may be intended for the copyholders benefit) and the Court agreed it could not. 4. That a copy of the act of the Court is enough to prove a man administrator, for there is only a commission goeth out to swear the party, but no particular authority, by Twisden & Curiam; but yet such copy ought to recite the authority of the Court or persons that give it: and unless the authority be good and allowed, such copy shall not be read (which of it self by Foster is a kind of allowance) and this upon the doubt of a grant by Dr. Ayloff. 5. On *Cromwell & Giles case:* I thank my husband he hath done kindly by me in giving me this land and my son after me. This was a good assent by fem executrix to take as demisee: and by Windham, The not bringing a writ of dower may be taken for an assent after her death. Also if she saith that the heirs (for whom lands are devised in trust) shall have them undivided, it is a good assent. *Southwards case,* that after the death of my wife the land goeth to the Holloways, adjudged a good

assent by the husband of Holloway, executor to a devise to Holloway and the heirs of the testator. The principal case was H. devised to his wife for life in lieu of her dower, and after her decease to two in trust for J. D. during life, and after of the male heirs of the testators eldest son, this being of a term after the death of the tru-[16]-stees, by Windham, shall go to the heirs of the testator. But for the length and intricacy of the case, the Court directed a special verdict. 6. Devise of a term to one for life, the remainder to the first issue male by Windham & Curiam is void to the issue, and the executors of the tenant for life shall have it; and they all agreed not to exceed *Mannings case.* One title, *Child & Baylies case*, 2 Cr. and *Jenkins & Gibbons case* in the Exchequer 1655. Devise to T. for life and to his heirs males for so many years as they should live, this adjudged no descriptions of the persons capable, but an absolute voyd devise. Wind. auxi cited 1 Bulstr. Rep.

44. SIR RICH. TEMPLE. *Ante* 13, pl. 31.

Fine. Leonard, 72, pl. 9.

He had told several of the jury that they needed not appear, for he would insist upon his priviledge, which the Court held a great misdemeanor, the jury failing by reason of it: and by Finch councel for Sir R. it was an abuse of his priviledge of Parliament man; and though the Court would not tax costs presently (which would have been to fine him indirectly) yet they ordered, that upon the tryal he should pay them if the tryal went against, or allow them if the verdict went for him.

45. HINKSIE *against* BENTLY.

Variance.

On nul tiel record plead in sc. fa. Allen for the defend. alledged variance, because the record is esq; and the sc. fa. but gentleman, 25 Ed. 3, 39, pl. 6, by Foster Ch. Just. cited, thinking the record had been gentleman and the sc. fa. esq; and the party had lost nothing of his first addition. And by Windham, neither of these are parcel of the name, and therefore no variance. Sed adjornatur.

46. BOWDEN *against* WARREN.

Amendment.

Defendant in consideration that he had received 43l. promised, that if the plaintiffs testator be evicted by Cheswell, then he would pay, &c. to Bowden the testator. And it was said that after his death, viz. 1660, which was before C. was evict, which was moved by Baldwin in arrest of judgment, but Curia contrà, for the viz. is void, as if by Twisden H. declared in ejectment of seisin 1 May 1650, and that after viz. 1 May 1600, the defendant ejecit, which is impossible, and therefore immaterial being after issue as well as if there had [17] been no time laid for the eviction, which is but form, and to be demurred to; and therefore judgment for the plaintiff.

47. RAWLINS *against* ———. *Ante* 6, pl. 16.

Slandre.

J. H. shall lose his life for marking my sheep; Twisden cited the case, Thou art a bastard, and a whore, and that will be proved by a pair of sheirs and sive. adj. act. but per Curiam, here is no mention of stealing: also that J. S. was indicted, and it will go hard with him for his life, adj. not actionable. And so in this case, adj. not actionable.

48. ——— *against* REYNALD.

Tryal.

Upon the act of God hindring a tryal or any circumvention apparent in it, the Court, ex debito, and not of favour only, will grant a new one, per Curiam.

49. BOOTH *against* BEARD.

Amendment.

After record removed by error the amendment if any be must be where the record is.

50.

Costs.

Nota. The lessor of the plaintiff by several rules of Court on demand, ought to pay costs upon the insufficiency or sculking of the plaintiff. In ejectment.

51. THE KING *against* READING. *May* 9.

Serement.

In an indictment for murder, the Court refused to admit proof of a copy of an order of the commissioners of sewers (under which the prisoner claimed benefit) upon oath, but read it upon the bare affirmation of the witnesses that it was a true copy. 2. The prisoner was said to murder J. S. under colour of authority, which by Twisden and Foster was not to be confirmed by the act, but to make an act murder only by reason the authority is afterward made void is unreasonable, to which the others agreed. 3. Though a wound may be cured, yet if the party dyeth thereof, it's murder; and if the act be unlawful, it matters not who gave the first blow. 4. Though the commissioners of sewers had err'd in their authority, yet, by Twisden, this will not make it murder. Quære; The Court agreed if the intent of the party were to do a lawful act. *Post.*

[18] 49. HEATH *against* GODDINGTON.

After judgment against the principal the plaintiff brought debt against the bail on recognizance (after the course of the C. B. and so the party shall have time to bring in the body only by the retorn of the latitat, whereas otherwise they are not bound to render the body till the second sc. fa. And if the party be dead before, then the bail is not forfeited; and the reason of the C. B. is, because the bail is of a sum certain, but in R. R. here it is to pay whatsoever the principal shall lose uncertainly: and this hath been the course of the Court, by Foster, for 40 year, but the Court doubted if debt lye upon the recognizance at all: & adjornatur, to search presidents. *Post.*

50. BYE *against* WOODMAN. Rol. 255.

Covenant.

In trover and conversion, Winnington moved in arrest of judgment, because the plaintiff saith, that he is one of the attorneys Curiæ domini Regis in the said Court to hold pleas before the King, which by him is not the office of an attorney; but per Curiam this is applicable to the stile of the Court only and not to him: judgment pro querente.

51. RICH *against* HALL. Trespass.

Damages. Trespass. 2 Leonard, 148, pl. 18. 1 Brownl. 42, pl. 216.

In evidence to a jury it was observed, 1. The trespass being for fishing and cutting 2 acres of oziers, which being several damages, ought to be so, per Curiam. 2. H. leased a river and the land on both sides, yet per Curiam, the right to fish also remains in the lord, as of a common high-way, warren, &c. And though he had granted the sole fishing, yet where the grantees land lyeth not on both sides, he cannot prescribe for it probably, though it be not impossible that he that hath land on both sides, may not have any fishing. 3. The proof for the plaintiff tenant of the mannor was by a court-leet-book by presentment of the homage, not per juratores of any certain place; & so it was supplyed by witnesses. 4. Trespass lyeth not by one tenant in com. against another, nor for a several fishing. 5. Presentment without execution of it by levying the assessment, is no evidence. 6. The verdict being only of fact is properly the juries, and not void tho contrary to directions of the Court, but if any matter of law be directed of that, the Court may reprove a jury, and they find it in pain of **[19]** attaint. 7. Though a man may accept parcel by copy, yet he may give evidence for more, because the rest is not thereby destroyed, per Curiam, if it be by prescription.

52. HEATH *against* PAGET. *Ante* 13, pl. 30.

Abatement.

Windham: Knights of Malta were knighted by their abbots with orisons, not with the sword as H. Kt. of the Bath is. But by Twisden, As the Stat. de Scandalis Magn. mentions not any marquess or vicount, but inferiour degrees, yet being made for execution of justice, extends to them by equity; so this being made for speed of justice, shall be taken by equity. And by Foster: Knight is the genus, of which these are all species: and therefore 14 E. 3, 26, pl. 14, the name continueth, and so, per Curiam, the writ shall not abate, *vid. Sir Simon Benets case*, which is positive. 2. No other plea to the writ may be but as amicus Curiæ; for though this be to the person, yet it is pleaded to the writ, and therefore not a bare plea in disability of the person. *Post.*

53. BASTARD.

Slandre.

Mr. B. did lye with J. P. as often and familiar as with his own wife, without special damnification, the judgment stayed usq; &c.

54. HOWARDS CASE. *Ante.*

Pardon 13, pl. 20. Charter de Pardon Br. 10. So is 27 Ed. 3, c. 2. Pardon § a. Com. 455.

He now prayed the allowance of his pardon, and brought in his writ for that purpose on 10 Ed. 3, cap. 2, which only mentioned homicidia, &c. with a non obstante to the statute. And by Twisden, The pardon is different from all presidents, and is upon false informations, whereas he should have put in his merit as an inducement to it, & Curia advisare vult. And Twisden said, that a sc. fa. may be brought 7 years hence, and repeal it upon disproving the suggestions. *Post.*

55. BUSHEL *against* BLAND.

Error.

In assumpsit after verdict, if the plaintiff would deliver to the defendant in Jan. 1642, in figures is helped; by Jones, being in Inferiour Court by Stat. of Jeoffails.

Windham, The place is material after verdict. And per Curiam, The time is also necessary, and ought to be in Latine according to [20] the stat. and being in figures, is insensible: and judgment reverst.

56. THE KING *against* HALSE.

Retorn.

On mandamus to restore H. to the place of Steward of the Corporation of Torrington: Baldwin excepted against the retorn; 1. Because it is said they are a corporation according to a charter of a long time granted, and do not shew what manner of corporation they are, or what authority they have. Twisden, They are admitted to be a corporation by the bringing of the writ, which the Court agreed; and that it is enough for them to set forth how he was chosen and removed; and upon a retorn an action upon the case lyeth against them by the name in the writ.

57. FANE *against* MINSHAW.

Debt. L. Co. 112 b. 4 Co. 51, *Ognels case.* 1 Anders. 47, pl. 120. 7 Ed. 45 b. pl. 16. 10 H. 6, 11, pl. 38. It lyeth against him. 47 Ed. 3, 23 b. Dett Br. 44. In debet & detinet against husband for the arearum sola. So 5 Co. 36. Walcot. 5 Co. 10, *Hensteds case, &c.*

Debt on lease to fem sole for arrears during coverture was brought against the husband after the death of the fem. Wild for the defendant, The executors of the husband shall not be chargeable, and therefore not the husband no more than debt upon a bond. Allen for the plaintiff on Chamberlains Rep. Debt on lease might have been brought against the husband sole in the life of the wife, because during the coverture he is assignee in law, and receives the profits, and therefore it is but reasonable he should be charged. So F. N. B. Debt 121 c. Of this opinion were all the Court: and Windham cited 3 H. 7, that the husband alone may bring debt upon a real covenant made to the fem dum sola suit, and broken during the coverture. Also the husband might have forfeited or assigned it. *Post.* 22, pl. 63.

58. WHITWICK *against* OSBASTON.

Action sur stat.

Debt for words on the Act 12 Car. 2, of Oblivion, averring that he was a gentleman. And on 8 Ed. 4, 7, Hyde moved in arrest of judgment, that the plaintiff had not averred, that he is not within the exceptions in the Act, as having a hand in the rebellion in Ireland. Twisd. Where such disabling exceptions are in the body of the Act, there, as Com. *Stowel* versus *Souch*, such averment is necessary, but not so where such exceptions, Leonard 76, pl. 102, are only in the proviso of an Act, which the Court agreed, and judgment pro querente. *Post.*

[21] 59. ——— *against* DAKINGS.

Indebitatus assumpsit for rent reserved ought to be where the land is, and not otherwhere though by consent. 1 Cr. 284. *Post* 46, *pl.*

60. BARNARD *against* EWEN. *Suprà* 7, pl. 13.

Agreement. Leonard, 23, pl. 29. 2 Leonard, 53, pl. 98.

An agreement (for a modus decimandi) parol is good to excuse a man from the penalty of 2 Ed. 6, 13, of Tythes, and such an one whereupon an action upon the case may be grounded though it do not actually transfer the interest of the tythes; and it is the constant custom in the western parts to plead such an agreement in bar against

the stat. And by Wind. An agreement to hold for life is a good agreement, though without livery it transfers not the estate a fortiori, here for so long as the defendant shall be parson.

61. ——— *against* DIKINSON.

Trover. 3 Cr. 837, pl. 10. Stiles. 25, pl. 58.

Trover for stockings, and said not whether womens or mens, yet good: so for two pair of bodies, also adj. good. Stiles 25, pl. 58.

62. TROWEL *against* CASTLE. *May* 31.

Custom. Record.

In evidence to a jury it was observed, 1. That by custom of Woodstock freehold ancient demean as well as copyhold passeth by surrender and copy, and shall descend to the youngest son or daughter. 2. Decree under the Exchequer Seal (which by Twisden is in the nature of a judgment) yet though it recite the bill and answer, that is not sufficient evidence. By Allen council with the plaintiff contra, by Foster Ch. Just. & Curiam. And by Twisden, Decretal order under seal, which recites all the proceedings on exemplification under the Great Seal hath been allowed to be read; but by Allen, not unless it have the bill and answer, which Windham agreed: but by Twisden, Where the decree is produced only in paper, then the bill and answer ought to be adjoyned, but not so when the decree is under seal: and in C. B. *Stiffe* against *Stiffe*, the Judges admitted a decree to have been under seal, and yet would not allow it without bill and answer. And by Allen, Its usual to disallow such decrees, but an examplification of the Chancery, per Curiam, **[22]** always recites the bill and answer. Moreton Serjeant said, he never did see the seal of any Court denyed to be given in evidence. 3. Custom that fem shall not have dower, and that 2 years value shall be paid for fine by any purchaser, and one by the heir by descent in lieu of a heriot and relief, and that surrender out of court to three of the freeholders may be good (but shall descend as at common law); and ought to be presented within a year after. But by Wild Serjeant for def. The words of the custom are not negative, nor do exclude but that a feoffment may be made of it; which Allen who was for the plaintiff, agreed. 4. Freehold as well as copy may be customary lands; and being ancient dem. by Twisden, may pass by feoffment as well as surrender (though a fine cannot be levied thereof, because a writ of covenant cannot be there brought). 5. An interlineation (without any thing appearing against it) will be presumed to be at the time of the making of the deed, and not after. And by consent the jury had a copy of court roll given by the plaintiff in evidence.

63. FANE *against* MINSHAW. Bar. & Fem. Br. 29. *Ante* 20, pl. 47.

Debt. 3 Cr. 712, pl. 35.

F. N. B. 121, C. That the Baron or his executors, as 10 H. 6, 11. 4 Co. 49, and *Underwoods case* B. R. 1641, shall be charged in debt for the arrearages in time of the coverture on lease made to fem dum sola fuit, after the death of the fem, which the Court also agreed clearly. Mallet absente, and judgment pro querente.

64. HILL *against* STERN.

Jeoffail.

Action upon promise to pay for a chamber, &c. 45s. for every quarter; the plaintiff alledges that the defendant enjoyed it from the 7 of September to the 7 of June following, by the space of seven quarters. Baldwin moved for judgment, the time being good without (per spatium) which the Court agreed. 2. It is an action upon the case for rent of a house in M. and after issue of nil debet, the postea was mended and laid in Cursitors Alley, which ought not to be. Adjournatur.

65.

Amendment.

Nota. Though a cause be entred up, yet if the amendment do not much deface the roll, it may be, and is usually in B. R. done, upon paying costs or giving an imparlance.

[23] 66. COW *against* SHIPWELL.

Lieu. So in sc. fa. c. in a q. incumbravit, that being orig. needs not recite where B. R. was in rec. in q. imped. 12 Ed. 74 b. per Ric.

Debt on judgment, wherein the plaintiff declared of a recovery in Doncaster in the county of York in the Court of B. R. being then at Westminster in the county of Middlesex, which by Lindly for the plaintiff, is not material where the Court sate, it being moveable at pleasure. But by Wild for the defendant, the action is local, and so not to be in any county but Middlesex. Curia, It is not said in Curia Doncaster, nor doth not say in the Court of Kings Bench then, and there being: therefore judgment arrest, and the Court agreed, that plene administravit is a good plea in debt on a judgment. *Post.*

67. SARJANT *against* MADOX.

Repleader.

In debt against assignee for rent, the defendant pleaded assignment of the term before rent arrear by the assignee by assent of the plaintiff, the plaintiff traversed the assent, which by Allen is ill, this being against the assignee, in whom only is realty of contract, which is gone by assignment and so his assent not to purpose because the assent of the plaintiff to the assignee (the personal contract being determined) is not material, and this might have been demurred to; or it appearing the plaintiff hath no title, the defendant shall have judgment; for though the plaintiff hath not confessed the assignment, yet he having let that slip and traversed a surplusage, a repleader ought to be: the assignment being with notice, but without assent. Nota. (Replications per bene & verum est, are not usual here as in C. B). Also by Twisden, On immaterial issue the Court can give no judgment, which Foster Ch. J. and Windham agreed: if the jury had found an assent, that would have implyed an assignment, but not so where it is found in the negative.

Repleader.

H. justified trespass by grant the 16 year of this King, which is impossible & on non concessit, & verdict for the plaintiff; this was moved for a repleader, adjornatur. But Windham conceived that it is as good as if no time had been alledged. *Post.*

68.

Error.

Nota. A bill may be filed after the death of the party on error brought in before.

[24] 69. *May* 14.

Surrender.

Title to a copyhold cannot be made by the commission of bankrupts without there be a surrender or admittance, 1 Cr. 569.

70. HEATH *versus* PAGET. *Ante* 13, pl. 30.

Briefe.

Stroud senior for the defendant, that the case remains at common law and not within the stat. of 1 Ed. 6, c. 7, for 2 Inst. 594. At common law a knight ought to

be so named, and if made so pending the writ 7 H. 6, 14 b. it shall abate, Dy. 55. 7 Co. 27 b. 6 Co. 10 b. though in a quare impedit, which the Court agreed. 2. That it is not within the statute, (though within the general word knight) because here is neither suit nor action pending by the plaintiff at the time of his being a knight, because that was after the test and before the retorn of the original. 10 Ed. 4. 49 H. 6, 19. 18 H. 8, 5. 2 Inst. 129. 6 Co. 47. Dy. 165 a. An original purchased in the time of one King, cannot be returned in the time 7 Co. 30 a. of another: and the enacting clauses of the Stat. del Demise le R. and of this are alike. Allen for the defendant, The retorn hath relation to the test, and the plea is put in after the retorn: and it is said, that post impetrationem brevis, &c. which supposeth it to be pending, unless he had said also (and before the retorn of the said writ) which Twisden and Windham agreed; and though it be not within the express words, yet it is within the equity of the stat. as 560, *Millingtons case*, of Pardons: especially that stat. being made for suppression of delay and in favour of justice, and therefore will be construed most favourably, which Mallet agreed, Foster Ch. J. absente, and awarded, that sedente Curia, the defendant should plead in chief. *Post* 72.

71. THORN *against* BURTON.

Disseisin. Com. 349 b. 1 Cr. 304. Claim.

In evidence to a jury it was observed, 1. That lessee of a trustee is in by way of trust, and that lease of cestuy que trust to T. is no disseisin, only at the election of the trustee S. W. but it is a good lease betwixt lessor and lessee at least, which cannot be determined without notice, by Windham, but it was directed to be specially found. 2. Claim within 5 years after the death of cestuy que vy when lease was to commence, is necessary on *Saffins case*: but by Glyn, **[25]** the fine being in pursuance of a trust, cannot destroy any lease made by cestuy que trust, which Twisden, Foster and the Court agreed. And though a fine by cestuy que trust to his lessee do not extinguish the trust, yet it is not safe. Twisden, A lease to the use of me and my heirs is not altered by fine to the same use, nor any claim necessary. 3. When men have two titles, they shall be presumed in of the best, notwithstanding their election, especially when such entry is only to avoid a nonclaim. But by Windham, this case is more proper for Chancery than this Court.

72. HEATH *against* PAGET. *Ante* 24, pl. 70.

Monstr.

Neudigate for the defendant, The assize is of an office the plaint of a grant without shewing it to the Court, which per Curiam is not necessary unless the grant were by deed: whereupon he pleaded over, that the plaintiff never had any such seisin whereof he could be disseised: & adjornatur. *Post.*

73. ——— *against* OPIE. *May* 15.

Satisfaction.

In evidence to a jury it was said, that payment of part to any treasurer or committee is no good satisfaction for the whole, and so not pardoned by the Act 12 Car. 2, 11, nor at law, for it is payment after the day, but in equity they may have benefit of it. 2. Affidavit, that the defendant had paid or satisfied not saying how, is not good. 3. All Private Acts must be proved by the rolls, but Publick Acts (though obsolete) may be allowed by the Court without a copy proved.

74. MUNIFAS *against* BAKER.

Surrender. Apres. He cannot distrein or have debt before. Forfeiture.

In evidence to a jury it was doubted if (upon a custom to surrender to two copyholders out of court) a surrender to the heirs of a copyholder before admittance were

good: Twisden conceived it was, Foster and Windham absent. 2. The not appearing at a court being a forfeiture, a copyholder said, if it were a court, he would appear; if none, he would not. Though this appear to be a court, this is no forfeiture, because no wilful contempt, by Twisden. And so where a copyholder hath license to fell (though it were repeald by the grant of the lord of his interest before the felling) yet this is no forfeiture though the license be determined by it. 3. Whether a lessee for years may grant a license to a copy-**[26]**-holder to fell timber, was doubted: but by Twisd. Though it be good against himself, yet it is void against the lessor, because the license is derived out of the interest, and so can be of no greater extent than it, and the assignee of the lessee may take advantage of it. 4. Whether the admittance of an heir of a copyholder by dominus pro tempore be a dispensation with a precedent forfeiture; Mallet and Twisden conceived it was. 5. To say that J. S. is lord, and the tenants must attorn to them (being by the lord) is a good lease at will; but a bare agreement that J. S. shall have the land, will not amount to a lease at will; by Sir Jeoff. Palmer Attorney General, which was not denyed.

75. THIN *against* THIN. *May* 16.

Grants. Cum pertinentiis will pass things parcel in reputation only. 8 H. 7, 4 b. pl. 1, § 3.

The Court conceived, that parcel of a mannor in reputation only will not pass by the general words (of the mannor cum pertinentiis) in a recovery suffered by tenant in tail a fortiori, where the issue was out of the Chancery, to find whether this parcel was dockt by the recovery, which doth only mention the mannor in general cum pertinentiis; but otherwise if the grantor himself were seized in fee (yet directed it to be specially found) because desired by Serjeant Maynard for the plaintiff: and Foster Ch. J. said, that whatever his own opinion were, he would never deny a special verdict desired by any serjeant. And by Windham, tenancy escheat can never again be parcel of the mannor, nor can any man have the same lands in fee, and yet hold them of 2 mannors, though the land may be parcel of one, and the services of another mannor, which the others agreed. *Post.*

76. SALMON *against* WOMAKE. *Post.*

Quare impedit.

The bishop refused to admit a clerk presented to an avoidance on the Act 12 Car. 2, cap. for his preaching against, and refusing to baptize infants; for which cause the justices of peace had declared it void, and turned him out by order, which was removed hither from the sessions by certiorari, and excepted against. Sed adjornatur.

[27] 77. READINGS CASE. *Ante. May* 17.

Coron.

Being found guilty of manslaughter, he desired before judgment to hear the indictment read, which was granted: but Twisden said, he never did see it done before after verdict, nor any of the other Judges, but desired to see presidents. *Post.*

78. CROUCH *against* DRURY.

Evidence. Depositions. Godbolt, 326, pl. 418.

In evidence to a jury, Twisden observed a case betwixt *Lee and Lee*, that the book of any merchant is no good proof, nor may not be allowed to be read touching any debt due to him; but of any debt against himself it may be good enough, which was agreed per Curiam. 2. Depositions in Chancery after the death of the party, shall not be allowed against other parties, though one claim from him that so is deposed

for by Wild Serjeant for the plaintiff; but the Court allowed it to be read, because the defendant could not be made a party to the decree betwixt the plaintiff and him under whom the defendant claim by a debt subsequent to the plaintiff though by a conveyance before; which gave occasion to the suspition that this conveyance was fraudulent; and though depositions might not be read, yet a decree is the judgment of the Court, and therefore ought to be read, especially when the point of fraud depended thereon. 3. Bond presumes a due debt till the contrary be proved, and it shall not be intended to be for performance of covenants till the defendant sheweth it. (Quære how the defendant shall avoid such bond that is for performance of covenants in indenture where the indenture is lost or never any indenture made revera) because the plaintiff declares only generally. *Post.*

79.

Tryal.

On affidavit that one of the jurymen that served was not intended to try the cause, the Court would not grant a new tryal without it be alledged, that such person thrust himself in, to do favour to any of the parties.

80. READINGS CASE. *Supra.*

Indictment.

Before the indictment was read the Court demanded what he could say in arrest of judgment, who said, that it is ad Generalem Sessionem apud castr. Lincoln in comitatu predicto of oyer and terminer, &c. extitit presentatum, without **[28]** saying, ad Generalem Sessionem domini Regis; yet this may be helped by a writ of diminution per Curiam; and then it was read, and he excepted. 2. That predict. R. was then present with the rest abetting, without mentioning whether at the place of the wound, or of the death. But by Twisd. if it had been that feoffator quam feoffatus habeantur pro disseisatoribus, this relates to him that may be so. Also though the indictment were void as to the abettors, yet it may be good to the principal. 3. He pleaded the Act 12 Car. 2, c. 11, of Pardon. But per Curiam, all felonies are excepted by special proviso. Sed adjornatur.

81. HILL *against* STERN. *Ante.*

Amendment. 2 Cr. 125, pl. 9. Godbolt, 385, pl. 473. 5 H. 7.

Plaintiff declare in London, that if he would let the defendant have a house in Cursitors Alley in Middlesex, that then he should have, &c. 5 H. 7, in special action upon the case for this promise; after issue joyned in London the words (in Middlesex) were omitted: for which cause the Court arrest judgment: for though such a promise might lye any where, yet when the action is special in London of a house which may be any where, it is therefore ill. Per Curiam and Twisden cited the case of *Reader* against *Palmer* B. R. that a man would stand to an award made within a month, and the attorney added proximè sequent, which altered the very nature of the promise, and therefore ill. And by Foster Ch. J. the attorney after issue in promise for juvencas made it up juvencos, for which cause judgment was arrest. *Post.*

82. ——— *against* DAVIES.

Costs.

H. desired to be made defendant, confessing lease, entry and ouster, and at the tryal refused so to do; for which Powis moved, that he may pay costs, which the Court on information of Hern Clerk Secondary, denied, because hereby the plaintiff hath recovered, and so had the fruit of his suit; and none of the Judges remember any president to the contrary: but yet upon such a refusal, the Court will give a rule to the defendant to confess it &c.

[29] 83. BLUNKET *against* HOLMES. *May* 18. Siderf. 47, pl. 6.

Demise, Br. 16. H. demised copyhold to bar. & fem, and the heirs of the body of the fem, if they shall attain to 14, they suffer a recovery, and then they have issue, which after his death attains to 14. Sp. Verdict, 2 Leonard, 11, pl. 16. 1 Brant. 1, pl. 2. 2 Leonard, 92, pl. 115. 3 Cr. 526, pl. 5. 2 Cr. 461, pl. 6. That this is all one as to say, when T. dyeth without issue.

A demise was found by special verdict thus: I give my messuage to my son Thomas for his life; and if he dye without issue of his body then living at the time of his decease, to Leonard a son by a second husband, and his heirs: but if T. have issue living at the time of his decease, then to T. and his heirs. T. suffers a common recovery to the use of himself, &c. Allen for the pl. This is no estate tail, because the limitation to L. is not absolute upon an estate tail but upon Thomas's dying without issue living at the time of his death: and this point hath been agreed by both parties, and so waved it. But he argued that L. hath not any contingent remainder upon the death of Thomas, which is only when a remainder is in obeyance until the contingent happen: Com. 35. But by executory devise where the fee is vested in somebody always, but to be divested by a future contingent, this cannot be by way of remainder, because a fee cannot be upon a fee so and T. hath an estate in fee simple (and not for life only) immediately: T. being heir at law, and so had a devise been to him for life. This will not displace the fee nor put the estate in obeyance: as Jones (who argued that T. had it but for life) said, relying upon *Archers case*, which was a mistake: for Robert had an estate there in fee simple, having only by the will an estate for life, and being heir at law. 2. That was a devise of a remainder in tail, and so an obeyance of necessity, because the contingent was subsequent, but here the contingent is precedent and to be in the lines of the parties. And that T. hath a fee simple is clear, because the limitation is to his right heirs (if he dye having issue, &c.) which doth not make his heirs purchasers, but are declaratory, that if T. have no issue, then L. shall have it. This giveth nothing to T. that he had not before, and this was the most genuine meaning of the will; because the sons being by several venters, could not inherit each other, and so she made provision for the youngest L. by disposing the writings in a friends hands for him. 3. When the intent is dubious ut res magis valeat, &c. the intent of the devisor shall be taken most favourably, especially when by such construction the whole will may be fulfilled, as here, that T. if he had issue, should have the whole estate. 2. That the common recovery here by T. is no bar, is manifest, because the intended recompence (which is the sole ground of bars by recoveries) reacheth not to this remainder. So *The Marquess of Win-***[30]***-chesters case*, & Dy. 252, when he cometh not in by voucher or in privity of estate: and though tenant in tail be attaint or utlawed, yet a recovery by him will bar, only because of the intended recompence; because the tenant might have counterpleaded the vouching of any such persons, and so it is his own fault: and here Leonard hath no contingent but a distinct estate, and a recompence cannot go to it, no more can it go to a fee limited upon a fee reservation, Br. & Rec. en Value Br. Because the recovery in value must be of an absolute fee though by reason of a warranty annexed to an estate upon condition. 3. L. though he cannot falsifie, yet he shall not be hard, because as *Pelhams case:* such a recovery is but upon collusion, which destroyeth the legal operation of a common recovery, especially where it is to avoid a title: and L. needs not falsifie, because he is a stranger, and so not bound by this recovery. Privies in blood and estate cannot falsifie in the same, but only in higher actions, conditions, Br. 26, & *Boswells case*, 6 Co. 52. And if this should be otherwise, then great mischiefs would happen in common assurances; as that after a feoffment by a recovery a man may defeat all uses and mortgages which are of the same nature with executory devises, there being no real distinction betwixt a condition and a contingency. And *Pell* versus *Brown* is adjudged in all these points, 2 Cr. 590, pl. 13. Finch for the defendant, that L. the devisee is barred by this recovery whether he take by way of remainder or executory devise; but that the defendant is in by way of remainder is clear, and not within *Pell & Browns case*, which was a devise to T. and his heirs, and on death of T.

without issue living, W. &c. And Dy. 330, the law will rather make such construction, than suffer a fee to be upon a fee, which shall not be allowed but in case of necessity, 37, 38 Eliz. *Sole* versus *Gerrard* C. B. A devise to the youngest son and his heirs, and if he dyed before 21, or without issue, then &c. here to avoid this contingency they strayned and made it. Or so 2 Cr. 415. And here the construction must be strained to make it otherways, (though if T. had not been heir it would have been out of question, yet) his being heir will not alter the case, it being no mischief that the fee be in obeyance when the freehold is visible; and it is also the intent of the will, which provides, that T. shall not sell, &c. which could not be hindered by delivery of the writings into a strangers hand: but admitting L. takes by executory devise, yet, 2. He shall be barred because this limiting of a fee upon a fee, is new; as 38 Eliz. *Fulmestons case*, & 3 Co. *Borastons case*, and the first **[31]** judgment in the case is that of *Pell* against *Brown*, and hath been since a serjeants case, and often debated, but never received any determination till (53) *Jay* against *Jay*, contrary to *Pell & Browns case*. But the recovery upon such a contingency never yet received any decision. And had the recovery been by title it would have barred clearly; and being private, is of the same effect, and only to be avoided on the statute 32 H. 8, by the same parties as the other. And it is not only the intended recompence, but the favour of common assurances, as 9 Co. *Beamonts case*, that gives efficacy to common recoveries. So Hub. *Duncomb* against *Wingfield*, 1 Leonard 157, pl. 221, (which he commends, and Foster also) and otherwise all the inconveniencies of perpetuities will be de novo introduced; and though future uses may be limited thus with a fee upon a fee, yet may they in many cases be destroyed, as in *Englefields case* in Poph. 20, by an attainder. And a condition is collateral without dependance upon the estate, but this contingency goeth with the land, and is of the same nature with it, 6 Co. *Mildmays case*. And in like cases a recovery will bar, as Formedon Fitzh. & 4 Jac. *The Earl of Cumberlands case*, a fee depending on estate conditional was barby such recovery at the c. law. And 6 Eliz. C. B. Moor Rep. 73, pl. 201, a devise that if J. S. dye without heirs male, that his executors shall sell this by such a common recovery, was barred, and all these without any intended recompence, Rec. in Value Br. Foster Ch. J. The not barring of the recovery will set up perpetuities. Windham, When a precipe is brought against the tenant of the land, be it for life with voucher, that this (for the intended recompence) should bar all the remainders or possibilities depending thereupon (if upon real title) is clear. And so if tenant of the land (whereof rent in fee doth issue) suffer recovery, this shall be charged with the rent and have a fee only charged with the rent or with the condition according to the warranty. Twisden conceived this estate to be a fee, and that if a collateral ancestor suffer a recovery vouching tenant for life, it will not bar the remainders. Contra, where the recovery is against tenant for life vouching the lessor, &c. this will bar all remainders or dependancies upon it. And though the recompence giveth force to it, yet being common assurances, they will be construed more favourably than at c. law: and in *Pell* against *Brown* the Judges argued upon several and different reasons; and a feoffment to J. S. and his heirs till a marriage had been gone by recovery before by Twisd. though Foster cited the opinion of Hutton to the contrary, & **[32]** adjornatur. And by Wind. He in remainder had no remedy at common law on recovery against the tenant for life. Per default. *Post.*

84. PLAYER *against* BARNADISTON.

By-law.

The sheriffs of London retorned, that for the more indifferent way of merchandize they have accustomed, that the goods as well that were sold by weight as others of all strangers before sale ought to be weighed at the common beam; and to enforce this, there is a by-law made with a pain of 40s. per tun for not weighing. Allen for the plaintiff, This is a good custom (and though it were objected that men should be forced to weigh whether they sell or no, yet) because it may have a reasonable commencement, because the city are bound to keep officers there: and that they need not sell by weight but at their pleasure might be upon good grounds restrained, and

being used long and confirmed by Parliament will be as well presumed good as a custom that goods foreign bought and foreign sold shall be forfeited: and sometimes these Courts have taken notice of these customs: and admitting the custom good, this inforcement of it by a penalty is good as well as restrayning the carmen, foreign traders, &c. Twisden cited the opinion of Justice Barclay, that this Court shall take conusance of recoveries in London, and conceive also the custom and by-law good, and award procedendo nisi, &c.

85.

Dilatories.

After imparlance plead any plea not admitted by it, as joyntenancy, &c. and that upon oier, which must be demanded of deeds the same term it is Curiæ prolat. but if after by the course of the Court, the plaintiff may bring in his bond when he will; and therefore oir being demanded the first term, the defendant shall have the space of that term in which the deed is shewn, to plead.

86. GRAY *against* PHIPS.

Repleader.

The mispleader by default of the plaintiff himself though it be in an impossibility, if issue be thereupon, as *Reynalds case*, Hub. yet the defendant shall have judgment on the plaintiff per totam Curiam, for his mistaking his own plea shall not avail him.

[33] 87. BOROUGH *against* MOOR.

Amendment.

In error of judgment against executrix, in the judgment it is recited true; but the time of the appearance (was the same day) which being a judgment entred by agreement of the parties and is but inducement to the action, which might have been only quod cum recuperasset, &c. therefore Windham moved that this may be amended. Adjornatur.

88. TOMES CASE.

Certiorari.

On motion to remove indictment out of the sessions for matter whereof they have cognizance, is unusual without affidavit of good causes, because of delays; but it being for words, and he giving bond to traverse it here so as to carry it down the next assizes, it was granted.

89. ——— *against* NOELL. *May* 20. Error Br. 55.

Supersedeas. Marking the roll, paying fees for, or allowance by the Ch. J. of a writ of error is no supersedeas unless actually taken out before execution.

Error being brought and shewed to the attorney is no supersedeas by Twisden, until it be shewed to the clerk of the errors, which is an allowance in Court: and therefore if execution be done before it be allowed by the Judge or shewed to the clerk of the errors, it is well done, because the attorney otherwise would never have it allowed, but only shew it to the attorney of the other side. But if he shew it and declare his intention to have it speedily allowed, there execution is superseded in the mean time; but yet if bail be not put in according to the statute, the execution may be well done, which the Court agreed.

90. THE KING AND SANDERS *against* THE BAILY, &c.

Retorn vic.

On a mandamus to the Court of Aldermen of Brecknock to restore an alderman, they retorn, that they are an ancient corporation, and have power yearly to chuse, or at the death or removal of any, and that the plaintiff was duly elect. And the defendant was removed for divers outrages, as taking away the mace, and opposing the swearing of the plaintiff: but they shew not how the plaintiff came to be removed, nor his offence. And the saying quod clam & subdolè he acted against them is not sufficient nor doth it appear the party was ever heard. Bald. for the defendant on Mich. 23 Car. 1, Rot. 241, *Catchin & Wargar* B. R. a writ directed to the bayliff and **[34]** constables, and the retorn is by the deputy-constable and suitors, which was held ill: so here, the writ is directed to the aldermen, bayliffs and commonalty, and the retorn is, by the bayliffs and capital burgesses, without the commonalty, which, per Curiam, is ill, and not like a retorn by any justice of peace upon a writ of error directed custodibus pacis, because here the writ is satisfied, but in the case at Bar, the one part of the corporation may make one, and the other part another retorn.

91. GREEN *against* GREEN. *Ante.*

Slandre.

The words are actionable by Archer on 1 Cr. 332, and 2 Cr. 407. 1 Cr. 117, because if not treason, yet they are a high misdemeanor, for which he may be fined: and these words were spoken not by a madman (as was supposed) but by a drunken sottish fellow. And Foster Ch. J. said, that in his time all the twelve Judges were of opinion, that words may be so laid, that they may be treason. And by Twisden, you spake treason, was adjudged actionable, and so the Court agreed the words were here.

92.

Tryals.

Nota. By Twisden, tryal at Bar in Trinity term is not to be but in great necessity, or upon the Crown side. And 2 per Curiam, notice of tryal given upon Sunday is not good.

93. LADY DACRES *against* HAZEL.

Consideration. 1 Cr. 530. 2 Brant, 211, pl. 498. Com. 307 b. 2 Cr. 181, pl. 19. Gold. b. 173, pl. 106.

In debt for rent upon a proviso to make leases (as in *Mildmays case*) in a covenant in consideration of natural affection to stand seized to the use of himself for life, his wife for life, and after to his own right heirs. By Jones & Curiam, Here is no consideration to the lessee to raise any interest to him out of the covenant, as there would be if the proviso were to make leases to his son: and this action was brought by the widow of Mr. Chute as an assignee to him against his lessee of lands in Dorcetshire.

94. WALCOT *against* TAPPIN.

Trespass.

In trespass for breaking a house and carrying away ten peeces of timber, which by Powis was moved in arrest of judgment, that it is incertain, as B. R. 1656, against Tomlin, for certain pieces of cloth, not declaring whether wool-**[35]**-len or linnen, yet good. But here it was said, that pieces of wood is uncertain. Twisden cited the case of *Web and Washborn*, that pieces of hangings is good enough: and in trover, for

hides, without shewing what hides, yet good. And the case at Bar was of 10 pieces of timber among other, and 40 pieces of raftures, &c. The Court agreed this sufficiently certain, wherefore judgment pro querente.

95. PLAYER *against* BARNARDISTON. *Ante.*

By-law.

Reeves for the defendant excepted to the retorn of the habeas corpus cum causa, 1. That the custom is, that all goods of foreigners usually bought and sold by weight being exposed to sale, ought to be weighed, which as it is compulsory, is unreasonable. 2. The by-law is grounded upon a custom, where there is any default necessary to be remedied, which he conceived is not here, because that they may have an action upon the statute. 3. That 13s. 4d. the hundred is an unreasonable imposition, which the Court doth think reasonable. And by Twisden, this is the common form of retorn of by-laws. 4. Such by-laws are to be profitable to the city and people; this Reeve conceived is not so here, because only the first buyers are concerned herein. 5. The reason of a by-law, viz. that there might be a just and indifferent weighing of all merchandize is not in this case, that exempts the citizen and duly restrains the foreigner, which is not adequate to the mischief of the contrary. 6. They have not proportioned the penalty to the offence, but to the subject matter. 7. The by-law is made the 2d, and to take effect the 10th of February 1658, without any provision of notice to the strangers (who are not concerned in the common-council) and yet must be bound to take notice of it at their peril, which is unreasonable. But by Twisden upon *The Chamberlain of Londons case*, notice is not necessary on a by-law that is grounded on custom in London. Sed adjornatur. Foster Ch. J. absente.

96. TERRY *against* BROWNE.

Condition.

The justices declare marriage void, being by petition to them shew'd to be had by fraud, though by the wifes own, yet without fathers or mothers consent; and if this be confirmed by the Act 12 Car. 2, cap. &c. of judicial proceedings was doubted on a special verdict in trespass, for taking away the plaintiffs wife; & adjornatur.

[36] 97. BLAKE *versus* PAGE. *May* 21. *Ante.*

Prohibition.

After an appeal after sentence in the Admiralty of that whereof at the time they had cognizance, and so confirmed by 12 Car. now notwithstanding the appeal, which is only a suspension of execution, the plaintiff would have a prohibition, but by Windham Justice, he shall not. *Post.*

98.

Tryals. Examination.

Nota. Pro regula, that an action entred the last day of the former term cannot be tryed before the last week in the next term in London, unless it be by proviso 2. Examinations of witnesses by interrogatories out of the term, by Foster Ch. J. is extrajudicial and not to be allowed, though the parties consent, contrary by Twisden and Windham, consensus, (if according to law) tollit errorem: and the Court may as well allow the examination of witnesses before a Judge by depositions, as read the affidavit of a person absent, this is no more than the law alloweth.

99. FOREMAN *against* WRIGHT. Ejectment.

Testament.

In (56) H. devised, &c. and in (58) transcribed what he had formerly writ, and as he transcribed so he crossed the former paper and made other persons executors by the last. Both were found privately in his study after his death in a drawer among money and old things. But it appeared that the testator should say that the defendant whom he had made executor by the last part, should never be his executor, nor ever have any thing to do with his estate. The first part was under hand and seal, the latter brake off abruptly, referring to what was not crossed out in the former. And in direction to the jury at Bar, Foster Ch. J. conceived, that the whole will to which he subscribed, was void, and so Mallet; and that because lands were not devisable at common law, therefore it ought to be clearer. And by Twisden, The intent is the main, which is not sufficiently declared. And Justice Windham said, A will by writing without hand or seal may be good, being published, or lying among papers of concernment; but the last of these maketh no dispose of the land as in the former, and therefore without the finding of both it is nothing available.

[37] 100. CARSEL.

Livery. Com. 213 b. Com. 231.

Lands out of the County Palatine in lease were granted by patent without attornment or livery, and if it passed as a bargain and sale was doubted, 21 Ed. 4, 60. 1 Inst. 3, 14 b. And by Twisden on information of a learned person experienced in the dutchy lands, that the grant of such a reversion is good without attornment, being out of the county to pass the interest, though not to have an action of wast, &c. But by Wind. Out of the county the King and a common person shall be in the same condition, but the general practice hath been as before. 2. By Windham, Acts concerning the King are publick, and need not be found by the jury, but by agreement of the parties the stat. 37 H. 8, 16, was found. *Post.*

101. READING'S CASE. *Ante.* Siderf. 40, pl. 3.

Diminution.

Allen moved, that the indictment for the exceptions aforesaid might be quasht, because on diminution a writ may go to commissioners of oyer and terminer on removal of the record tryed before them; but where an indictment is removed and tryed, here diminution may not go down, as in *Samsons case.* Windham, The caption is waved by judgment, and after that a certiorari on diminution alledged may well enough go forth. And by Twisd. Ad sessionem pacis without publicæ, is ill, but without domini Regis, is good enough. And so of a presentatum extitit contrary of presentatum fuit: this is but a relation of a former fact, and by him according to Coopers Dictionary, the word extitit may be intended either present or future. And per Curiam, this being since March (59) is not within the Act 12 Car. 2, cap. 11, but excepted by the words (other felonies in the proviso). But by Allen, This is only for felony of goods, as theft, &c. otherwise it would be repugnant to the body of the Act that pardons felony, till 24 June, 1660. But because it is of general concernment, adjornatur. 2. Allen desired a copy of the indictment, which the Court denyed, but said, that of so much as they had moved in arrest of judgment they should have a copy.

[38] 102. GRAVES *against* SAUCER.

Action sur case. Yet one may have trespass against the other by 4 Ed. 3, 22 b. pl. 54. Trespass Br. 63, 204. One may demise the whole, 38 Ed. 3, 7, pl. 24, but cannot grant that estranger agist his cattle to the prejudice of his companion, 45 Ed. 3, 13 b. pl. 10. 2 Leonard 220, pl. 278.

An action on the case for fraudulent disposing of the sixteenth part of a ship, which is a temporary damage, on Cr. 16 Jac. *Leicesters case*, is sufficient (though the property be not destroyed) for an action on the case; so *Gower* versus *Danbuy*, 26 Eliz. especially being fraudulently; because the ship being a thing entire, and therefore may also be disposed of by one tenant in common, which being done by fraud, is a good ground of an action. Windham, Fraudulenter is not material but only where the subject matter warrants it; but in things entire the law gives a power to either party to dispose of it, and the other hath no remedy, for volenti non fit injuria, which the Court agreed; and that it was the folly of the tenant in common that he did not take collateral security for his sixteenth part, and nil capiat per breve award: see Conscience Br. of 9 Ed. 4, 2.

103. SEIGNIOR BRUNKERD.

Patents. Stiles 135, pl. 301.

The farmer of estreats of amerciaments in the Exchequer moved, that this Court would not in diminution thereof levy their estreats by process of the Court by levari facias as hath been the ancient practice, the Court agreed, that the patent was good, but how they should alter the constant course before, at the time of, and since the patent, they would advise by search of presidents, and whether it be inrolled in this Court, and what claim hath been made on such patents.

104.

Demurrer.

A demurrer to any plea ought to have the counsels hand: and by Foster Ch. J. If it be frivolous he shall be fined, but on demurrer to a declaration by the practice of the Court, the hand of the attorney is sufficient. But per Curiam, If that were good and the demurrer were frivolous to the declaration, the attorney shall be fined; but neither ought to be without the hand of counsel, per Curiam, or with warrant from him particularly: and he that doth otherways, shall be turned out of the roll and pay costs, as the council should do if he demurred frivolously.

[39] 105. SERJEANT *against* MADOX. *Ante.*

Jeofail. See Dett. Br. 43.

In debt against an assignee, Scrogs for the plaintiff moved for judgment on 1 Cr. 25, and Hob. 316, that the issue upon the assent, as 5 Co. *Nichols case*, though immaterial, yet after verdict, is good enough on 32 H. 8, 31, there being no default in the plaintiffs declaration. Allen for the defendant agreed to these cases, but said, that if the immaterial issue by the plaintiff or defendant upon an immaterial point be found, judgment shall be according to the verdict if it be found against him that pleads it, but if it be found for him that pleads it, that was held to have been a jeoffail, in *Nichols case*, especially when a material issue is offered, and the plaintiff will plead so immaterially. Twisden, Where issue is improperly joyned as (*Chouse* against ———, 1 Cro. 190). On the traverse of a conclusion there judgment may proceed, but as *Jones case*. And Hob. 197, on duces plead to a bond the plaintiff replyed that he made it not per minas, and issue thereon, this being immaterial (though a perfect issue) yet the plaintiff shall not have judgment. And so in Stiles 150, pl. 340, the case that was here betwixt *Jennings* against *Lee* 1649, B. R. in trespass, the defendant justifies in defence of his wife, plaintiff replyed de injuria sua

propria, and an issue joyned thereon, which was held ill. And by Foster Ch. J. this plea upon the assent is conclusive to one party, for if there were no assent, no action would lye. Sed adjornatur, Windham absente.

106. PLAYER *against* BARNARDISTON. *Ante.*

By-law.

Reeves for the defendant admitting the custom good, yet there was no necessity of it, because there was a remedy convenient before by action upon the statute. And 2. This is not for the benefit of the people in general, as 19 Assizes 6. 3. Being penal against foreigners must aver notice, which is not provided for here, 1 Cr. 498, *James* versus *Tutne*, although if it had been the custom all persons had been bound to take notice of it, yet not so of any by-law. Allen for the plaintiff prayed procedendo, because where there is a custom without means to enforce it, that may be made by by-law, as in restraining foreigners to set up trades on pain of 5l. and the party cannot have any action upon the statute, nor the mayor and commonalty, for they have no loss thereby. And 2. Being in pursuance and strengthening of the custom, must **[40]** be for the peoples benefit as well as the custom. 3. Notice is not necessary, because nothing de novo is done, but pursuant of the custom; and every person trading in the city is to take notice of the law of the place, and else all the by-laws in London would be overthrown; and the party may excuse himself by being ouster le mere, &c. but the Court otherwise will intend notice. Twisden, There is equal remedy, as 5 Co. *Greyes case;* and in annuity pro consilio, the party may refuse, so he may to carry his goods to the beam: and for notice it was never seen, but if it be bonæ fidei consonum, and both parties have equal remedy; and to enforce a duty, it will be good enough without notice, especially in London where the by-laws resemble Acts of Parliament. And by the whole Court a procedendo was awarded, because all that are merchant traders at their peril ought to enquire into the law of the place. By Foster Ch. J. Dy. 322, pl. 23.

106. 8 ELIZ. 2, POULT. 1070.

Arrest.

Nota. A person was arrested at the suit of A. and a feigned name of attorney put in, whereby the party arrested knoweth not how to put in bail or be discharged. And thereupon Foster Ch. Just. and the Court pronounced a rule to disallow any attorney to practice in anothers name, or any man to be a common solicitor but only in particular cases: also that none shall be arrested on a bill of Middlesex, without the name of the officer attesting it.

107. EDEN *against* CHALKHILL.

Tryals.

Tryal at Bar on poverty of the party plaintiff, and consent of the defendant was granted to be in Trinity term, but not to be made a president.

108.

Priviledge.

Nota. The Kings servant is not so priviledged from arrests, but that the sheriff ought to return his writ, unless he sheweth his priviledge on the arrest.

109. CROUTCH *against* DRURY. *Ante.*

Tryals. Deceit.

Twisden Justice said, he never knew a new tryal at Bar except in *Woods case*, where there were unmerciful damages and suspition of tampering with the sheriff.

And where there are many tryals of the same nature, and the verdict of the latter go contrary to the former, there a new tryal **[41]** hath been awarded. But by Twisden, He never knew any others in the same action, especially where one may have another. And by Foster Ch. J. Without an apparent practice and deceit it ought not to be granted, only because the jury give a verdict contrary to expectation. 2. Fraudulent conveyance is not when one party only intends to deceive, and the other is purchaser bona fide, but where both parties conspire to deceive, and to that intention make a conveyance.

110. TERRY *against* BROWNE. *May* 24. *Ante* 35, *pl.* 96.

Entred Trin. 1659, Rot. 959. That the judgment of divorce being not warranted by the Act of Marriages in (53) is not confirmed by the Act of 12 Car. of Judicial Proceedings; and by that Act all other marriages than by justices of peace, are declared void, but the party was never indicted for fraudulent or violent marriage, or violent taking, which doth not appear by the verdict; but after that clause of (no other) was taken away by a subsequent Act found, and then this marriage was had before a parson. Archer for the defendant, that the sentence is confirmed, the Act of (53) to this purpose is made as a good and valid Act of Parliament: the case is not within the clause of repeal in (56) being found and admitted a good marriage; but being fraudulent, as appears by the circumstances found by the jury, that she was stoln and clandestinly married in the night, and they may as well proceed by information as indictment, or otherwise upon motion and publick notice. And it appears they had a complaint, and proceeded thereupon according to their power then, and therefore their sentence confirmed. Windham, The jury find not any express fraud or force, but evidences of it, but that is not enough to enable the justices to the conusance of the cause. Twisden, Though the justices determin it to be fraud, that will not make it so if it be not expresly found, and the justification must be positive or special, as in *The Chancellour of Oxon's case.* And 2. Generally things left to justices of peace are intended (without special words) to be proceeded upon by indictment; but for the dangerous consequence of this, if they might proceed only by indictment that every act they do of fact shall be re-examined by jury, and because the general practice of the justices through England was then to proceed by petition and not by indictment, the fraud should be found; yet this is not so necessary to find express fraud as where it is upon pleading, and issue thereupon: and now the Court is not to judge of fraud, but to affirm the judgment **[42]** of the justices of peace that is found by the jury. Adjournatur.

111. COXE *against* WARWICK. *Ante.* In dett Br. 49.

Debt.

Baldwin for the plaintiff, that debt lyeth for a rent seck for years, on Lit. sect. 228, by the assignee of the lessor for years having attornment of the grantee, because he hath no other remedy; and beside, the attornment is in it self an implied contract also 5 H. 7, 8 b. Debt Br. 41. For the devisee of such a rent without attornment dett may lye; and so against grantee of the lessee debt lyeth, *Mansells case:* & 6 Co. 58 b. *Bredmans case.* And as the remedy for a freehold is an assize, so debt for rent of a term for years. 2 Ed. 4, 11 a. Br. 17. 2. Powis for the defendant agreed, that it is only a rent seck, but without remedy before seisin had, though after he might have had a writ of annuity, but now here wants all manner of privity, unless a double privity should be created; he agreed the cases cited, but conceived that upon the act of God, which, as *Ognells case,* that resolves the real contract into a personalty, though there, rather than be remediless, debt may lye, yet not so where it is the act of the party himself to determin it. If it had been an original rent granted out of the land, annuity or debt may lye, but not so here, notwithstanding attornment, which is but an agreement to enjoy as the law will: as in 2 Jac. Rot. 2660, *Warner* versus *Agnas:* lessee for years surrendred rendring rent with a cause of distress. If this had not been made he conceived that the rent had been remediless: and alike is L. Co. 46 b.

but he relyed on 2 Ed. 4, 11 a. Windham Justice upon L. 5 Ed. 4, 42 b. conceived, that the action of debt lieth as well as for an annuity, which hath been resolved also lately. But the attornment being a bare ceremony, he agreed it will not make any new contract. But here betwixt lessor and lessee the privity of contract is by reason of the rent, as 45 Ed. 3, 8, and so is transferred with the rent to the grantee. As on lease of a fair reserving rent, debt lieth, and yet no reversion but only a contract. Also debt for rent charge may lye every year the contract being annual: and where remedies may be given without manifest inconvenience, they shall be as Yelver. 51, much favoured. Twisden Justice to the same intent, because the rent was originally subject to such an action before assignment. And 9 H. 7, 16 much guide him, F. N. B. Annuit is against 19 H. 6, 42, by Askue, & 7 Co. 47 b. *Lylingtons case*, & 44 Eliz. *Benloes* **[43]** against *Philips*, B. R. Grantee of a rent seck that is so originally, shall have debt in favour of remedies. Mallet to the contrary, and Foster Ch. J. doubted, but inclined, that the action lieth on P. 30 Eliz. *Austin* against *Smith*, a copyholder by licence makes a lease for years, and after grants the rent over with attornment, it is a quære if debt lieth. Adjornatur. Dy. 140, pl. 38.

112. SALMON *against* ELLIS.

Quare impedit.

Justices of peace put out a parson for being against infant baptism, the defendant removeth the certificate of the justices; and here Spilman moved for a procedendo, or that the Judges would declare some opinion, which by Windham would be extrajudicial, and they refused both, leaving him to his quare impedit if illegal.

113. CURLOIS *versus* BACON. Siderf. 39, pl. 2.

Demurrer. Leonard 124, pl. 1. 3 Cr. 139, pl. 15. 2 Cr. 544, pl. 4. Noy 132. 1 Brant 125, pl. 280. 2 Cr. 625, pl. 19. 1 Cr. 178, & 55. Yelverton 65, pl. 94. Reports.

In a sc. facias against several persons they plead severally, and the plaintiff demurs to all joyntly quod seperalia placita, &c. this by Allen is good. And he cited 8 Car. 1, Rot. 420, B. R. *Cross* against *Norman* in covenant upon several breaches. The defendant pleaded several pleas; the plaintiff demurs quod placitum predictum, &c. this was there ruled good. And Justice Twisden cited *Tucker* against *Honywood* 44 Eliz. This plea ruled good; and that 15 H. 7, 10 b. Dy. 182, *Fish* against *Broket*, and *Chapman* versus *Dalton* Jac. It was ruled that such a plea was not good, but the current hath been contrary. And by Windham, The new reports being but promiscuous, are no farther to be credited than as they are consonant to the old, or agreeing with the roll. Dy. 325, pl. 4. Veniat assiza de titulo, where there were two titles, yet good, because title is nomen collectivum. And he agreed with Twisden, that the plea is good, reddendo singula singulis; and Foster Ch. J. to the same intent, and so judgment pro querente.

And by Twisden, The case of Chapman was, where upon a demurrer on one part, and issue upon the other part of the plea, the plaintiff said quod placitum predictum, which was uncertain which plea it should refer to.

114.

Trespass. Damages Br. 141, per Hussy. 2 Cr. 74, pl. 3.

Trespass for taking and carrying away eight ferkins or pots of butter, after verdict shall be intended synonyma. Also where damages for goods are recovered against J. S. **[44]** J. S. shall have trespass after for the goods, for none may have both goods and damages. 21 Exod. 34.

115.

Copy.

Upon a contempt pardoned by 12 Car. 2, as *Fossels case* 4 Jac. the parties can proceed no farther, but yet the Court will not take notice of any contempt that the parties are in, without special pleading, upon a bare motion only.

116. IN THE ADMIRALTY.

Admiralty. 1 Cr. 296.

Nota. There by Hide Judge, that in the case of the Dutch pacquet boat seized at the suit of the King, and for contempt and misdemeanour of the master, that this is bailable at the value of the appraisment. But where the boat it self is seized at the suit of the King for misdemeanor of the boat to which the King makes title, that is not bailable: which difference was moved by Dr. Turner, and agreed by all the doctors. 2. That appeal upon a sentence may be ore tenus within 15 days, but after shall not be admitted without the seal of the Court shewed.

117. DE LA BAR *versus* GOLD. *May* 25. In Debt Br. 79.

Consideration. 1 Brant 334, pl. 861. 1 Roll. 26.

Allen moved in arrest of judgment in action upon the case upon promise, that in consideration J. S. on the part of the plaintiff let to W. who let to Gold the defendant the half of three eight parts of a ship, the defendant upon forbearance of J. S. to attach the money of W. in the hands of Gold, the defendant promised to pay what was due to the plaintiff, that this is no good consideration because it doth not appear the defendant is concerned therein, the plaint being betwixt J. S. agent for the plaintiff, and Wood (which is necessary previous to a foreign attachment) Wild for the defendant, that the consideration here is not that the defendant would pay to the plaintiff, but, as Hob. 216, *Bidwell's case*, that if J. S. would forbear, the defendant would pay what was due for the fraight; and here is a loss to the plaintiff of his attachment by J. S. and an advantage to the defendant: and therefore though the consideration be betwixt other persons, yet if it have any influence upon the defendant it will be good. Windham, If the promise had been to J. S. from whom the consideration moved that the defendant would pay to the plaintiff, that would have been good, which Allen agreed contra where the promise is to the plaintiff only from whom no consideration moved. Twisden, Upon a collateral promise **[45]** on a marriage to a person unconcerned, as Yelv. 54, *Musgrave* versus *Wharton*, the married persons shall not have benefit; but otherwise where the meritorious cause ariseth from a third person as in a promise betwixt parents on marriage of their children, there either party may have the action. And by Foster Ch. J. If one promise to give 500l. with him that shall marry his daughter, if J. S. a stranger doth it, he shall have an action upon the case for it. And Wild cited a case, that A. indebted to J. S. &c. deposits goods for this debt with J. N. and in consideration that J. N. would deliver the goods, A. will paye to J. S. it was ruled that an action upon the case lyeth. Adjornatur.

118.

Amendment.

The transcript of a record is in placito coram Olivero St. John; the roll that is here removed is in placito coram Edwardo Atkins, this was here amended after error brought.

119. PAGE *against* BLAKE.

Prohibition.

The plaintiff in the Court of Admiralty (that is now defendant) had judgment in the Admiralty on a charter-party made on the land, after which the defendant (now plaintiff) appealed, and after that he here prayed a prohibition: and Powis for the defendant in the prohibition conceived, that the suit there being according to their power, is confirmed by the Act of Judicial Proceedings, notwithstanding the appeal, which is only a suspension of execution: and by the Court the prohibition was denyed.

120. FOXE *against* ———.

Pleading.

Nota. Acceptance of a declaration after the term is not good per Curiam, though the attorneys or parties agree to it, being delivered by-the-by. So is Stiles 321, pl. 687, &c.

Nota. Indictment may be amended the same term that the caption comes in, but not afterward: but by all the bar, an indictment for perjury shall never be quashed, but the party will plead immediately.

[46] 121. HEATH *versus* GODLINGTON.

On a latitat H. did not bring in the body, whereupon debt was brought on *Peter* against *Fox* in Hil. 1657, Rot. 1144, against the manucaptors, and it was said to be ruled upon argument in *Lamden* against *Carden*, Rot. 1230, and *Markland* against *Kelway* on the same point in error, this term adjudged that the action lyeth. But by Foster Ch. J. He may plead on the scire facias that which he may not plead in debt: nor can the manucaptors have any power (which the law and practise of the Court alloweth) to bring in the principal, and beside the plaint. might sue this notwithstanding the principal were brought in; for which reasons the Court stopt the proceedings on the declaration, and on rendring of the principal he was committed in discharge of the bail. 2 Leonard 29, pl. 33.

122.

Nota. An administrator who brings an action of his own time shall have costs; as *Worfields case* 3 Car. 1, B. R. per Curiam.

123. COXE *against* SHIPWELL. *Ante* 23, pl. 16.

Amendment.

At Doncaster in the Court of Kings Bench at W. in the county of Middlesex then being, 5 Ed. 4, 7. 17 H. 6, 10. This being after a verdict, the Court cannot judicially take notice where the Court is held. 2. If there had been no place mentioned this plea had been good enough, and here it is repugnant, and so void, and as none. But by Wild, If the action be local, the Court will never give judgment upon what plea soever out of that place as this debt upon a judgment is to be only where the recovery is, which the Court agreed, and doubted if a plea were pleaded out of the place, that is not material where the Kings Bench was. *Bulwers case* judgment arrest.

[47] 124. SICLEMORES CASE.

Prerogative.

The King may wave his demurrer in civil, but not in criminal causes, by Allen for the prisoner: but per Curiam, the demurrer is by the Clerk of the Crown, by the mis-

demeanour of whom the King shall not be prejudiced. Also the Court required presidents of this to be shewed by the prisoner, because the Kings prerogative is general that he may wave his plea; but no presidents could be remembred where such waver had been in criminal causes. And by Allen, the presidents must be in the affirmative, not negative, but Curia contra. *Post*.

[49] De Termino Trinit. 1661, An. 13 Car. II. in Banco Regis.

Foster, Chief Justice; Mallet, Twisden, Windham. *June* 14.

1.

Tryal.

In *Woods case*, and *Sir Tho. Somes case*, and in any case where it appears to the Court before whom the cause was tryed, that the damages were excessive, per Curiam, a new tryal shall be awarded.

2. Smith *against* Warner.

Trover.

Trover pro certago, the postea catago Anglicè a frying pan, which by Maynard, who moved for judgment, is well in the declaration, but there nonsense: as Hob. 191, with an Anglicè shall be good. So in H. 4 Jac. *Wood* against *Smith* de duobus articlis & de duodenis fili of thread, which was supposed uncertain whether of graynes, pounds, &c. Yet 2 Cr. 129, after verdict judgment was given. But by Powis, If it be ill it may be amended, the plea-roll being right. But by Twisden, Then the jury may be attainted who have found damages for it upon a new invention of an Anglicè, if that will help; but de vestibulo, Angl. a feather-bed, ruled naught; and so of any known ancient words, an Anglicè will never help. Adjornatur.

[50] 3. Dr. Witheringtons Case. *Ante*.

Mamdamus.

He was ousted by the master and five fellows without admonition contrary to the statutes of the house, which require three admonitions, and that the master and seven be present to displace any man. And because the colledge had delayed and trifled with the Court, they grant an alias with a pain of 100l. retornable within a week.

4. Greens Case. *Ante*.

No fees may be allowed by the Secondary unless the attorney bring a note under such councels hand to whom they gave it; as Cr. especially if he be not an attorney of a Court of Record, according to the statute 21 Jac.

5. The King *against* Fitz & Castor.

Indictment.

An indictment taken by the oaths of, &c. and doth not say they were probi & legales homines, yet being for taking away stones of a church, the Court would not quash it, but put the defendants to plead or demur.

6. Nuttal *against* Page.

Slandre.

An action upon the case for slanderous words: N. that was Solomon Smiths clerk is a rogue and a knave and I will prove it, and he is in Newgate, and is to be hanged

for counterfeiting the Kings hand and seal (without express charge) on 2 Cr. 206, 321, was moved in arrest of judgment: and it was said in *Ireland* against *Bootheman* in C. B. The Court were divided in opinion, that if J. S. had had his due he had been hanged for stealing sheep, but breaking a house may be only a trespass, and a seal is uncertain alone. By Twisden, Whether it be the Great Seal or little signet, or any other, therefore the Court stayed it. *Post.* 56, pl. 16.

7. DOMINUS REX AND SICLEMORES CASE. *Ante.*

Preragative. Error.

Allen for the defendant supposed, that the Act of Oblivion had discharged him of the manslaughter; and after this error shall not be brought to reverse the attainder of manslaughter. Twisden, The King may the rather bring a writ of error, because the Act doth not extend to erroneous judg-**[51]**-ments or utlawries. And by Windham & Curiam, error is the only way. The errors were, 1. Because it doth not sufficiently appear that he was secundo exactus. 2. In com. meum, not said Suffolciæ ad Curiam ibid. tent. which is ill, though in comitatu Suffolciæ, which is necessary to be in the margent: because his Court held for his county for ought appears may be any where, and is uncertain, as 11 H. 7, and this hath been a common exception. 3. At the tertio exact' Wiseman was made sheriff and saith, at his Court, not saying where. And for these errors all the Court reversed the utlawry. Also the ven. fa. was before O. St. John Justice of Peace and Oyer and Terminer, and doth not say, justice of gaol delivery. Allen, The writ is brought in the prisoners name, which he denyeth: but by Twisden, This is but ore tenus, which the Court cannot take notice of; which was agreed by Windham, especially when judgment is given to reverse the indictment, upon such writ he shall be estopped. But by Allen, The judgment is yet in the breast of the Judges, which yet the Court will not alter, being for speed of justice. And by Foster Ch. J. a release of a void judgment is not good, nor shall be accepted without assent of the Attorney General. But by Twisden, Issue on these errors is not usual, but they are the bare suggestions and desire of the party: also these errors are in the very plea of the party, and therefore the Court may give judgment upon it, especially being, by Windham, to further justice, and not to defend the party against wrong. Sed adjornatur.

8. *June* 15.

Argument.

Nota. The course on arguments is, that the plaintiffs attorney delivered books to the two senior Judges, and the attorney of the defendant to the two puisne Judges.

9. WEDEN *against* BALDWIN. *Ante.* Ejectment.

The plaint. declared on lease made by H. B. and by special verdict it is found that T. B. was seized in fee of lands in capite joyntly with his wife for their lives, and to the heirs of T. B. and that T. B. is seized of the lands in question in fee in his own right, and devised all his lands in W. to his wife, and after her decease deviseth to H. B. and Howel argued for the defendant, that the devise is good but only for a third part, and said, that herein it is considerable if T. B. hath power to devise any part of these lands, and he held **[52]** that he cannot, because prima facie he was seised of a joynt estate for life with a remainder to his heirs; but it is uncertain of what quantity of lands he was so seized of, or of what estate, because this may be intended several ways, and therefore no certain judgment can be given thereupon. For if they were thus seized before marriage, then they take by moieties, if after, they do not; they might be joyntenants by one conveyance, and several by another, or they might be seized joyntly for the life of the wife. The verdict should be as if it had been pleaded, though the words of lay gents be found neither the quantity nor the quality of his estate, as in *Lovyes case*, 10 Co. 83, is found, nor that he had no other lands of the same tenure, Dy. 366, which was necessary. But supposing the lands capite to

be two parts, yet having once disposed all, he cannot dispose of the third part, being soccage, 2 Co. *Binghams case.* As if the case were as 25 H. 8, 55, that T. B. had once executed his power for the two parts by feoffment to the use of him and his wife, as in Dy. 237. Also if they had the estate by purchase, he cannot dispose it because they do not take by moieties, Co. 28, *Butler & Bakers case* the fem may after the death of the baron wave her estate, Dy. 9, but not so where they take by moyeties; yet the fee is in him to whom it is limited, as to Estrangers Gard, F. 48. Pet. Br. 303, and shall not be in contingency, Relief F. 40, and the verdict it self hath found that T. B. died seized, which will overthrow the objection, that he died not tenant to the King: and however, if he had had but a right, it is sufficient to make him tenant within the stat. 32 H. 8, 1. But dissee, as Litt. 106, to many purposes is actually seized, Mortdancestor Br. 59. 16 Ass. 11. It is in the heirs election to have mortdancestor on the death of his ancestor, joyntenant for life with fee to him linit Dy. 368. And here the baron, although he had estate for life joynt with his wife, yet he is sole seized in fee. Twisden conceived the verdict utterly uncertain, because that the devise of the third part is not utterly void, and so all the Court agreed. But by Allen for the plaintiff, this devise is good for the whole, and so the verdict is good; but it agrees, that if it be void for the third part, that then it is uncertain. And by Foster Ch. J. The ancient course on devise of more than two parts an inquisition was awarded to enquire of the value of them: also the Court will intend that they were seized as husband and wife, and to the heirs of the husband, and not otherways. And by the agreement of the parties the special verdict was amended in the uncertainty of the third part, and made that a full third **[53]** part descended, because otherwise if the verdict be such that no judgment may be given upon it for plaintiff or defendant, a new ven. fa. would be error, because the Court must give judgment where the verdict is totally defective. Windham, A bare remainder of capite lands will not hinder devise or disposition of the soccage, because such person is not tenant. Sed dubitatur, whether tenant for life the remainder to him in fee shall be said sole seized, so that he may devise, *Ployers case,* per l'Estat. 182, pl. 208.

10. USHER *against* BUSHLEY. Syderf. 39, pl. 1.

Trespass.

In trespass for money and goods, after verdict this shall be intended sua, as they shall be if they be in my possession, though they be feræ naturæ, and I may have property in them by reclaimer, Register 93. And if it be good in a writ, it may be good in a bill, by Wild Serjeant, who moved for judgment for the plaintiff. Windham, When the words are general, and after per videlicet it is said as in 12 H. 8, 3, that he was seized in particular as sua, as 12 H. 8, 9, that will not aid after verdict, but otherways when the words are particular at first; for the defendant was cited 43 Ed. 3, 24. Br. Trespass 64. 16 Ed. 4, 7. 1 Cr. 544. Dy. 307. 7 Co. in arrest of judgment. Adjornatur.

11. CROFTS *against* WILKINSON.

Monstr. 2 Cr. 46. Leonard 220, pl. 303. Yelverton 46, pl. 63.

Trespass for taking away a mare, the defendant said, that before the taking the defendant (being the Kings baily) he by precept out of the Court of Pomphret to make execution made it on levari facias to bring the mony into the said Court, adjudged for the plaintiff there, &c. It was excepted by Wild, that he doth not shew in certain the judgment, nor the recital of the whole record, plaint, &c. Nor he doth not shew the jurisdiction of the Court, which, per Curiam, is necessary by the baily of an Inferior Court, especially because that he justifies by reason thereof, as in *The Countess of Rutlands case.* And it must appear that the Court hath conusance of the cause, otherwise he cannot execute their precept. Judgment for the plaintiff. Nisi.

[54] 12. ——— *against* MADOX.

Error. F. N. B. 20.

Nota. If the plaintiff doth not remove the record on error after three terms, a non process may be entred on a rule given to them by the clerk of the errors or the attorney of the other part, which was made a rule, per Windham & Curiam.

13. BANBURY *versus* NEWLAND & CORPS. Prist.

Unc. Prist.

Covenant for that the plaintiff lessed to the defendant certain tythes, and the defendant rendred rent and entred into bond for security, the defendant for part pleaded payment, and for the other part tender without uncore prist, and for the other part that he is ready to make the obligation. This by Wild for the plaintiff, is not sufficient, but he must do it at his peril, which the Court agreed, and judgment pro querente per Curiam nisi. Also for every several point he should have put himself upon the country, because the plaintiff had alledged non solvit, but otherwise issue should be taken by the plaintiff, which the Court agreed.

14. GWIN *against* LLOYD & BOLD.

Sc. fa.

Error to reverse a judgment given at the Grand Sessions in Anglisie, because the warrant by the writ of summons appears to be after the dedimus potestatem, and after the common recovery removed, & in nullo erratum pleaded upon suggestion at the Bar, that others were tertenants, a sci. fa. was awarded against Ellen Gwin, who pleaded in abatement & said, that there were other ter-tenants as T. Gwin not named, whereupon the plaintiff demurred, because that it was not necessary to the ter-tenants, as Dy. 321, but to the heir: and the ter-tenant is only warned to appear, to shew why the judgment should not be reversed and his land saved to him, but he cannot plead in abatement, 30 H. 6, 2, or any thing which concerneth not himself. By Allen for the plaintiff, The tenants plea must be to the possession, not to the errors, and this plea is against the express retorn of the sheriff that he is ter-tenant, and he cannot take issue thereon. Also if execution be against one ter-tenant sole, this shall be avoided by the others by audita querela: also here there is no certainty of what quantity the other is ter-tenant. Williams for the defendant, that he shall not be charged before all the other ter-tenants be served. 1. That a sc. fa. is necessary against **[55]** the ter-tenants as well as against the recoverors, on Dy. 321, & 2 Cr. 392, 160. M. 38, 39 Eliz. Owen 157, C. B. Rot. 545. *Carne* versus *Warren* 21 Ed. 3, 56. *Holland* against *Jackson*, 11 Car. 1, B. R. To the same effect Bridgman 11, 70. Also 2. If this be necessary, yet being general that award without particular names this cannot be satisfied by particular retorn, and the ter-tenant coming in due time and pleading such a plea, the Court in discretion will not leave him to an after game. Also 3. It must the rather go out against this ter-tenant as the case is, because otherwise he shall be finally concluded by the judgment, because he cannot come in upon a second sc. fa. because he had liberty upon the first. But 4. Admitting the plea frivolous in her month, yet because such a suggestion as sc. fa. 138. 2 Ed. 3, 56, as amicus Curiæ to the Court is a sufficient ground for a sc. fa. against the ter-tenant. Windham Justice on 47 Ed. 3, in a sc. fa. on a judgment or recognizance such summons to the ter-tenant is necessary, and so it may be here in a writ of error on a recovery, because it is not dilatory, being the first sc. fa. therefore he conceived the sc. fa. must be awarded, but the pleas of ter-tenant ought to be proper. And by Twisden, Any thing that may extort execution against him, but nothing against the errors; and though this plea be not proper, yet as amicus Curiæ, this will be good. As diminution alledged by the Lords mediate or immediate. Also by Windham, an averment

may well be against such a retorn of the sheriff, because he is not omniscient. And by Twisden, The writ that is directed to the heir and ter-tenants, and if it be executed only as to the ter-tenants, yet the heir may come in and plead that he is ter-tenant, &c. And here that the writ is general, as 1 Cr. 312, *Eyre* against *Danton*. And per Curiam, this is a common assurance, wherein it is the discretion of the Court that none may have prejudice by too quick dispatch; and here the plaintiff at his peril must seek out all the ter-tenants. *Post.*

15. CAVE *against* MERING.

Notice. Consideration.

The defendant promised in consideration that if the plaintiff would consent that the mortgager shall assign an indenture to the defendant, he would pay to the plaintiff, &c. And it is alledged that ad tunc & ibidem the plaintiff consented without notice, and good. 2. The consideration was that the plaintiff should consent to the assigning of a lease, which by Windham & Curiam, the plaintiff having possession of the **[56]** indenture as mortgagee of B. A. Estranger is a good consideration, because the lessee without the consent of the plaintiff cannot make assignment, and so the defendant hath a benefit and the plaintiff prejudice thereby. But by Allen for the defendant, If the lessee had never assigned, yet the plaintiff had been bound by his consent, which is of no operation of it self, because he may yet keep the indenture in his hand: but yet per Curiam, hereby is an influence to make the bargain better, and therefore it is good: judgment, nisi.

16. NUTTAL *against* PAGE. *Ante* 50, pl. 6. *June* 17.

Wild Serjeant for the plaintiff moved for judgment on Cr. *Ball & Beggarlies case*, and *Verson* against *Goodday*, that he could not be in Newgate unless it be for counterfeiting the Kings Great Seal; and this implyeth that he hath judgment to be hanged, Trin. or P. 13 Car. C. B. *Ireland* against *Booths*. It was ruled to the contrary: and so in 1 Cr. 331, cited by Norton to the contrary. Justice Twisden and the Court agreed that this is a direct affirmation, and what seal soever it be, it is felony, 1 Mar. 1 & 2, cap. 6. Judgment pro querente.

17. WALCOT *against* TAPPIN. 1 Leonard 201, pl. 280.

Simile.

In action upon the case on promise that in consideration of 20s. the defendant promised to give 20l. if Ch. Stuard should be King of England within a twelve month. Scroggs moved in arrest of judgment, because that this doth imply that he was not King at the time of the promise; as promise to a married man, that if he be married within a month, &c. this is void if he be married to a second wife, but the Court seemed for the plaintiff. *Post.*

18. STRATFORD *against* BATEMAN.

2 Inst. 340. 1 Cr. 446.

An action upon the case against the sheriff for taking insufficient bail, because that although (as 10 Co. *Beaufages case*) the sheriff be bound to take bail, yet that is meant of sufficient bail. But by Twisden, He is Judge of the sufficiency. Jones prayed, that the party being in prison, the Court would stay proceedings, which yet the Court would not do, because it is after a writ of enquiry awarded.

[57] 19. THE TOWN OF ORFORD.

Ways.

Keeling Serjeant moved for quashing of an order of sessions at Orford in Suffolk, because they cannot levy a tax for any new bridge nor for an old one of money, but

only by way of issues and distresses; also the way might have been repaired for less than the bridge newly made. And by Justice Twisden, This is no bridge within the stat. 9 H. 3, but only the reparation of the way by this amendment as a wear, which only remedies the defects of the sinking sands, which the Court agreed, and that by by-law of the majority of the inhabitants a tax of money may be levied, and that if the majority be for repair, the justices may compel particular persons to contribute money, whereupon they refer this to be finally ordered by the Justices of Assize.

20. WINDSOR *against* SAYWELL.

Prerog. Goldsb. 180, pl. 115. 9 H. 3, cap. 32. Prerog. Br. 38. Lee 17, pl. 17.

In ejectment special verdict find, Sir Arthur Gorge seized, and so being he was utlawed at the suit of the lessor of the plaintiff who had judgment before against him; whereupon after a seisure on the utlawry he extended on his judgment, no amoveas manum being sued. Also the defendant had levied fine of the lands before the seisure on the utlawry made, which was only in personal action. Jones for the defendant, The King by this utlawry is as Com. 541. 9 H. 6, 20 b. partner of the profits only, and his interest continued only so long as the interest of the party in the lands, 21 H. 7, 7, which is gone per mort ou feoffment. 9 H. 7, 21, Stanf. Prærog. 57, but the course of the Exchequer hath been contrary. Yet this is intended after seisure, but before he may defeat the Kings interest. And in *Pickerings case*, 24 Car. 1, in the Exchequer it was adjudged, that a bargain and sale made after the extendi facias awarded, and before the execution thereof, had it been inrolled, had been good, but it was inrolled after the execution, and therefore would not bind the Kings interest. But it was agreed, that if nothing be done, the Kings interest might be discharged, and the Court conceived this difference to be law. Sed adjornatur.

[58] 21. SHEFFIELD *against* MORRIS.

Error.

In action upon the case on non assumpsit pleaded, judgment is given for the plaintiff at Hereford, and the defendant assigned the general errors in the judgment, &c. and after special errors were alledged; 1. That ven fa. is of xii. at Hereford, &c. without more, which the Court ruled to be no error. But 2. It is, that the Court awards, and doth not say who in certain. 3. It is capiatur pro misericordia, for which it was reversed: but it was moved for the plaintiff, that the error being directed to the mayor only of a record quod coram vobis, it was ill, but per Curiam, this is the usual course, and not quod coram te, &c.

22. GLIMSTON *against* AUDLY.

Covenant.

In an action of covenant that he was seized in fee at the time of the bargain and sale without condition or limitation, &c. And the breach assigned by the plaintiff that he was not seized in fee, which by Wild on demurrer is not good, without shewing in whom the estate was. 2. It was said that he was not seized in fee without condition, which is not good, because that the condition or limitation is not answered. Allen for the plaintiff, that this is a direct answer, and he is not bound to shew in whom the estate was, to which the bargainer only is privy, as 9 Co. 61. Also his replication could have been only that he was seized in fee, and not absq; hoc, that any stranger was seized, which Twisden agreed, on Yelverton. And if it was a good covenant that he is seized in fee, and that he saith farther without condition or limitation. This by Windham, is superaddition, that he hath a good estate in fee, and doth not qualifie or alter the fee. And the plaintiff cannot take issue that another was not seized in fee without condition, but the condition must be shewed by him that pleads that he was seized in fee, confessing it, but that it was on

condition; for it was the folly of the covenanter to make such a covenant. And Twisden conceived, that to alledge that he was not seized in fee is a good plea, contra by Mallet, Foster absente. Adjornatur.

[59] 23. COOKE *against* MORGAN.

Departure.

In debt upon an obligation made to the plaintiff as bayl for security of the appearance of J. S. the defendant pleads non damnificatus, the plaintiff replyes non comparuit, and the defendant rejoyned that no latitat issued forth. This per Curiam is a departure, but notwithstanding the bond the party might have averred, as in *Birches case*, that there was no latitat. But by Wild, that is intended in an action brought by the sheriff himself, and not between other parties, which the Court agreed on demurrer to the rejoynder, and gave judgment nisi.

24. WEST *against* WRATHBAND.

Arbitrement.

In debt on award that the defendant shall pay money and also grant annuity to the plaintiff for his life and the life of his wife, and that the defendant do secure by lease to the plaintiff, and that thereupon the defendant upon the request of the plaintiff shall carry his goods, &c. And upon performance of all to give general releases; this by Wild in arrest of judgment is ill, because the request of the plaintiff is uncertain, and the releases by the parties are not to be made untill all is performed, which is no benefit to the defendant; for by Stroud on the same side, the payment is to be made during their two lives, and the release cannot be made before all be performed, and so the plaintiff is not obliged. Windham, Super performationem of the award shall be intended by giving of security, and not by payment so long as they live. Also the tender by the defendant to carry, is good performance in law, if the plaintiff do refuse it: but Twisden doubted, because that the breach may be assigned in the non payment or for default of the security; and also because it is not shewed what interest the defendant had in the lease, and because that the defendant may tendre when the plaintiff hath no occasion or convenience. But by Wild, The release is to be of all matters untill the date of the release, which he conceived would be a discharge of the annuity, and therefore that it could not be executed, but that the annuity must be determined; and this was the intent of the arbitrators, which, by Windham, is nothing to the purpose, for this release will not discharge the annuity. Adjornatur.

[60] 25. USHER *against* BUSHLER. *June* 18. *Ante.*

Trespass, Hetly 50, of a greyhound. Kell. 203 r. per Shelley: trespass of entry into a mannor, and taking escripts, not saying sua, or out of his possession, good. 1 Ed. 3, 23 b. pl. 112, 11. Quere of trespass de bonis & catallis without saying (suis) after verdict. Quare equum cepit a persona del plaintiff, is not good, unless he say (suum) after verdict. 2 Cr. 46, pl. 16, & yet for breaking the park & taking feras suas is good, 5 Ed. 3, 62 b. pl. 102, &c.

Wild prayed judgment in trespass of goods upon *Sir Fr. Vincents case*, 1 Cr. & *Pell* against *Lemon*, trover for a spaniel, which was here on error on judgment on demurrer in C. B. given that it was good; that it was so a fortiori in trespass of goods taken out of his possession; which as in 3 H. 6, 55 b. pl. 34, in property, Br. 4, being after verdict shall be intended sua, as in the case of Swan. Twisden, Quare warrenam fregit, 1 Cr. 554, et cuniculos suos cepit, it is good. And in trover for such goods if the defendant demur, is good. So *Sir Rich. Fines case*, and *Spencers case*, Dy. 306 b. pl. 66, and 1 Cr. 18, 89. Trover and trespass in this differ not, both being of goods; which as Bulstr. 95, after verdict will be good, as well for taking away as for killing his hawk. In *The Lord Lindsey* against *Hudsons case*, quare cervum cepit, by one

Judge it was adjudged for the plaintiff, being moved in arrest of judgment, 43 Ed. 3, 44. Windham, Quare pisces suos cepit in libera piscaria, after verdict was agreed naught in 1 Cr. 544, and so here: to which opinion upon 16 Ed. 4, 7, 30, the others inclined. Adjornatur.

26. HEATH *against* PAGET. *Ante* 24, pl. 70.

View.

After demanding whether the jurors had had the view, they were sworn: the title was made to two offices of custos brevium & recordorum, and clerk of the writs and Treasury except the writs of Nisi Prius. And in evidence to the assize it was observed, 1. That it needs not be proved that the Chief Justice hath power to grant these offices, but the Court will take notice of it. 2. Whether, as 1 Cr. 198, a grant by patent, though void, be not a surrender of the office by writ. 3. An admittance of any clerk is matter of record, and without that, the Court will not take notice of the fact, Dy. 2, 3 Ph. *M. Fancies case*, 39 H. 6, though the record be lost. And 4. It is not sufficient for admittance without a special entry of it on record; for the admittance is by the Court, though the grant be by the Chief Justice: but by Keeling, A man may prove a thing recorded, though he cannot prove the record it self. 5. The entry of a record of proclamation avails not if it be not under the Great Seal: yet by Serjeant Keeling for the plaintiff, this is only the warrant of the sheriff, but the entry among the records in Chancery is the authority, which may afterwards be **[61]** exemplified. 6. A writ is necessary to an adjournment, because the last proclamation of the term is hither, which cannot be altered by word, only by the removal of the King, for the Kings pleasure cannot be declared but by writ, because by Twisden, it is not the King, but the Court that adjourns: and so are all the presidents since 4 Ed. 4, and thus hath been the law (viz. the usage of the Court) which the Court agreed: and that before Magna Charta the Kings Bench had conuzance of real as well as other causes. 7. Admittance to an office is no grant, by Windham. 8. The copy of a record ought to be brought into the Court by the officer, especially being a single parchment and not bound up among the rolls; and because the officer would not come without special command of the Court, which they would not send, thereupon the proclamation was disallowed. 9. Offices may be divided ad libitum of the Chief Justice, especially the course having been so of long continuance. 10. The admittance ought to have been in Court, and it doth not appear that any Court was held in Oxon, because no adjournment is made thither; and on full evidence verdict for the defendant.

27. DR. WITHERINGTONS CASE. *June* 19. *Ante.*

Retorn.

Finch moved to stay the retorn of the mandamus, because the name of the colledge was mistaken, being certified by the master on his oath to be so. The writ was to the master or custos and fellows, whereas their names was master fellows and scholars. Allen for the plaintiff, The name of corporation, Boldstr. 189, 190, is not necessary in the writ but only such persons that have the power of making a retorn. But the indorsement of the writ was by the name of the custos collegii infra script, which by Foster Ch. J. and Twisden, is an acknowledgment of the writ. And per Curiam, This is a great affront to the Court, being after so long delay. And by Windham, The writs are according to the powers, though if it be directed to the whole, and mistaken, that is void. Adjornatur.

28. SMITH *against* WARNER. *Ante.*

False form.

Powis moved for judgment, that false Latin after verdict is not material, as trover de eriis instead of ereis, H. 12 Car 1, *Williams* against *Taylor*. Wild for the defendant moved another exception, that it is said unum ferrum, Anglice a fire-grate, which is ill, because there is a proper word **[62]** for a fire-grate. Twisden, If there be no

Latin word one may be made with an Anglice, but not by general terms: as unum instrument, Anglice a horse-cloth, is ill, though Angl. a pedigree 11 Car. hath been ruled good; and so when the words before Angl. doth describe it particularly, as unum instrument pro tormento, Angl. a spanner for a gun, Stiles, *Barker* against *Marten*, ruled good. De instrumento magno de ligno, Angl. a skreen, ruled good. Pro tribus ornamentis pro capite, Angl. coifs, ruled good: but this case being de ferro igneo, with an Angl. it was held good; as pro instrumento ferreo, Angl. a jack. 3. Wild said, that a word for which there is a proper Latin, cannot be expressed by an Angl. but that was over-ruled by the Court, being after verdict.

29.

Slandre.

J. S. is with child with a maid, which was penal heretofore, and now confirmed by the Act of Judicial Proceedings: and at another time, J. S. is brought to bed of a child on 2 Cr. 199, this was held clearly actionable at c. law per Curiam. But in 2 Cr. 473, 5 Car. Rot. 322, *Lightfoot* versus ——— She had a bastard in Devonshire adjudged not actionable, but the words shall be taken in the common sense: and of a physitian, that he is a quack-salver, which signifieth a quick healer, yet for the common acception adjudged actionable; and judgment for the plaintiff, nisi.

30. TIPPING *against* GROVER.

Rent. 2 Cr. 554, pl. 16. 3 Cr. 636, pl. 33. 1 Leonard 333. By 31 H. 8, cap. 1, patentee of rectory may enter, quere of debt for tithes Moor 528, &c. Moor 778, pl. 1078. See Poult. Abr' tit. Rents, § 3. Rent hors de eglise is not distrainable, H. 45 Ed. 35, per Cheldren.

In debt against lessee of tythes for years (by the executors of H. lessee to H. and his heirs of a rectory, for three lives &c. 2 Cr. 112, 453, 454, rendring rent on Tr. 37 Eliz. *Buskin* versus *Edmonds*, it was said this is a good rent, and not a sum in gross, and that a demand is necessary to make void such lease, and so it is incident to the reversion, but per Curiam, it is gone by the death of tenant for anothers life; there being no occupant of tythes, unless as joynt with a rectory: and therefore by Jones for the defendant, here the executors shall not have the rent. Allen for the plaintiff in *Jewels case*, it is resolved that rent upon a lease for lives shall go to the executors, and not to the bishop or the heir, Inst. 47, and so should it do in case of a lease for years. And though it be said spectant rectoriæ, yet when the lessor hath nothing to do with the rectory, yet the heir shall not have the rent, for by letting the tythes they are severed from the rectory, and so by the death of tenant pur auter vye; only the **[63]** contract remains, but the rectory vanisheth, which the Court agreed. Jones, Such a severance for years will not amount to a full severance but only if it had been for life. Windham, It is said that the lessor was seized of the tythes, which are part of a rectory, and not only incident to it; and of them only an occupant cannot be. But a rectory is like a mannor mixt, and an occupant may well be of that: and when tenant pur auter vye makes a lease and dyeth, this determineth his interest but not the lease. But by Twisden, This is the act of God, and so may determine the lease, but not so of a surrender. And the Court agreed *Dentons case* in 2 Cr. 111, pl. 10, put by Jones, that a lease for years is good of tythes, but not for life by such a tenant; but yet that the rent should either follow the reversion, or shall be extinct, being by act of God or of law: but otherwise if the lessor had surrendred, there the rent had been absolutely gone; and after the plaintiff, executor of tenant pur auter vye discontinued the action. And by the Court, this is a good case for a reader of an inn of Chancery.

31. DE LA BAR *versus* GOLD. *Ante.* In Debt Br. 79.

Assumpsit. 1 Cr. 273.

Jones for the plaintiff taketh it as admitted, as Hob. 116, that forbearance (whether the party had cause of action or the other benefit by it or not) is good; and

it is sufficient that there be but either benefit to the promisee, or damage to the promiser. Personal considerations, as of blood, &c. are not applicable to others, but other considerations are. B. R. H. 24 Car. 1, Rot. 1010, *Disborn & Donaby.* Consideration that an estranger at his request had transferred his goods to the defendant he would pay to the plaintiff, this on error adjudged good, P. 28 Eliz. *Meggots case* in the Exchequer, in consideration that estranger had enfeoffed the defendant at the plaintiffs request, the defendant promised to enfeoff the plaintiff, and adjudged good, Stiles 296, pl. 643, in Tr. 1651, R. R. Rot. 1071, betwixt *Starkie & Milney.* In consideration the plaintiffs grandfather had given to the defendant, &c. (44 Eliz. 3 Cr. 849, pl. 3, *Rippon* versus *Norton*, Yelverton 1). And *Thomas* versus *Green*, in consideration that J. S. would surrender to the defendant, he would pay to the plaintiff, &c. and ruled good, because being a promise all at one time, all such parties will be intended to be present and consenting. Allen for the defendant relyed upon the difference where the benefit of the consideration redoundeth to a stranger and when to the party; and here, if any man should **[64]** have an action, it should be Luke Wood and not his lessor, who by Windham, was but agent for the plaintiff, but yet the lessee of Wood is not at all concerned in the lease betwixt Gold & Wood, on the part of the Plaintiff by Allen: and by him *Donabys case* was upon delivery of goods by executors to the defendant, for which he was sued by the plaintiff for them, and so he had a benefit by it, but here the defendant hath no benefit; for Wood to whom the money is due is better entituled to it than the plaintiff, who is not concerned in the matter of the promise, which is most considerable in action upon the case upon a promise. Windham, If the promise were in consideration that A. hath sold goods to B. he promiseth to C. 10l. C. hath no remedy because he is but as an attorney of A. to receive for his use; and A. only can have an action upon the case against B. for not paying the money to C. But if A. sells to B. and B. promiseth in consideration thereof to pay to C. 10l. which A. owed to C. in this case C. shall have an action because it appeareth the interest was his: these cases he cited of his own reports in time of Rolls being Ch. J. And here the defendant hath done an act on the behalf of the plaintiffs, and there is a debt due for that which he hath done for the plaintiffs, and so he may be entituled to the actions. Twisden, In *Donabyes case* it was said, that it matters not from whom the consideration moveth, but who hath the benefit thereby; which was said per Curiam, then and so he conceiveth in this case, that it is a good consideration, because Gold owed Wood 10l. for which Swinock sued Wood, and attached the money in Golds hand, upon which this promise was made. And in consideration that J. B. was bayl for J. S. at my request, I promise to save J. B. harmless, this he conceived good. Windham on *Evans* against *Jampney* 24 Car. 1, where A. sold to B. a house, in consideration whereof B. promised to pay to A. and C. in action upon the case by A. and C. adjudged that it was no good consideration to C. and so he said it was here. Allen for the defendant, It doth not appear in the declaration that Wood is to be discharged by the payment of this money, for the second lessee owed nothing to the plaintiff. Windham, In consideration that Swinock will forbear his attachment, implyes that he shall procure the attachment to be discharged and forborn: and by Windham, The consideration was only to pay such money as was in Golds hand to the plaintiff, for whom it was attached as due by a stranger to whom the defendant owed so much. Adjornatur.

[65] 32.

Visn.

In actions upon the case on escape, nor in debt, which may be all over England, the venue shall never be changed.

33. ——— *against* Sir George Freeman.

In appeal on appearance of the appellee for the death of the husband, the plaintiff, counted in French; and after the defendant demanded oyer of the writ and Court, which were by the clerk read in Latine, then arraigned the party, and after issue the prisoner was bailed, having joyned issue without exception to the writ or Court, which Foster commended, 3 Cr. 69, pl. 22.

34. *Ante* 56, pl. 17.

Assumpsit.

Judgment was given on the promise to pay si Carolus foret Rex Angliæ, &c. That this is a good consideration, though he were then King, if he so continued.

35. COLLINGWOOD *against* PACE. C. B. IN DEVIZEN BR. 76.

[S. C. 1 Vent. 413. See *Kynnaird* v. *Leslie*, 1866, L. R. 1 C. P. 396. Discussed and followed, *De Geer* v. *Stone*, 1882, 22 Ch. D. 252. See *In re Hawkins* [1892], 1 Q. B. 904.]

Alien.

Bridgman Ch. J. argued, that the issue, as L. Co. 80, 84, cannot inherit one to the other propter defectum, though upon attainder, which is only propter odium culpæ, whatever was in the ancestor may be left to the issue betwixt each other, H. 11 Car. 1, *Bradstock* versus ——— and Hob. *Dunkom* against *Wingfield's case*, will not reach this case (not that it is not necessary to name the ancestor) for without him he cannot make his pedigree by him, tho he may his title, on 32 H. 8, cap. 36, and those cases are grounded upon the statute: but at common law it would not be so, but that the heir taketh only by reason of the right that falleth upon the heir, and not only by reason of the naming his ancestor, as 3 Co. 61. Also the children by several venters by a possessio fratris shall not inherit each other though daughters be, who shall not hinder this case, because there an intirety of blood is necessary: but if there had been no daughters, the uncle must have named the father, and yet the younger brother who is his heir shall not inherit. And Coke in this case upon great advise in *Hobbies case*, held the same opinion, who in this is much to be relyed on: for the case is but that Sir. J. Ramsey seized in reversion having brother an alien, and a son English, deviseth to his brother and his heir, and this in trust to pay his debts, and he conceived that it was the intent of the devisor that he should take, but not a legal one, because the son of an alien is no heir, though in propriety of speech the eldest son be **[66]** thereby intended. And legal forms may be supplyed where the intent is apparent, as here, there could be no other heir: and in the other cases cited the word heirs carried limitations of estates, as in *Counden & Clarks case*, Hob. But here the word heir is only a designation of the person, and so the devise is only to Patrick the nephew and his heirs, and not to the heirs of his heir, for he could have none; but this it cannot be, and so it is void: as a devise to the heir of J. S. (J. S. being then alive) as in *Wildes case* a fortiori when the devisor taketh notice of this disability, and especially when there is no verdict in this case, the party having described him only according to the law, his intent shall not have any other construction: Tyrrel agreed with him, but Brown and Hide to the contrary. *Post.*

36. CHAMBERS *versus* NOSWORTHY. *Ante. June* 20.

Prohibition.

The rule for a prohibition was set aside, being obtained by the plaintiff after an appeal by him brought where there are concurrent jurisdictions.

37. THE KING *against* WARNER.

Felo de se doth not forfeit his goods as heretick or traytor Auei' Roberti Rec. Jud. lib. 1, cap. 12, p. 203.

Wild for the almoner cited *Hales case* Dy. 261. Com. 258. That felo de se is within the words (murder) in the Act of General Pardon, 12 Car. 2, 11, being ex

malitia precogitata and none can take advantage of this pardon, the person being dead, and he can have no administrators.

42 Eliz. Day. }
19 Jac. } And all the presidents of the Court are this way,
21 Jac. } sub silentio.

The inquisition was found after the Act. Twisden, No indictment ever had the word murdravit for felo de se, which is a necessary badg of murder. But the inquisition was quod voluntarie se ipsum suffocavit & murdravit. Keeling Serjeant for the defendant, The King had only an inception of a title, and no interest in the lease till found by matter of record, before which time the pardon was made, which was a release by the King. And an exception is of a thing that without that would have passed within the general words of the Act; and felo de se is not capable of a pardon, no more than he that committs murder and dyeth before the pardon, he shall lose nothing: and the issuing out of process is only grounded where **[67]** the inquisition is before the pardon, as 5 Co. *The Archbishop of Canterbury's case*, which enureth not as a pardon, but as a release to the executors of the estate. Allen to the same effect relyed on the negative clause, that the executors, &c. of any of the Kings subjects shall not suffer, &c. but only for such persons and offences which are expressed in the Act, &c. but that it shall be effectual to all others, &c. and expounded beneficially for the party, &c. by a pardon of felons, felo de se is not included, nor by granting the goods of felons, the goods of felo de se pass not. Nor ought this particularly described murder to be excepted by general words especially because the intendment of that Act was to bring the offender to justice, which cannot be here. And an hundred presidents sub silentio, are not material. Finch pro Rege com' is express, that ex vi termini this is murder, and the intentions are guided by their proper words, and the seizing of his estate is a sufficient example, and publick justice for deterring of such offenders, and that is the same that is ordained in all such cases of felo de se: and it was never doubted before that the King was not hereby intituled. Windham, By the common appellation of murder it is intended of murder of another person, and these are handled under distinct titles and names. And Parliaments have always excepted murders, becase it hath been doubted by divines whether any humane powers can pardon the offence, though the law hath been otherwise; and this was a law delivered to the patriarchs before the Mosaick law. And thus it is presumed the King would never pardon murders by express words, because hereby is aliquod periculi animarum, by contracting that blood on themselves which they should put away by vengeance against the offender, which cannot be here, but only a forfeiture; which is within the express words of the Act, and though it be a high offence, yet it must be taken in the common sense, and liberally according to the pardon. Twisden ad idem, That murder is pardoned by all supream powers on earth, and David did it, and by the law the King may, 6 Co. *Windsor's case*, and here he hath pardoned the person and offence, and is not within the exception of murder. The statute that saith, one shall not be essoined is to be intended by the common essoin, but not quia in servitio Regis: and the presidents, 4 Co. *Slades case* L. 5 Ed. 4, sub silentio without argument, are of no moment; and the words of the Act of Pardon as of all statutes shall be taken in the common sense: Mallet to the contrary, and Foster Ch. J. to the same effect, but both on the sudden they agreed the liberal exposition of the Act, **[68]** but that such crimes were to be depressed as much as may be; and this is as hainous a murder as any, and is done rather to avoid the shame and loss of their posterity. They denyed the difference betwixt the finding of the title before, and after, for that the King hath a right fallen, and so nullum tempus occurrit Regi, though he cannot grant it before office; likewise there hath been no opposition or grievance against so many former presidents. Twisden agreed with the Ch. J. that if the King be intituled, the inquisition avails nothing; and yet when the King's right is in him, by Windham, it cannot be pardoned, but must be granted though the King may pardon murder. Adjornator.

38. SPARROW *against* CHAMBERLAIN.

Entry.

The defendant having had a verdict of too little damages, would not enter his postea but enters a new action; whereupon Allen for the defendant prayed that the plaintiff might enter his postea, that that verdict may be pleaded as a bar to the new writ: and though there be error, yet the plaintiff thereupon may pray a nil capiat per billam, and so proceed de novo, and this hath been the ancient course to compel the entry of it. Wild for the plaintiff, The Court may enforce the party to bring in his postea, but not to enter his judgment, which difference Twisden agreed on ——— against *Trussell*, and *Lental* against *Andrews case*, which were accordingly: and the reason of the statute 2 H. 4, that the plaintiff should not discontinue after verdict, was grounded upon the same inconvenience; but by Wild, this was, because then no plea in abatement was left, which Windham agreed; and if the defendant hath neglected to plead this in abatement, it is his folly, and he shall not now plead it in bar.

39. DR. WITHERINGTONS CASE. *Ante.*

Misnom. Godbolt 44, pl. 52.

Finch for the colledge on *Phelps case* and *Estwicks case* in 1 Bulstr. said it ought to be directed to the right name of a corporation. Windham, Be it one or the other the writ is good. Twisden, The retorn is no such corporation, which if true, is good, if false, an action upon the case lyeth; and therefore the writ ought to be quashed because it cannot be executed, and every corporation is of record, and the writ was filed, which could not be denied upon the motion of the other side, and yet the retorn was waved afterwards. Adjornator.

[69] 40. IN CONTRACT BR. 19. ENTRED TR. 1659, ROT. 1460.

MANBY *against* SCOT.

[See S. C. 2 Sm. L. C. (11th ed.), p. 446; 1 Lev. 4; 83 E. R. 268 (with note.]

Bar. & feme. 1 Brownl. 47 r.

An action upon the case for wares sold to the wife of the defendant after departure from her husband, but desired that she might again cohabit with him, which he refused, and prohibited the plaintiff to sell or deliver any wares to the wife, as appeared by special verdict, as also that he did allow her no maintenance. Jones for the plaintiff, that the husband shall be charged, 1. Supposing her only as his wife and this only for necessaries, yet he agreed the general rule of the books to be contrary, and that the wife is but as a servant, who without assent, precedent, or subsequent cannot charge the master; but the reasons hereof are, because the property of the wives personal, and the possession of the wives real estate is in the husband; and therefore it is but reasonable that the husband should allow his wife necessaries, for which alimony by other laws is allowed. And though the wife be uncapable to contract, yet so is an infant, and yet he may take up necessaries, and shall be bound by it, and so the wife. Thus are Dy. 234 b. The case in Parliament was adjudged, that alimony was not allowable, because she might charge him at the common law for necessaries. And thus was Tr. 22 Car. 1, Rot. 1651, B. R. *Dent* againt *Scot*, wherein judgment was given only upon a slip in pleading: but 11 H. 6, 30, by Marten agreed, that as to the merits of this case an action would lye. 2. Admitting this though here the wife did depart against the husband's will, yet this will not hinder. So *Yean* against *Brown* in Guildhall by Roll given in charge, that a wife might charge the husband, because there may be many unkindnesses betwixt them which the wife cannot prove. But if she lived in adultery, then she cannot charge him, but here it is not found one way or other; and malum non præsumitur: and it is here found she was willing to come and live with her husband, and therefore it would be great inconvenience that husbands

might so take away their wives maintenance. 2. The prohibiting the person to trust, is not of purpose if he be chargeable. 2. Baldwin for the defendant waved all the parting and desire of return, because no cause of it is found, and so the Court can say nothing to it but that the husband is in general not chargeable on 34 Ed. 1, Debt F. 163, though it come to his use without an express authority, 22 H. 6, 20, by Newton, V. N. B. Debt is no warrant for this **[70]** case which came not to the use of the husband: and 11 H. 6, is an opinion obiter, but 21 H. 7, 40, by Fineux, Dy. 234, and F. N. B. 120, are full in this point; and Mich. 1650, in the Exchequer, *Foxhil* against *Scot* was so, though in this case there was nothing found that the wares were necessary, and therefore a nil capiat per billam. Also the wife, as Rot. Claus. 8 H. 3, Membr. 19, *Freckfields case*, might have an estoverio capiendo against the husband; & quia nun vult maritus uxorem suam secundum legem maritalem tractare, he was excommunicated, and a capias against him, and she had estovers until the husband should take her: and as 4 H. 3, Rot. Claus. Membr. 7, use her according to the law of marriage: and the note in the margent of that roll was a writ of seisin pro sustentatione uxoris. And 1 Co. 139, great inconveniences would follow upon this expence of the wife as an encouragement to evil, &c. And this is but a new devise to let in alimony to the common law, and the law doth presume the husband will not use his wife ill, unless she hath deserved it; and the father for this cause is not compelled to allow his son maintenance; and it is better that some disobedient wives want maintenance, than that the husbands should be thus forced to allow them. 2. This prohibition (if the wife had lived with him) is sufficient to discharge the husband, and nemo per delictum facere potest conditionem meliorem; and the operation of the law will not be stranger than the facts against an express disagreement, which as is said in 27 H. 8, 25, is to maintain a contradiction, because it can never be presumed the husbands contract against his express assent; and he could never have forbid every body, though he forbid these. 3. As this case is found, judgment cannot be given for the plaintiff, because the declaration is of 90l. and the verdict only of 43l. and especially because they find not what the particular wares were, that the Court might have judged upon them. And 2. They ought not to have found that they were necessary, but left that to the Court; as also they ought to have found what trades the plaintiffs were of, else are the juries made Judges of the law as well as fact, 20 Ed. 3, 23. 40 Ed. 3, 15 b. & 9 Co. 74. Verdicts must be certain & that necessaries are to be judged by the Court appears, P. 9 Car. 1, Cr. B. R. *Hastings* against *Duglas* in trover for a sprig of diamonds; and M. 27 Eliz. Moor, *Burley* against *Hutton* on demurrer the same point ruled, and though it be suitable to the degree of the husband, yet that is not sufficient, unless it be also suitable to his estate, and what is convenient or not is always questio juris, as also reasonable or not, 4 Co. 27, especially when the word **[71]** necessary here is no more than convenient, and not necessitas naturæ or absolute, without which she cannot subsist; and on the whole he prayed judgment for the defendant. Twisden Justice agreed, that the Court is to judge what is necessary but it must be the Court before whom the tryal is, and if any jury give verdict against directions, a new tryal will be awarded, and upon an elopement she cannot work but only to the advantage of the husband, and therefore she must be kept by the husband. Windham, Debates betwixt the husband and wife are not to be brought to the common law, but are left to the Ordinary to whom it belongeth by the ancient common law, Register 34. That placitum de matrimonio with testamentary causes appertain to his jurisdiction, though when these jurisdictions were taken away men did endeavour to have remedy at law, the Ordinary did allow by paternal care fitting maintenance to the wife, which we cannot do now: but by Foster on elopement, It is fitting and just she should lose all sustenance; and more of these debates have been within these 20 years, than in 200 before: and 7 Membr. 4 H. 3, of Katharine Pinkney was, that she should not extraordinarily grieve her husband, but she may go to the Ordinary, 1 Cr. 17 Car. *Drakes case*, & 1 Cr. 220, *Pannel* against *Cramont*, alimony is maintenance for a woman cast off by her husband, 2 Inst. 434, 435, and recoverable in the Spiritual Court. *Post.*

41. THE KING *against* THE INHABITANTS OF CHEVENY. *June* 21.

Challenge.

In evidence to an inquest it was observed, 1. The issue being a way or not a way, a juror was challenged, and being for the King, cause was shewed presently that he had said that it was a way, and if it proved otherwise it would be a prejudice to the country, which being proved, he was set aside.

42. *June* 22.

Extent.

Upon an elegit nihil is retorn, if this be recorded a new execution shall not go forth unless the filing be procured by the defendant. *Post.*

43. ROBINS *against* WARWICK. *Ante* 42, pl. 111. In Dett Br. 94.

Debt.

Wild Recorder, that the action lyeth, else shall the lessee hold his term without rent, for the lessor cannot have remedy having no reversion: this is a remedial **[72]** case, which shall be favourably construed, and differs not from the case of debt for an annuity granted for years. And so is L. 5 Ed. 4, 2. Yelverton, *Lucas* against *Fulwood*, 208, & Bulstrod 151. And as in L. Co. 46, there is no necessity that the party that brings debt should have a reversion, but the rent is reserved by reason of the profits, as Dy. 127. And an attornment is an advantage for the grantee, and an agreement that the tenant would pay his rent to him; and in this case the Court ought to judge according to good conscience; wherefore he prayed judgment pro querente. And Serjeant Sais being for the defendant and absent, the Court would not delay their opinion: but Windham was of opinion the action lyeth, and that on 5 H. 7, 18. The privity of contract is incident to the rent and passeth with it, where the law fixeth the duty it fixeth the remedy and privity, and this is made by the attornment, which is necessary to every grant; and it is not barely, and in its foundation a chose in action as an obligation, but is as a shadow to the body, and accessory to the principal, and passeth as a remedy in the annuity. And the opinion in Dy. 140, pl. 38 is but obiter, and hath been over-ruled; and this is not a remedy de novo, as in L. 5 Ed. 4, 42 b. is said, but a supporting of an ancient remedy, as *Lilingstons case* is, and as in 45 Ed. 38. When an estate or interest is determined then an action of debt is proper, because it depends on the thing granted, and not on the inheritance. Twisden ad idem, Debt will lye for a rent charge granted for years, because the agreement of paying the rent is as a contract betwixt them, being but for years; as L. Co. 47, and as in 1 Cr. 111. If it were a rent out of a fair, as 20 Ed. 4, 12, which is not good for life, because no rent can issue out of it, and yet by this quasi contract it is good for years, 3 Cr. 895, pl. 13, in 44 Eliz. *Benlos* against *Williams*, and the reason of this difference is (*Ognels case*) because that freehold is in being in one case and not in the other. In Leonards Rep. 441, which he commends, it is said, that the ter-tenant shall be charged by the contract of the grantor and grantee which is evident, because, as 32 Ass. 10, it was always subject to debt, and there is no other remedy left, and it is no prejudice to the lessee, as 9 H. 7, 16. 19 H. 6, 42. 7 Co. 39. And he affirmed that the privity of estate and of contract remain by reason of the attornment, as in a quid j. clamat upon a fine, 4 Co. 49, which amounts to a real contract in case of a lease for life, and personal in lease for years, as 3 Cr. 637, *Ard* against *Watkins*. Mallet to the contrary in omnibus. Foster Ch. J. agreed, that an action will lye for the rent against the **[73]** grantor, not against the lessee, who may be discharged of his rent by the voluntary grant of the lessor (neither who) nor the grantee have thereby any prejudice. No man shall be charged for rent but upon a contract, which is not here either real or personal, which are inseparable, the one to the person, the

other to the estate. 3 Ed. 6, Rot. 140, ——— against *Bosworth;* and 1 Leonard 441. This is left a quere, because there is no privity, for the lessee is but as a conduit-pipe to convey the rent to the grantee, unless he give any thing in the name of seisin that may charge himself with a privity of contract. The rent is reserved payable at a place certain, to which the grantee by general words shall not come to demand the rent, nor is there any fealty incident to the rent in the hands of the grantee as there was in the hand of the grantor. Dy. 206, pl. 9. *Post.*

44. GOODIER *against* CLERKE. Trin. 12 Car. 2, Rot. 1043.

Lease.

In ejectment special verdict find, that bar. & fem, seized in right of the fem having issue W. C. for provision for children made a lease to J. S. to commence on the death of W. C. and his wife without issue male; and after made another lease and delivered it first: then W. C. and his wife died having a son and a daughter, by whom the plaintiff claimed. Whereupon Serjeant Neud. for the plaintiff on 1 Co. 62. conceived this lease to commence on death without issue is good, not only in respect of the lessors, but of the lessee also, and in both C. B. and here these two points were thus agreed, because it may be reduced to a certainty, and is to fall upon a common possibility as well as if it had been upon a life. Also because by construction according to pleading when such a tenant in tayl, as 38 Ed. 3. 26 Dy. 14, 16, 349. 8 Co. 88, being tail to him and his issue male dyeth leaving a son which after dyeth without issue, now he is dead without issue, so 27 H. 8, 13. 6 Co. *Treports case*, and damages F. 121. Dr. St. 80 F. N. B. 212, in a legal sense: and the words of conveyances have a more liberal construction according to the intent, as 21 H. 6, 10. 3 H. 7, 4. L. Co. 112. Leonard fo. 285. 30 Ass. 20. L. Co. 22. 5 Co. 29, which is plain in this case: here the lease was made before the conveyance, and indorsed on it, which maketh it altogether but as one conveyance, which being for provision for daughters portions; as also that the executors of W. C. should receive the profits for 100 years in trust for other purposes: and here is a daughter unprovided for, she is in nature of a purchaser upon a valuable conside-[74]-ration, and so being precedent to the conveyance of the reversion, which was but voluntary, 2 Cr. 80, shall defeat it. And whereas it is objected, 1. That this would countenance a perpetuity. And 2. Not to be defeated by a common recovery. And 3. Would introduce great inconvenience by the late contingent, which could not be intended for provision for the daughters; and being upon a collateral limitation, shall be taken strictly. To answer which on 1 Co. 85. 6 Co. 40. L. Co. 84, he conceived this a present interest grantable, forfeitable, &c. and may be cut off by a common recovery, though neither by the father nor the son, which would have been a contradiction of the intent of the making; in all marriage agreements there are intermediate estates to preserve remainders to the eldest son. And *Hains* against *Villers* B. R. 2 Cr. 90 is, that it may be cut off by a recovery, 8 Co. 96. 10 Co. *Lampets case*, and no purchaser can be deceived by the lease because it is indorsed on the conveyance of the inheritance, Benloes Rep. the second case. And though there had been no daughters it were nothing to purpose to hinder the other uses, the heir having other provision, 5 Car. 1, *Keble* against ———, C. B. Rot. 3770. 5 Co. 35. The lessee shall have advantage of which of the accidents first happen, Hutt. 119, as well as if it had been expresly mentioned. And upon the same reason, Noy 132, that if lands had been given J. S. so long as B. hath issue male, notwithstanding infant born after the death of tenant in tayl, the tayl is gone, and the remainder shall be revived. So here, & *Meller* versus *Robinson* in Mich. 4 Jac. B. R. 2 Cr. 395. Dy. 14, the authorities to the contrary, P. 55, B. R. *Southam* versus *Clerke*, was considered in the C. B. and in Trinity term after, that case adjudged contrary. And in C. B. H. 58, *Mustion* against *Clerke* in a second action there adjudged accordingly. Twisd. cited a case of a devise to J. S. on the death of J. N. without issue, and J. N. dyeth, and after his issue dyeth, that the devisee shall take nothing, and so he said was *Pell and Browns case*, *post.* 78, *pl.* 51.

45. WINDSOR *against* SEYWELL. *Ante* 57, pl. 20.

Alienation.

Yarnton for the defendant conceived that the King had good title not to be defeated but by an amoveas manum. But by Twisden Justice, upon conference with Hale Chief Baron; and on 9 H. 6, 20, he said, that it is the constant course to alien before any seisin made, and so it is good, for the utlawry is but a contempt: but yet by Glin for the defendant, It is first in time and the course of the Exchequer in many points contrary to our books, as in *Pickerings case*, and **[75]** in the Exchequer they would not allow this elegit, because though a fine conveyeth away the interest, yet it shall not defeat the King of his profits, which begins by the award of the writ of seisin, and otherwise men may by dormant utlawries avoid all judgments. And by Wild for the defendant, When lands are seized, be it by a writ awarded before the fine or after, the Kings hands shall not be removed without writ, according to the custom of the Court of Exchequer. But by Allen for the plaintiff, When there is a seisin virtute officii upon an utlawry, as 9 H. 6, 20. 21 H. 7, 7, Stanf. Prerog. 57. This is discharged by alienation a fortiori a seizin by a capias in manus, where there is no question to be made, but it will pass, because it is but a bare pernancy of the profits; and by him the two Judges in *Pickerings case*, were divided, but upon mispleading agreed to give judgment for the King. Glyn admitted the fine will pass the interest in the land, but not the pernancy of the profits, which yet he agreed by the death of the party are gone. Adjornatur, to consult the custom of the Exchequer. 76, pl. 49.

46. DR. GODDARDS CASE IN ASSIZE BR. 76.

Mandamus.

On a mandamus to be restored to a fellowship in the Colledge of Physitians, the colledge returned that G. as the writ supposes, is not removed, and therefore they cannot restore, against which Glyn excepted, that the retorn in the main is ill, 1. Because they have not answered the writ which supposes Dr. G. one of the society, and turned out, which they agreed, but do not speak any thing of the priviledges and advantages which the letters patents of H. 8 giveth them. 2. They say that 30 persons (by by-law) whereof the president was to be one, were chosen by the name of fellows to assist in comitiis; this is a good by-law, as 4 Co. 78, to give an interest and priviledge to the party chosen, although the corporation commence within time of memory: and they have shewed no cause but his absence, without being called and summoned to answer, which is no sufficient retorn; and he may be unus sociorum, and yet not enjoy all the priviledges of it. 3. It was alledged that the by-law was made ea intentione, that the persons should be present, but do not alledge any positive rule laid upon them. 4. It is said that he was absent but do not say for what cause. 5. They do not say the president had designed any meeting or given notice of it, without which the person cannot divine when it will be. 6. They say they have put in aliam idoneam personam, without naming **[76]** him. 7. The writ is directed to the president, who returns ego, which ought not to be, this being to him in his politick capacity. 8. This is a pleading, and therefore the word president is not good without the Christian name. 9. They have alledged no issuable plea. Adjornatur. Justice Twisden absente.

47.

159, pl. 181.

Tryal.

Foster on motion put off a tryal, because the defendant was at sea, and had material witness upon agreement, to cross examin the defendants witnesses; but Windham after in his absence denied to do so without judgment given for security, although the attorney had no warrant so to do, because it was the defendants folly to move to put off a tryal, and not to be ready to give security.

48. LENIT *against* BUXTON.

Prohibition.

Scrogs shewed cause why prohibition should not issue to the Mayor and Aldermen of London, because execution was done for debt upon the plaintiff before any warrant of attorney was given to confess the judgment to the defendant; for which cause a bill was by the plaintiff exhibited to discover the practice, whereupon the prohibition was stayed until the practice be examined. But by Allen for the defendant, Practice is not material if the Court have no conusance of the cause.

49. WINDSOR *against* SAYWELL. *Ante* 74, pl. 45.

Utlawry.

Foster Chief Justice having been in the dutchy with the Barons of the Exchequer reported, that it was all their opinions, that before seisure the title of the King may be discharged by alienation of the party, whereupon judgment pro querente nisi.

50. STEPHENS *against* BRETHEREDG.

Discontinuance. Br. 38. Leonard 258, pl. 345.

In ejectment Coke for the plaintiff put the case on the special verdict that Sir Fr. Worsely tenant for life the remainder to his wife for life, the remainder to the heirs males of their two bodies, the remainder to Sir Francis his son by another wife and his heirs males, the remainder to his right heir; Sir Francis the father levied a fine **[77]** with warranty with his wife, which by him doth not work any discontinuance, and consequently no bar to the plaintiff, because the wife hath no remedy on 32 H. 8, or on 4 H. 7, cap. 24, being party to the fine; but she nor he was but tenants for life at the time of the fine, and the estate tail not executed, and so could not be discontinued, as 1 Co. 104. 1 Instit. 22 b. where the ancestor takes an estate of freehold, and the heirs an estate by the same conveyance: so 40 Ed. 3, 9. And the remainder to him there is executed, but not so where a measn estate is limited to another by the same conveyance, as 27 Ed. 3, 87. 1 Inst. 281. And he relyed for this difference upon Lit. sect. 578, the consequence whereof will be, that by the fine of the baron & fem they granted only their estates for life and in tail, but doth not disturb the remainder, because the law will never make a tortious construct. where a good one may be found, 1 Co. 76. And here they granted only what was in them to grant, the estate tail first, and then for life to prevent a forfeiture, 10 Co. 95, *Chenois case*, and for Dy. 339, pl. 44, there was only estates for life present, with an estate tail to one after an intervenient estate, but here the estate tail is immediately subsequent to the estates for life. 2. The collateral warranty doth no ways affect the lessor of the plaintiff, because the remainder was not displaced at the time of the warranty. So 1 Co. 76. *Bredons case*, L. Co. 398. Noy, 66. Kell. 79 a. L. Co. 388 b. Also the estate to which the warranty was annexed is determined, Lit. sect. 741, and ought at least to have been avoided by plea, because it doth only bind the right, not extinguish it, L. Co. 372 a. nor give it, L. Co. 385. Arthur Treavor for the defendant conceived the entry of Sir Fr. the son to be taken away because the warranty is descended upon him, for which reason no discontinuance can come in question; but whether or no by the joyning of bar. & fem upon 11 H. 7, c. 20, that the entry of the heir be taken away; this by him extends only to the heir of the first husband, as 1 Inst. 365, and upon that this question is raised, which in 1 Leonard 161, pl. 347, in *Estwick & Ridges case* is resolved to be out of the statute expresly: and P. 16 Jac. B. R. 2 Cr. 475, because till the death of the husband the statute operates not, 7 Car. 1 Cr. 244. *Copland* against *Piat* B. R. 15 Car. at the Assizes resolved accordingly. Twisden, The wife here hath but an estate for life; but by Windham, & Curiam, a gift to the heirs of the husband upon the body of the fem is tail in the fem: but here it is express to the husband for life and the wife for life, and the remainder during their lives not **[78]** executed. Twisden, If it had been to his heirs, agreed it, but

doubted when the words are to the heirs of both. be law, being over-ruled in *Browns case*, 3 Co. 50. Windham denyes 1 Inst. 365 b. to Adjornatur.

51. GOODIER *against* CLERKE. *Ante* 73, pl. 44.

Lease.

Wild for the defendant put the case, that on marriage to be had betwixt W. and M. it was agreed, that on their death without issue male the land shall be charged with 2000l. for portions of daughters, in pursuance whereof a lease is made to commence after the death of M. without issue male in trust accordingly, and after he levied a fine to W. and M. in tail, who died having issue, which after died without issue: and he agreed this lease good, as in *Capels case*, but subject to be dockt by the tenant in tail, nor is this lease prejudiced by the fine: but when this lease shall commence is the main doubt, whether upon the death, or on the failure of the issue. And he conceived it shall commence immediately upon the death of W. and M. his wife; otherwise that which is made on 1 Co. 156, one contingent will be upon another, which depends upon the other; and hereof the inconvenience would be great, because the law will not admit of such dancing estates that by fractions shall rise and fall, *Corbets case* 86. The law fixeth on the most near contingent. 2. This is the grant of plain men, as Hob. 304, and shall be taken in the vulgar and common sense, and not in any accurate construction, 1 Cr. 102. Leonard 167, pl. 233. Dy. 361, *Cradocks case*. The first day of the term for legal acts is the essoin day, but for common parlance the 23 Jan. Yelverton 149, *Pool & Needham*, 6 Co. *Bishop de Baths case*. The 3d reason wherefore he conceived the lease determined then is, that otherwise perpetuities would be favoured, which here can never be cut off by any recovery by tenant in tail, and it may as well be for 1000 year. And 4. This is the very intendment of the parties, as upon every marriage agreement, to provide for daughters, and not to enrich the executors. Twisden, The main point is only how the party meant this dying without issue, which the Court agreed. Windham, If it had been limited, that if H. had died without issue J. S. shall have for 100 years, if having issue, only for 50. This sheweth the critical time of having issue or not must be his death. Foster Ch. J. demanded what difference betwixt from the dying without issue, and if he dye without issue. Twisden cited the case of a devise, that J. S. his executors shall sell if he **[79]** died without issue male if he died, and after his issue dyeth, yet the executors may sell having but a bare authority, and this he said was the nearest that he knew. Adjornatur.

52.

Mandamus.

Wilmot excepted against a retorn of a mandamus directed to the sheriff, because it was said that he hath only the custody of the records. 2. He sheweth that he is debito modo electus, steward to the Sheriff of Notingham, and doth not shew how. 3. The retorn mentioneth no title under the new sheriff but under the old, by whose authority he cannot keep the records: but this being matter of fact, must be admitted, per Curiam, to be true, and therefore the retorn awarded good.

53. PRITTIMAN *against* DOVE. *June* 26.

Contempt.

A man shall not be in contempt by non-performance of any rule of Court without an actual service of it upon the party, or left at his house.

54.

Tryal.

Nota. That in a transitory action when the defendant would change the venue (which is but in favour of him granted) he shall not be preferred when the tryal stands

in doubt, the plaintiff being not able to bring his witnesses to one place, nor the defendant his to the other, but the plaintiff shall have his election to trye it where he will.

55. DR. WITHERINGTONS CASE. *Ante.*

Retorn.

The retorn being come in, Richardson prayed that it might be filed, which Twisden Justice said is not of necessity; but yet as retorns of certioraries it may be filed without reading, but a habeas corpus ought to be first read, but of favour they may read any retorns.

56. HOBS *against* BELCHER.

Error.

Error of a judgment given in South-Moulton in action on the case for misusing a horse which was lent to ride 20 miles, by turning him out when he was hot: and by Baldwin all this was out of the jurisdiction of that Court, being upon an issue of not guilty. 2. The judgment is, it is considered by the mayor and burgesses, and not per Curiam.

[80] 57. MANBY *against* SCOT. In Contract Br. 19.

Bar. & fem.

Justice Windham waved all the exceptions taken to the verdict as not good; and for the main point he conceived, that this express prohibition will weigh much, but as to that exception that the jury have found, that they were necessaries, and suitable to her degree; which on L. Co. 56, reasonable time (59) shall be judged by the Court. And in *Hastings case* it was found specially, that she was a lords daughter, but yet it being in a verdict, it is good enough; though in special pleading it ought to be ascertained that issue may be taken thereon: as upon tendre of amends the certainty must appear by averment, upon which as the common course Bar. F. the jury may find it reasonable or not, and it lyeth in their cognizance so to do by direction of the Court before whom the issue is tryed, and they may find it generally or specially at their election as in all other cases. For the main point that 11 H. 6, 30, by Martin is but obiter, and though some general recoveries have been, yet none upon a special verdict: but it is an unshaken maxim, that the fem, Cod. 5, tit. 16, l. 9, without command precedent, or assent subsequent cannot charge the husband for necessaries, though she hath been compared to an infant: and it hath been said that these things came to the use of the husband. An infant is capable of doing any act for his advantage, and so is no ways like a fem covert. A lease by him without rent is not void as it were if made by her. She hath no will nor capacity, but is as a dead person without her husband. Her bond for necessities is a nullity, and non est factum may be pleaded; her will is subject to her husbands, and is his, and she is as a servant to his master, a monk to an abby, &c. She is a person disabled to any act of benefit to her self or husband, as 2 Cr. 617, *Tracy* versus *Dutton*, nor needs there any notice hereof. 2. It is no inconvenience that she hath no remedy at law for a livelihood, because she hath a better remedy before the Ordinary, to whom the law hath given a paternal care in such matrimonial and testamentary causes, and he may allow her maintenance as anciently as any law in being what ever. And this hath been always practised by them accordingly, being established in them by the Kings authority, 1 Cr. 16. 1 Cr. 220, and though they do severe acts, yet the Court will award no prohibition, because every Court is presumed to do right according to their laws and customs, as 2 Cr. 364. And alimony is with them in the proper jurisdiction in the Spiritual Court, Register 34, **[81]** 38. 21 H. 3, Prohibition F. 31. Attachment on Prohib. 8. Upon a divorce propter sævitiam, which is only a mensa & thoro, the Ordinary may restore the goods which the wife brought with her to her husband, because these chattels are incident to the main cause of matrimony, and he had cognizance of them by excommunication only; but yet upon a significavit the King will imprison him till he hath performed

the sentence, and upon a caution put in he may be discharged. And that president in 8 H. 3, that the sheriff seized the lands of J. S. is eo quod idem J. S. excommunicatus est usq; he takes his wife & lege maritali illam tractaverit: so 4 H. 3, 8. 18 H. 3, 10. And the temporal power came in aid of the spiritual, and the common law doth allow this proceeding, being in aid of it, and all make but one compleat law: and this is the most prudent way that a reconciliation may be first had, if possible. 3. Though the wife do convert goods to the use of her husband, he shall not be charged without his assent, else might she build houses with her husbands money; and Det. F. 163. 21 H. 7, 40. Bread bought for the houshold will not bind the husband by special verdict so found without his assent, which yet is easily intended by that general authority that he giveth: as the baily of a lord, or the purveyor commoin, and the abbe, but this general authority is a good evidence only of the assent; and all the books run upon this express difference, 21 H. 6, 22. 13 R. 2, Annuity F. 50, 2. F. N. B. 120. 27 H. 8, 24, 25. And there is no case but men may find some opinion for and against it in the books, arguendo Hob. 234, & Dy. 234. The very gift of the case was upon the assent of the husband, not whether he shall be charged, because the things were necessary; and that which staggered his opinion was the frequent finding of it in Guild-hall and here, upon which recoveries have been had: yet upon consideration he found them consonant to the rules of law, being by direction of the Court. And although she were enabled to take up necessaries, yet not against the express prohibition of the husband, else would she be judge of her own convenience and necessaries after the fact done, which is a mischief like seizing mens estates before conviction: it were more necessary and convenient to complain first, that it may be known in whom the fault is; and so he conceived the action doth not lye. 2. Twisden to the contrary, but agreed the verdict well found in both points, her going away being not material, nor will the husbands prohibition be valid, because hereby were there but one tradesman in a town, he might by this means defeat her of maintenance: he agreed the difference put of spe-[82]-cial and general verdicts, as upon a reasonable fine of a copyholder, &c. by the direction of the Court. The reasons why the husband is chargeable are, 1. Because it is a thing of necessity, and that she must live is the law of nature, and the only medium is food and rayment; and because she hath no remedy her self, the consequence must be that her husband is chargeable; as I may throw another mans goods over-board when a boat is over-charged, 9 H. 7. A lease by infant without rent is void, and a lease by husband and wife by acceptance will bind her after her husbands death. So *Clare* against *De la Val* H. 2 Car. 1, Rot. 521. And the goods of a monk taken up in vacation of the abbe shall bind the successor, 13 H. 7, 3. And so 11 Co. 61. New offices granted for necessary subsistence will bind the successor of a bishop. 2. The law taketh all away from the wife, which is a kind of consideration for her thus to charge him. Trover may lye against husband and wife, which sheweth she may convert to his use, 9 Co. 73. And the wife, as *Coxe* against *May*, 11 Car. 1, may charge her husband for any wrong; they shall both be taken for her trespass a fortiori, for that without which she cannot live. 3. It is no more than the husband must have done himself; it is agreed the husband must maintain his wife. And 1 Cr. 16 is no determinate opinion: for alimony probably never was within ecclesiastick jurisdiction, because it is not mentioned, 24 H. 8, 12, in 9 Co. 9, in any old books, nor in that statute that takes away appeals from Rome. He agreed that matrimonial causes are of spiritual cognizance as the right of matrimony, as unq; accuple, or divorces, 4 Co. *Bumtings case*, 7 Co. 44, and bastardy general, but not of the consequents, 48 Ed. 3, 18. 50 Ed. 3, 19. And appurtenances of matrimony, as the age of consent shall be tryed by the common law. And Debt F. 8, she must live and be maintained as well when she is single, as when married, and so that cannot be a necessary dependant upon that jurisdiction that marriage is. Also the Spiritual Court cannot sequester the estate but only issue forth process, the result whereof must come again to the common law, and therefore inutilis labor. The presidents prove that the common law had care of it; but being of ancient time and not used, it is of little force, and the assistance of the secular power was only to imprison the person: as 4 H. 3. They could do no good to bind the land; and the other writ was an habere facias sesinam after the death of the husband upon a gift in fr. marriage, as 37 H. 6, 14, and though they have juris-

diction, they may allow alimony: but 2 Inst. 492, not of necessity upon a divorce **[83]** propter sævitian (they need not) give alimony at first dash; if the husband should absent himself, she will be without remedy. Also that men may sue in the Spiritual Court (ergo they cannot sue at common law) is a fallible argument, for some causes are indifferent to both; and that Court, as M. 2 Car. 1, which first is possessed shall take the conusance of the cause: as annuity by prescription out of a vicaridge and incontinency is not directly examinable here, but yet ex latere it may, as upon defamatory words, 21 Car. 1, *Globeries case*, the wife may bind the husband to the peace, and here it is not at all examined as this case is in 1 Leonard *Stone* against *Withipoll*. If it had not been necessary for her maintenance or degree at least it would not have lain: but as the same wind may lead to contrary ports, so the same arguments may be used several ways; yet this is the most convenient and prudent way, because whatever she doth will come under a stricter scrutiny: nor doth she begin with execution first, or is her own judge, but the Court by whose direction the jury find their verdict; nor is there one book contrary to this opinion, Det. 163, and all being of things not necessary, V. N. B. 62, is by a general contract only, which without an assent or command will not bind, as 21 H. 7, 40. And of *Poyns case*, nothing is to be made without a gloss, which may be to any sense: the authorities upon which he grounds his opinion are, that Rolls told him there was no law to compel alimony in England, and so said Glyn & Neudigate Serjeants, and Hutt. 105, 107. 1 Cr. 34, 139. Promise of payment by husband upon request makes the request the cause of the action, and therefore an action upon the case would lye, which could not be unless there be a duty; and likewise this action is brought in (1658) when no alimony was allowable, which must be taken notice of, though it be an usurped power as to the suppression of right, which is by force; but acts of jurisdiction set up by an usurped power shall not be taken notice of, as the giving cognizance of alimony to the Chancery, which being taken away, she may resort to common law, wherefore he conceived that judgment shall be for the plaintiff. 3. Mallet ad idem, 38 Ed. 3. 1 Brief 644. 1 Cr. 358. 4. Foster Ch. J. clearly agreed with Windham to the contrary, that the action lyeth not, because it properly appertains to the Spiritual Courts who have cognizance of the principal cause. As a solemn vow made to God, which is the ground of their jurisdiction, the fem cannot consent without her husband, but hath subjected her will (by her first transgression) to the will of her husband; she hath no other will, and she is bound to know this, **[84]** and is so much the more blameable if she do contrary. And Hob. 107 was grounded only upon the promise of the husband, because the fem could not contract, as is expressed: and in *Sir Marmuduke Langdales case*, the cause of alimony was 12 Co. 50, taken from the High Commissioners, and left to the Ordinary, because it is his of right, that judgment giving no new jurisdiction. Also a rationabile estoverium will lye at law, though it hath not been used of latter times; and these causes are accessory, which follow their principals, and there is no want of presidents of alimony during that time and before in Chancery, and the inconvenience hereof will be much greater than can be of the contrary, and so he conceived the action lyeth not. *Post.*

58. *Ante. June* 27.

Tryal.

By the Court the rule as given by Wyndham was confirmed, and by a new tryal the defendant will have a judgment for his security, but no execution till the Court be moved.

59. DR. GODDARDS CASE. *Ante.*

Retorn.

Wild for the colledge agreed to the exceptions as invalid as this case is, but one, viz. by the Act of Parliament 34 H. 8, there is none but presidents elect and censors, but all the commonalty are socii, and so is Doctor Goddard as much as any man, and they only desire to be restored to the place and priviledges according to the Act and

letters patents. The writ is general, and doth not particularize any priviledge, and therefore the colledge not bound to answer otherways; and the thirty chosen by by-law are only called socii by that, not by the Act of Parliament. And by Allen, This is but a profit of being a fellow, to which he cannot be restored alone without the principal. Charleton Serjeant for the doctor, The writ distinctly requireth restitution ad locum statum & previlegia unius sociorum, which is a particular office, and however made is not material; but it being distinct from the commonalty, and the place being distinct, he cannot be expelled without being called to answer; and so he enforced all the former exceptions that the counsell on the other side agreed, but as not material here. Glyn the Kings Serjeant, The retorn ought to have answered the previledges and incidents to the place expresly; and by the retorn it doth appear that there is a priviledge to which the **[85]** doctor was elected and chosen, and in which he had a right and freehold pro tempore. Finch for the colledge, This doth not concern any freehold, but a priviledge occasionally made for convenience by by-law, for which no writ of restitution will lye, because it concerns no matter of government or legal interest. Justice Wyndham conceived the retorn good, because it doth not mention that the eight mentioned by statute are only choseable out of the thirty made by by-law, but that the thirty were only chosen for convenience and consultation, of which the Court cannot take such notice as to restore him, because it appeareth to be but a burden to him, as the case in H. 7. And as their election was voluntary, so might their ejection. Justice Twisden ad idem, Restitution lyeth not for the dividend of a fellow or for priviledges, only if he be not amoved from his place, as he that is removed from his being of a corporation by by-law, is removed from part of his place it self, and in all agreed with Windham and Foster Ch. J. to the same intent, because no reward or fee for such attendance and consultation is due; nor are the eight necessarily to be chosen out of the thirty, but that they may augment or decrease the number as they please; and so by all he was denied restitution and the retorn ruled good.

60. TOMES CASE. *Ante.*

Indictment.

He was indicted for words spoken in his sermon, that though the great ones grin and shew their teeth, yet the faithful were more numerous: and he exhorted them to stand fast, for God would send his angel to fight for them. And the Court conceived the indictment sufficient; and Windham wished them more frequent, because though they do not talk treason expresly, yet tantamount.

61. ALEWAY *against* ROBERTS. M. 1658, Rot. 894. Dam. 852.

Scire facias. Damages shall not be assessed by the same inquest on judgment given by defaults. 3 Ed. 3, 23 b. pl. 13. Dower F. 73. 3 Cr. 557. 14 H. 7, 25, pl. 5.

Stroud for the plaintiff, that the heir of the ter-tenant that died after judgment, and before the writ of inquiry of damages, and the other tenants, &c. against whom dower is demanded, shall answer damages. The fem brings scire facias against the heir (the tenant in the first action bringing a writ of error, whereby he suspended the judgement, which was afterwards affirmed, and then he dying, the plaintiff after writ of dower brings scire facias against the heir). She had actual possession of the land, but yet the damages are not gone, because it is an original and perfected before the writ of enquiry is awarded, because it issueth only **[86]** upon allegation of a dying seized. And 10 R. 1, Rot. 28, among the records of the Roundhouse, *Mandevils case*, dower de virgata terræ, of which her husband endowed her, she had judgment for her dower but not for damages: and at this day the original writ 11 Co. 40 b. is determined, in Trin. 51, *Spitler* against *Farmer* Stiles 290, pl. 634, where Roll then Judge, cited a case, that judgment of damages was reversed, and the judgment of the dower held good because they are distinct judgments: and the sheriff needs not retorn his writ of seisin because the original is determined. And damages are only given by the statute of Merton cap. 1, and were not at the common law. Lit. sect. 39. In a

writ of right of dower no damages is at this day. And Trin. 50. B. R. *Zanchy* versus ——— and this case is within the statute, and that this scire facias is well brought against the heir and ter-tenants, because dower is one of the three favourites of the law ranked with life and liberty: and the delay of the execution is the parties own though in course of law; yet when the judgment is affirmed, the Court will suppose that error was brought for delay, 50 Ed. 3, 3 a. And if she should have it upon the act of God, that had determined her own estate a fortiori, when she hath her estate continuing: and Dower F. 185. Unless such an action had been well brought an interpleader would not have been allowed, 17 Ed. 3, 67 b. 10 Ed. 3, 41. L. Co. 33. The surmise of dying seized, 14 H. 8, 25, may be either before or after judgment, being only ex officio to inform the Court, and so were the presidents upon search in the Com. Bank, the seisin was awarded here upon the affirming the judgment, and then a writ to the ter-tenant to know why they should not have a writ of enquiry, after which the tenant dyeth in this case. Powis for the defendant, The ancestor tenant of the land in tail made a feoffment before his death, and after the writ of enquiry awarded he died, by which the damages being not ascertained and only chargeable upon his person, are gone, 9 H. 3, 7. 20 H. 3, cap. of Merton, was made only to help the defects in the quarentine; the words whereof extend only to the deforciatores ipsi, not to any feoffees: and because the act of God hath determined that writ and the damages, of which it was the plaintiffs own folly she had not execution of before, and they are only given to the woman in recompence of the trespass done to her in detaining her dower, which is distinct from the real action. And though actio personalis quæ oritur ex contractu dyeth not, yet quæ oritur ex delicto moritur cum persona, as all trespasses, &c. Dy. 271, 14 a. 12 H. 7, 22 b. **[87]** and the realty shall not support it as annexed to it, because in all mixt actions where the real part is determined, as 15 H. 2, 4 a. it shall not support the personalty, but every man in mixt actions, 37 H. 6, 35 b. shall render damages only for his own wrong by the Statute of Glocester, as in the 2 Inst. 284, and the feoffees shall not be charged in damages. Had the damages been ascertained in the time of the heir, that had been as a judgment in debt to bind the land, as Yelverton 112, *Bromly* against *Littleton;* and then should a writ of enquiry issue forth, yet the feoffee shall not be chargeable here, because he cometh in after the dower assigned, and had he come in before the dower assigned, as L. Co. 33, and pleaded any false plea, he shall be charged for the whole, because it doth not appear but that he is the deforceor. Also if he doth not in a writ brought against him plead specially, and shew that he hath been always ready, 14 H. 8, 25. Dr. St. 84 a. Issue F. 133. Dower F. 59, he shall be likewise chargeable, but in no case when he cometh in after judgment, because he hath done no wrong. 11 H. 4, fol. ult. cited in *Ognels case*, he hath no way to defend himself, and so nemo punietur pro alieno delicto, 26 Ass. 4. Damages F. 68, 102, and the damages do not charge the land, Libr. Entr. 226, 227, and so the land shall not be extended for them. The Court conceived the only material point to be the non-ascertaining of the damages, without which the last judgment alone is not such a clogge upon the land; but this resteth upon the first judgment that the land shall be charged, because that is a final judgment, and is general, including both land and damages, which is only suspended till the ascertaining of them which are for the seisin of the husband. But by Allen for the defendant, non liquet till the writ of enquiry retorned, whether she shall have damages or no. Adjornatur.

62. MAMBY *against* SCOT. *Ante.* In Contract Br. 19.

Adjournment.

Windham said, that he had the opinions of all the Judges and serjeants of his house of Serjeants Inn in Chancery Lane with him, yet it was adjourned into the Exchequer Chamber, on motion of Allen, they being divided in opinion before. *Post.*

[88] 63. BAROUGH & BUTTON *against* CATLIN.

Admiralty.

A prohib. was prayed to the Admiralty in suit there, on a stipulation for security made by rule of the Admiralty in a cause whereof they have cognizance, but denyed because this is not questionable here as a parol agreement, though it be collateral & extrajudicial as to the main cause, because the order is grounded upon that agreement of the parties, and because, by Wind. if a prohibition should be awarded hereupon, all the jurisdiction of the Admiralty would be defeated, 16 H. 6, and these interlocutory securities are incident to it. And by Foster Ch. Just. This is for benefit of trade, and so shall not be altered without great advice, and so said Mallet and Twisden Justices. but by Twisden, If the agreement had been to perform the decree it had not been to be doubted, but if a bond had been given for such security it should have been sued at the common law. Jones for the plaintiff, The libel is in nature of a scire facias upon the security, which they will make in nature of a recognizance, and so prefer it to a judgment at common law, and this against executors. Also it doth appear that the party and surety bound only themselves and not their executors, and yet this is but error, not cause of prohibition, as if they will not, as 8 Ed. 4, admit of an allowance of the precedency of debts or fitting pleas, as modus decimandi, a prohibition shall go. Adjornatur.

64. THE KING *against* RISDEN, &c.

Justices.

Shelton moved for quashing an order of the justices on a forcible detainer, because it doth not appear that there was any forcible entry. Yet by Twisden, The statute of 8 H. 6, was made against forcible deteiners: but by Shelton, as *Hitch* against *Nicholas* 9 Car. 1, this order is grounded only upon 5 R. 2, and no view may be upon 8 H. 6, but only an inquisition; and thus are all the presidents that the party may be dismissed after the view without any writ of error upon the insufficiency of the record: but per Curiam, The indictment must be first removed. And by Twisden, A conviction by view cannot be reversed but by error, as Roll often said: yet Shelton who was clerk of the peace of Middlesex said, that it had been otherwise ruled in *Blackwels case*, Trin. 1660, according as he before said in B. R. but by Foster, these presidents were upon the removal of the indictments, but yet they refused to bail the prisoner. *Post.*

[89] 65. *June* 28

Appearance.

If an attorney without warrant appear, this is a good appearance as to the Court, and the attorney only lyable to an action: an so if such an attorney mend an immaterial point contrary to the rule of Court, that is remediless, though a contempt punishable by the Court.

66. TOWS *against* LEWIS.

Account. F. 128. 1 Ed. 3, 3 b. pl. 10. And are destroyed by the demise del Roy.

After judgment quod competit on a capias the defendant came in, and is committed marescalo on manucaptors who are answerable for the account, the first bail being only for appearance, but yet shall not be discharged till the party render himself on the first judgment, though a capias had not issued before the bail can be charged, and yet the Court would only order the bail to be filed, and leave the party to his remedy according to the condition of the bail-bond or recognizance. *Post.*

67.

Bail. Execution, § 5.

Executors on a writ of error shall not be forced to special bail, as per Curiam hath been often resolved, unless some devastavit or the like appears.

68. SERJEANT *against* GIBBONS. *Ante* 23, pl. 67.

Travers.

In debt for rent the defendant pleads an assignment by the assent of the plaintiff with notice; the plaintiff replyes he did not consent: and after verdict for the plaintiff Scrogs moved for judgment on *Renolds* against *Bulkly*, Hob. The issue is well, being upon a good affirmative and negative. So *Kent* against *Hull*, Hob. and a verdict pursuant. So *Nichols case*, 5 Co. and 32 H. 8, 30 doth fully help this defect, whether the Court be satisfied the plaintiff had title or not, which is not material: and though the issue be upon never so frivulous a point, the judgment ought to be given. Allen for the defendant, If the plea is pertinent to the declaration, though it be immaterial, yet the plaintiff shall have judgment, but not so when the verdict upon such insufficiency of plea it is found for the defendant: and here issue by the replication is not offered upon the matter of the plea, which was an assignment by the assignee with notice to the plaintiff, and the assent of the plaintiff was but surplusage, and so the replication doth not answer the bar, and [90] therefore there ought to be a repleader. The case of *Reynolds* was grounded upon the verdict, which by finding an entry doth imply an ouster, which the Court agreed. And by Twisden, Where the issue is good, as 1 Cr. 78. Hob. 76, to bar the plaintiff of his action, if the issue be upon an immaterial point, that is good, upon which the Court may give judgment, but not so where it appeareth the plaintiff cannot have judgment, as in debt on bond, the defendant pleaded per minas, the plaintiff said he made it voluntarily without duces of imprisonment; the defendant rejoyned that he made it per duces: whereupon the plaintiff takes issue, and repleader awarded, 16 Jac. and so in *Jennings & Lees case*, Hob. 197. Godbolts Rep. 2 Cr. 585, *Saltkacke* against *Thorn*, because the plaintiff cannot have judgment. Windham also conceived the best way for expedition to be to replead, but yet he said *Reynolds case* is not answered, as issue on sufficient repair of hedges in trespass tempore transgressionis, but not at the time of the action; but here he said that the issue is well enough. Mallet contra, the verdicts shall be favour and no repleader here. Foster Ch. Just. that there shall be a repleader, the issue being immaterial; and for this reason were the words in the writ of error (or false judgment) which was to leave it to the discretion to judg whether, notwithstanding the errors assigned were not good, the plaintiff had no cause of action on the whole record. Adjornatur.

69. WELSH *against* PILKINGTON.

Assumpsit.

In assumpsit on consideration the plaintiff would give time for payment of money to him, he would pay, &c. The defendant said that he did not give time to him. Allen moved for a repleader before verdict, issue being taken upon non-payment to him, which is a jeoffail; but the Court directed that he waved the issue being in paper, paying costs.

70. THE KING *against* LONG.

Perjury. 1 Cr. 337.

In an information of a perjury made on oath in the Chancery, Shires moved in arrest of judgment that the oath is alledged to be to this effect, &c. which is uncertain, & adjornatur.

71.

Notice.

Notice on an old issue must be for a term before the tryal if it hath continued above a year: also notice to one defendant by the course of the Court, is notice to all.

[91] 72.

Justices.

Barwell moved to quash an order of sessions for reimbursing of a constable for money laid out upon reparation of a bridge on 22 H. 8, 15, because it is uncertain in what hundred the place is, or where the offence was, being no presentment made expresly of it. And though the justices may tax the parish, yet not the hundred; nor is a constable bound to repair any bridge. Also the bridge is in two hundreds, and one only is taxed, which by him is illegal; but the order being after a verdict, the Court will not allow such exceptions against it as against pleadings, and therefore they affirmed the order.

73. OPIE *against* WILKINSON.

Error. 1 Cr. 254.

In a writ of error of an action upon the case where it is declared that the defendant brought an action upon the case, upon which the plaintiff was arrested, not shewing the whole writ, which, per Curiam, is the course of the C. B. and thereupon dimunition should be alledged and not demurred to the declaration for that cause; for had there been no writ in the C. B. yet after verdict the judgment is good, because this Court will intend they had a writ. Foster Ch. Just. said, that for fifty years the writ of clausum fregit, with declaration in any other action, as debt, &c. in C. B. had been practised. 2. The custom of London is alledged to be a custom through all the land, which is but a surplusage, per Curiam. 3. The writ is, de transgressione coram R. Foster & sociis suis, where the plea is only before Foster, and Hide being present, but at the issue Tyrrel was added to them. 4. A misericordia is entered notwithstanding the general pardon, which is well enough, but it shall not be estreated or affeared, for the pardon doth not alter the judgment but only taketh away the penalty; and so is the course of the Court, per Curiam, adjornatur till the pronotaries certifie their course, but a capiatur is not entered at all.

74.

Nota. That after one elegit retorned, they cannot have another elegit without continuances; but per Curiam, The course is not to make continuances on the roll, but awards severally. And per Curiam, If nihil be retorned he may have a new elegit, but if but an acre be retorned, he can have no other.

[92] 75. AMERY *against* BATEMAN.

Action sur case. Deut. 10 r.

The sheriff retorned cepi corpus, and hath not the body at the day; whereupon the plaintiff, as 3 Cr. 460, pl. 8, *Laughton* against *Gardener*, the party brings his action upon the case. Now by Jones the sheriff cannot demur, because this is a private statute, of which the Court will not take notice without special pleading. Adjornatur.

76.

On plea of no award made, the plaintiff sheweth the award and breach of the defendant by non-payment of money in Threadneedle-Street, which by Turner is uncertain: but per Curiam, it is not here necessary to shew the place, because no

issue can be upon the breach, which were a departure in pleading. But the defendant must rely upon no award made, as H. 22 Car. 1, *Ken* against *Peeling*, on award to pay at or in the house, adjudged naught, because at and in are all one: but per Curiam, But where payment is to be in the house of a stranger, H. shall not be presumed to be able to perform it; but otherwise where the payment is to be at the house of a stranger.

77. SMART *against* EDFAY. Dett Fitzh. 7.

Scire facias. So for damages on rec. in assize against 2. Execution, F. 81. 27 Ed. 3, 80. Seu. 4, pl. 7, is express accordant L. Co. 386 b. The difference between the real and personal lieu, and also the same in 3 Co. 14, of which see in Assets per Br. 15.

In a scire facias against one joyntenant surviving without the heirs of the other on judgment in debt against both; this by Winnington is good at the plaintiffs election on 1 Ed. 3, 13, pl. 41. 3 Ed. 3, 11, pl. 37, because that where ter-tenants are charged all must be named; but not so when any party is himself, 29 Ass. 27, against whom the scire facias is awarded, because this is a personal thing, for which the execution at common law was personal. And this is but pleaded to the writ, and therefore concluding in bar to the action, it is naught. Wild for the defendant supposed the land was not chargeable at common law, before Westm. 2, and by this statute, as *Langfords case*, the real line is put all in the same case, and the judgment being joynt shall never survive. 2. As to the writ, that concludes only that he ought not to have execution, juxta executionem brevis; this per Curiam is well. Windham, The difference, as 16 H. 7, is betwixt a real and personal execution: and by Twisden, After the death of the survivor he must charge all the ter-tenants, which proves that it doth not survive, 29 Ed. 3, and *Herberts case*. On a recognizance the plaintiff hath electi-**[93]**-on to take out a capias, or elegit, or scire facias, and yet when the elegit or scire facias is brought, it must be brought against all, especially because the bond is joyntly against two, and this scire facias is only to revive the judgment, not to have execution: and yet by Windham, he must joyn them both, because though he may take a capias upon it against the survivor alone, yet he may also take out a scire facias to have execution, which ought to be against all, and therefore so ought the first scire facias to be, but Twisden doubted. Adjornatur.

79. THE KING *against* SPELMAN.

Restitution. Dyer 245. Yelverton 32. Moor 73, pl. 199. Yet after office found and in paper, though not engrossed, it came too late, Dy. 170, pl. 3. 2 Brant 8, pl. 24.

A certiorari was sued out here and not delivered to the justices before they had awarded restitution on the stat. of Forcible Entry, 8 H. 6. But before any restitution was actually made upon their warrant: and by Twisden, The hands of the justices are closed by the issuing of the certiorari, though they be not in contempt for what they have done before the delivery of it, but they ought to have awarded a supersedeas immediately upon the receipt of the certiorari, and because they did not, the party had a restitution. Nisi.

80. *June* 29. *Ante.*

Interrogatories.

When men are to answer interrogatories in the Crown-Office, if they accept against the Clerk of the Crown his report, they must have the interrogatories in parchment present. 2. The exception of the Act of Indemnity and Pardon, is of all escripts and writings, which doth not extend to the forging of an alias writ, which by Neudigate is a record, and not within those words, sed Curia contra. And Twisden said, that it had been ruled, if a man be to give security by writing, security by a record is a good performance.

81. BLATT *against* MOLE.

Apportionment. Hob. 177, pl. 202, agree in omnibus. 9 Ed. 3, 8, pl. 10. So 3 Ed. 3, 25, pl. 19, &c.

In a replevin the case was, a copyholder makes a lease rendring rent, and after surrenders parcel to the lord, who avowed an the lessee for part of this rent without alledging notice or attornment by him, which should be aswel on feoffment as on a condition broken, else the lord cannot avow, by Wild, sed Curia contra: and by Windham, The **[94]** lessee is in possession, and the copyholder is but a tenant at will, and hath no mean to do this but by surrender, and therefore an attornment is not necessary: also as *Mallories case*, where the thing is penal, notice ought to be, but not so where it is only remedial, as debt for rent or replevin, &c. Also the copyholder hath no other place than the Court to pass his estate, and therefore no such uncertainty as at common law. Till he is admitted tenant he cannot distrain or bring debt; and of the Court days he is bound to take notice at his peril. 3. H. said, that so much was arrear and unpaid, for which he doth distrain, and doth not say that quia the rent a retro fuit ideo he distrained, yet good, per Curiam though the other had been more formal: judgment for the avowant. Nisi.

82. In Error Br. 117.

A warrant of attorney given by agreement of the parties may be entred after the death of the party the same day by compulsion of the Court, being in the term, but not so where it is by covin, yet per Curiam, the judgment being acknowledged before the Judges before, although not signed by the clerk with taxing of costs till after his death, which by them is the compleating only of the same judgment, though they conceive a judgment without costs taxed to be only erroneous, not void: but Hern Secondary to the contrary. And by Allen, The very signing of the book by the clerk is the essence of the judgment; and by the death of the party before this, the authority of the attorney is determined. But by Windham, The signing is but only a ministerial act, the original of which is in the judgment of the Court, who notwithstanding the death of the party may enter it the same term, because the act of the Court shall prejudice no man. But by Twisden, The Court must pronounce the judgment first, and then if it be not entred, the party shall have no prejudice but on a non sum informatus, which is but the plea of the attorney, the judgment thereupon is not before that the book be signed, which is the judgment of the Court. All agree, that if this were per covin, it shall be avoided. Adjornatur.

[95] 83. COOKES *against* FOWNS.

[Not applied, *Delmer* v. *M'Cabe*, 1863, 14 Ir. C. L. R. 384. Referred to, *May* v. *Platt* [1900], 1 Ch. 620.]

Covenant.

Jones for the plaintiff, A covenant that he is seized of a good estate in fee, the plaintiff takes issue by replication that he was not seized of a good estate in fee: the defendant rejoyns, that he was seized of as good an estate as Sir J. W. who granted it to him, had; which by Jones is nothing to the purpose, because that he was seized of a good estate, according to such an indenture, refers to the estate passed by the indenture it self, and not to him that made it, which the Court agreed, and judgment pro querente, nisi.

84. PALMER *against* STROTWICK.

In Avowry Br. 37, (Sen. 38.) m'. Siderf. 44.

Estoppel. H. cannot have sc. fa. on ret. awarded for arrears after encurred, as in annuity he may; nor shall H. have any former arrears but barely the rent for which he avows, 21 Ed. 3, 22, pl. 12. 2 Leonard 3, pl. 3, &c.

The question was, whether an avowry being made for rent due 1661, shall be an estoppel to an avowry for all rents due before: and by Jones, This is in nature of an acquittance and disclaimer, there being a retorn habend awarded. Allen for the defendant, who doth not avow but makes cognizance as baylies in both the cases: and admitting that judgment in the latter avowry shall bar, yet it shall not do here: 1. Because it is betwixt them and other parties. 2. The arrears of the master shall not be lost by the servant, as *Bredimans case*, without his consent; so *Pilkingtons case* 5 Co. . . . and F. N. B. 71. Nor should his acquittance have barred his master, which the Court agreed. Sed adjornatur.

85. ——— *against* HARTLY.

Bail.

Upon a bail-bond the sureties shall put in common-bail, unless the Court award the contrary, which they will not do without special cause shewed.

86. WEDEN *against* BALDWIN. *Ante* 14, pl. 22.

Devise.

Allen for the plaintiff, The value of the capite lands is 10l. per ann. of the soccage 30 added by special agreement of the Court and parties; but by him this is not material, because if the will be good it must be good for all the soccage lands, or none, because the capite lands cannot descend in point of recompence because he was seized only **[96]** thereof in reversion after the death of his wife: in the stat. 32 H. 8, cap. 1, there are three clauses, 1. That of soccage only all may be devised. 2. That of knights-service two parts, and thereby that he that hath knights service and capite may devise only two parts of the whole: and the heir of tenant only in soccage shall not be in ward for his land, but by knights service he shall be in ward for all his land, knights service and soccage: this statute only extended to estates in possession, but 34 H. 8 came to explain that of estates in remainder; for which, as *Lovies case*, one shall not be in ward at the common law during the estate for life remaining, Dy. *Bokenhams case:* but here, because it is doubted whether by the limitation of such uses this be not the old remainder, and so in nature of a reversion for which one shall not be in ward. But the point now in question was not disputed there, being taken as granted: and the main question is upon the 32 H. 8, 1, where lands are given to two and the heirs of one of them, whether here the heir shall be in ward; and therefore this estate shall be such an estate that may by construction be said to hold of the King and to be tenant to him, and therefore makes this land also within the first clause, that only two parts shall be devised; but this is an enacting clause intended ad unum, and shall never by construction be drawn to other lands, or relate to any other clause. Also knights service tenure doth not by this statute hinder men from disposing all their soccage lands as knights service in capite doth. Also another reason is, that such a tenant shall be in ward for his body only, and not for his lands, where they were joyntenants in capite to the heirs of one who hath soccage lands, because the statute doth only give the ward of the body and not of the soccage lands; and therefore by the meaning of this Act he may dispose of all his soccage lands; for at common law the King had wardship neither of body nor lands, but only by this enacting clause he is entituled to the ward only of the body, and therefore such tenant shall not be said to hold of him, which would alter former clauses of that law. Jones for the defendant agreed, that if the land be an impediment to devise, the value will

not be necessary, because the knights service lands cannot make up any thing of a third part: and that it is an impediment is apparent by 32 H. 8, cap. 1, § 4, n. 1. The third clause without which knights service could not have been devised, and by this two parts are allowed to him that hath an estate of inheritance, as the defendant hath here, and the King by it hath title of wardship either at com-[97]-mon law, as when the tenant for life died, the heir should be in ward, 33 H. 6, 5. 28 Ed. 3, 93. 27 Ed. 3, 80. The land is not absolutely charged but chargeable upon the contingent death of tenant for life, and therefore it may reasonably be intended that such remainder-man could not devise all away in the mean time, and defeat the King, or else by this statute at least, that the King shall be intended to have this benefit, as a necessary consequent of the Kings advantage given him by the wardship of the body, which would be fruitless without such intendment; and all along this Act hath been taken for the Kings behoof, 6 Co. 76. And the nearest case hereto is that of a reversion, which is construed to be within the statute, by reason there is a tenure implyed, which is not material, the King being intituled to his wardship. Twisden, He that is joyntenant for life with fee expectant, cannot devise in probability, at least within the statute, which Windham agreed, Dy. 366 b. pl. 38. Adjornatur.

87. COOKE *against* MORGAN.

1 Cr. 350.

In debt upon a counter-bond for security of bayl given for appearance of the defendant, the defendant pleaded non damnificatus; the plaintiff replyed non componit; the defendant rejoyns, that the first bond given was void by 23 H. 6, 10, and that there was no latitat issued forth; this by Pemberton is no departure, and also the suit is only quia timet, the execution on the former bond will be had, which is no damnification, being, as it is affirmed by the defendant, without reasonable cause, by reason there is no latitat. And here the rejoynder on 1 Instit. 304, Dy. 207, is not disaffirmant or varying from the bar, as in 1 Ed. 4, 5. 21 H. 7, 27, but in corroboration of it, 1 Cr. 387. And thus the rejoynder is here, because it could not have been pleaded in bar without a conclusion of sic damnificatus, which had, as in Com. 20. 20 H. 6, 16. 1 Instit. 303, waved the special matter which here is most properly included. Wild Serjeant to the contrary. It is said, that the defendant was in the gaol debita legis forma, and in the bond whereby he is bound to the plaintiff as his security, the latitat is recited, which is an estoppel to say this after against the security, that there was no latitat (otherwise it might have been against the sheriff.) And 2. This matter is a departure, because one cannot plead non est factum to such a suit, but is lyable to be sued and arrested for it, which is damages and just cause of fear. Twisden agreed that here the party is concluded to plead this against the [98] bayl, and that the very non-appearance was a damnification, be the bond void, or not, which cannot by special pleading be made void on the stat. 23 H. 6, 10, § N. in the rejoynder: but by Pemberton, The plea only mentioneth a bond in which such a latitat is recited, which is no estople: but by Windham, The defendant affirms, that the plaintiff is bound for appearance on the latitat, and not barely recites it, which the Court agreed, and that the bond is only voidable by plea, because it supposes danger of arrest by just presumption of law. And by Twisden, This is but a recital, and shall not estop, but because this is a damnification. Per Curiam, judgment for the plaintiff.

88. TIRRY *against* BROWN. *Ante.*

Fraud.

Woolmer for the plaintiff, It doth not suppose that the marriage is fraudulent or without the parties consent, but it may be according to vulgar acceptation fraud if it be done without consent of parents, and no other fraud appears by that verdict. But by Allen on the other side, The justices having judg'd it fraud, this Court cannot alter their judgment, being confirm'd by the law of the times. But Twisden Justice doubted whether an action may not be brought against the justices on this judgment,

on refusal to refer it to the bishop of the diocess, according to the direction of the Court. Entred Trin. 1659, Rot. 959. Adjornatur.

89. In the Exchequer Chamber.

Entry.

On *Swain* against *Rogers*, 1 Cr. 32, & *Heatons case* 42 Eliz. cited by Hale, the Barons and Judges being there, it was said, that the entry of a capias or misericordia after a general pardon is not usually done in the Com. Ba. with a pardonatur in the margent, but otherwise it is in Ba. Reg. but the one or the other may be done on good reason, because he that is pardoned may be within the exceptions of the Act, and must aver aliquando, that he is not the same person excepted. *Post.*

90.

It was also doubted by the Judges in the Exchequer Chamber, whether the entry of judgment in English be good, it is considered that the plaintiff shall recover the pleadings then being in English: and it was said, that in B. R. several judgments had for this error been reversed, but by them this is intended of the judgments of Inferiour Courts, and not [99] of the judgments of C. B. Yet Jeaquell an attorney affirmed, that it was so done of them also, because it doth only imply time future, whereas the judgment is always. Therefore it is considered that the plaintiff do recover in the present, but by them this is a fault amendable.

91. Bush *against* Chamberlain. *July* 1.

Execution.

A sheriff who cannot do execution by a posse comitatus, ought to acquaint the deputy-lieutenants of the county, and if they assist not, he must acquaint the King and council; but yet the sheriff shall be amerced if he return that he cannot do execution. *Post.*

92. Winter *against* ———.

Error.

Carne moved to quash a writ of error directed to Sir Orlando Bridgman & sociis which is certified by Foster and Hide, and per Curiam, it was quasht.

93. *Ante.*

Bail.

Upon an account only common bayl is used, but upon a habeas corpus special bayl shall be to render the body on scire facias against him, and a capias against the principal, the condition of the recognizance is to render his body or pay the condemnation, and without making his account there is no condemnation: but by Wild, The presidents are only that such bayl that render not the body shall be fined, because they do as it were engage body for body. Per Curiam, The first bayl is only to appear to account, and then on judgment quod computit capias shall issue, and a scire facias against his second bayl for the sum for which he is adjudged to account, which unless he can discharge, shall lye upon him; and therefore the scire facias must be, that he render the body, or pay the whole sum.

94.

Restitution.

One may have restitution upon a forcible entry, notwithstanding that a lease of ejectment be determined.

95. THE KING AND ROSSE *against* STILES.

Golds. 96, pl. 12.

The Court refuse to grant restitution to him that was ousted by award of the justices after certiorari awarded and before the delivery of it, but awarded a writ of re-**[100]**-stitution not to be executed till the title tryed in an ejectment, or default made by the parties.

96. Error Fitzh. 40.

Brief d'enquiry.

In repl' Jones moved for staying the filing of a writ of enquiry, because there is no judgment entred upon the roll: but by Allen, this is not usual, but only that it be signed, which the Court agreed. Also the damages and costs are 20 pound, which, the tryal being in Durham, was held reasonable. And Twisden cited the case of *Amersely*, where in repl' the jury found 300l. damages, and upon a new tryal upon supposition that that was excessive, another jury gave 500l. and another after that 300l. and all without remedy by the whole Court, because only the costs are by them afferable.

97.

Bail.

In trespass for mean profits special bail is always given by Stroud, and so upon the bond sued against the surety for non-appearance of the principal, but til it appear that the first action requireth special bail, common bail is sufficient.

98. ——— *against* NOELL.

Covenant.

In covenant that H. will carry so many men to Jamaica as the defendant should bring, not exceeding 180, in consideration whereof the defendant promised 5l. a head, the plaintiff said he carried 160, and the defendant brought no more: the defendant saith he brought 180, and none was ready for the plaintiff to receive them into the ship: judgment for the plaintiff. Nisi.

99. COOPER *against* GARDNER.

Prohibition.

Williams shewed cause against a prohibition to the sessions of Mongomery, because, as *Bagnal* against *Owen* 3 Car. 1, the Court there had jurisdiction mixt, and have proceeded to a decree, whereas it might have been demurred when the cause was first brought by bill, being for a trespass. But by Powis for the prohibition, If it appears that there is no manner of equity in the bill, the Court, notwithstanding a decree, may award prohibition. Twisden, Hereby, upon 34 H. 8, the jurisdiction of Southwales will come in question, and therefore they would not be content only with the **[101]** suggestion, but would see the bill it self, for he held that a prohibition is not honourary, but ought to issue when requisite; whereupon the prohibition was waved until a view had of the bill.

100. THE KING *against* GAKES.

Indictment.

West moved to quash an indictment of forcible entry, 1. Because that it is said juratores, &c. super sacramentum dicunt, &c. and say not quod juratores onerati & jurati, &c. 2. There wants vi & armis in the expulerunt; whereupon it was quasht,

though as to the first exception it be good enough, jurati & onerati being intended at tryals at Nisi Prius, not in indictments; and on affidavit of spoile made, a restitution was awarded, nisi, &c.

101.

Tryal.

If the plaintiff will not file his venire, the defendant may take out a new one and trye the cause by proviso, as was agreed per Curiam, Dy. 215, pl. 51. 14 Ed. 3, 16, § 1, N. 2, 11, & 2 Ed. 3, 16, § 1, N. 3.

102.

Restitution.

Twisden challenged all the Bar to shew one president of restitution granted to a spiritual or lay hospital, or any other place that had particular visitors, before 20 years last past, but yet they will have retorns made upon their mandamus: and he cited a case of the Bishop of Durham, that was fined 2000l. for not retorning a mandamus here, in the time of Ed. 3.

103. WIDERBORN *against* KENDALL.

Amendment.

An amendment of a record after removement out of the C. B. was allowed on rule made in the C. B. and the record of the C. B. was brought in by the clerk of the Treasury for that purpose in B. R.

104.

Prohibition.

A prohibition shall not go to the prerogative on the calling of executors or administrators to account, but quoad distributionem it was awarded, per Curiam.

[102] 105. *July* 2.

Dy. 202 b. pl. 71.

Error was assigned by Monday, because that the heir on voucher pleaded riens per discent the day of the voucher, and between the vouchee and the tenant an inter-pleader was had, which is a delay, and therefore the demandant shall have judgment presently in dower, and therefore it is no error. 2. Judgment may be against the ter-tenant, that he shall be in misericordia, notwithstanding that the vouche be within age. Judgment for the demandant.

106.

Certiorari.

A certiorari to remove a record is retornable immediatè regularly, though the party for whose benefit it is may have it at a day certain: and on diminution alledged after (nothing being done upon the certiorari) a scire facias issued, which because it had not 15 days, Bear Serjeant moved to have the judgment reversed for error; but because no oir thereof is demanded, but the defendant pleaded gratis in nullo est erratum, therefore the advantage of the defect of the scire facias is waved. Bear for the plaintiff, in the error judged, that albeit that the scire facias is taken out by him, yet it is entered by the defendants attorney; yet because that the teste of the scire facias doth not appear of record, the Court awarded the proceedings to be good: but because the certiorari was of record coram Olivero St. John & sociis suis, and the record that is certified is by R. Foster, &c. the writ was abated: yet by Twisden, this is no advantage to the plaintiff in error, because the second writ of error is no supersedeas.

107. In Error Br. 117. *Ante.*

Jours.

Keeling conceived *Shelleys case*, being of land was more strong than this, that the term is but one day, and this judgment was for a just debt and to prevent the spoil made by the wife, as it appears by affidavit. Twisden Justice conceived, that in many cases the law will not allow fractions, but, as 4 H. 6, in many it will; as if the plaintiff purchase a new assize the same day that he had judgment, that another writ is depending is no plea. Also if an executor pay a debt in the morning, he shall not be allowed to plead riens entre manus jour of the writ purchased the same day. Keeling said it was agreed on the indictment of the murderers of the late King, which was contra pacem of the same King, that **[103]** by all the Judges of England this was good. But by Twisden, A recovery is but one act, otherwise of such a judgement as this is on warrant of attorney, and yet this shall be avoided if it be by covin, but it is not perfect until signed by the clerk, but is countermanded by his death that made the warrant before judgment. By Allen, And the consequence hereof is to allow this judgment given on warrant by a dying person who could not write his name, which would be an occasion of great trouble; and such a judgment in the City of London acknowledged by fraud would be vacated. But by Twisden, This is but evidence to a jury, and not to avoid the judgment here. Also by Windham, By the acknowledgment of the judgment, which was in his life, the warrant of attorney is determined, and the other proceeding is the act of the Court, which on an act well begun, will not make fraction of a day, which the Court agreed. And by Foster, To question this judgment upon this nicity, would introduce greater inconvenience, for it may be avoided by error or by pleading of collusion, and therefore shall not be vacat by motion, but shall stand; for on a non sum informatus rules are not necessary by the clerk, according to the course of the Court.

108. ROBINSON *against* AMP.

Siderf. 48, pl. 7. In Deceit Br. 2.

Deceit. 2 Cr. 505. 3 Cr. 77, pl. 32.

Maynard moved in arrest of judgment in an action of covenant for suing on a statute contrary to the defeazance, which by him is no breach of covenant, but he ought to have brought an action of deceit; for in covenant he ought to alledge a particular breach, 43 Ed. 3, 20, and conclude contra formam conventionis, which he hath not done here. Allen, The covenant is broken because it was to deliver up the statute to be cancelled, and cause the same to be vacated: when, as *Means case*, the money should be paid, and here by suing out execution upon the statute, he hath quite disabled himself to deliver it up, but it might have been otherwise, if the covenant had been only, it should be void on payment of the money, there an audita querela or action of deceit might have been the proper remedy: but this is more of an act to be done on the defendants part, and the breach is generally assigned in suing out execution, which relates to all the points of the covenant. Maynard, The covenant is not that he will not do any mean acts, for he may sue execution and yet cause the statute to be cancelled: but per Curiam, this is **[104]** only a performance of words, not in reality, because hereby the party that is to pay his money is without benefit. Also covenant will not lye upon a bare defeasance without this further covenant to deliver up: and by Foster & Twisden, The particular breach must be assigned, but because that they doubted whether this be a breach of the covenant of deceit. Adjornatur.

109. HATTON *against* JACKSON.

Scire facias. Leonard 64, pl. 84.

In a scire facias on judgment in debt on bond, as in *Eodes case*, the course of B. R. is never to recite the term of the judgment given, but it is otherwise in C. B.

110.

Tryals.

A tryall at Bar at the latter end of a term may be granted, notwithstanding the defendant hath not pleaded, because else the plaintiff having time to make up his book till the end of the term, the defendant thereby would else be defeated of it.

111.

Amendment.

In debt on a bond for performance of covenants, the defendant cannot now pray oyer as heretofore, but must plead to the indenture and produce it to the Court. 2. The plaintiff declared on a deed dated the 30 Jan. the defendant demanded use, and the date thereupon was by indenture of another date; and now the plaintiff prays that this mis-entry might be amended, being only upon oyer, which is the act of the Court, and therefore may be, but not so if it had been on a deed so pleaded; and because that this is but only a false recital by the Court, it shall be amended though in another term, per Cur.

112.

Ireland.

Nota. The Ch. Justice here may command the Ch. Justice of Ireland to do execution of lands there against manucaptors or other persons, per Curiam, and by the clerks, if the roll here be not marked till the retorn of the writ, the common bail shall stand but only to save amerciament, but not so but that upon good cause the Court may award special bail. Also if the plaintiff sheweth cause at the retorn of the writ, he may have special bail, though the roll be not marked, but then the defendant must have notice of it by the course of the Court. Also sufficient bail of Irish men whose estates are there, was allowed good.

[105] 113. THE KING *against* TENCH.

Pardon.

It was said, that the forging of an alias is discharged by the Act of 12 Car. 2 of Oblivion, because it is not any offence that is within the exception; for though every record be a writing, yet every writing is not a record, by Newdigate Serjeant for the defendant. Windham Justice, Exception of the lesse is exception of the greater, though pardon of the less doth not extend to the greater: and by the Act all escripts writings, &c. all are excepted, being forged; a fortiori a record, which the Court agreed.

114.

Misnomer. 3 Cr. 85, pl. 3.

A misnomer was pleaded in abatement: Bear pro Beer on 5 Ed. 4, 57, Misnomer Br. 58, and ruled per Curiam to be frivolous, and a respondeas ouster agard.

115. *July* 3.

Notice.

Nota. By Twisden, By the course of the Court, if the attorney of the plaintiff swear positive notice of a tryal, though the defendants attorney swear he had none, or excuseth it, that is not sufficient, but the affirmative shall stand. But by Windham, The attorney is not Judge of sufficient notice, and therefore if by the circumstances it appeareth to the Court, they will judge whether it was notice sufficient or not.

116. GLASCOCK *against* MORGAN.

Marriage.

In debt upon a bond to pay money on marriage, or at the age of one and twenty years of his daughter, on 29 Ed. 3, 8. 2 Co. 102, the jury may try wife or not wife, but not the legality of marriages: and this was moved in arrest of judgment on issue unques accouple, or debt on bond to pay money on marriage or one and twenty years of age after verdict. 2. Wild took another exception, that it is not alledged that the party was married at the time of the bill, but issue being joyned upon married or not married, after verdict this shall be intended, there being a good affirmative and negative, per Curiam. And by the Act of 12 Car. that confirms judicial proceedings, the legality of the marriages shall be tryed by jury; yet here the issue is not (as in dower) where legit. modo maritatus which shall not be tryed by jury; but **[106]** in debt on bond its no more, but unques accouple, which doth not draw the right of matrimony in question, per Curiam. Judgment pro querente.

117. LATTAM *against* ———.

Costs.

The lessor of the plaintiff is lyable to pay costs (though he shall never be forced to give security for them) but the lessor of a tenant in possession is not lyable to costs, because though he may come in gratis and defend his title, yet the tenant in possession is only lyable to costs by the law but only by the course of the Court, unless the tryal be by the lessors means brought to the Bar, and then he shall never have a second tryal at Bar before he hath paid the costs of the former tryal; but yet the Court for non-payment of costs will not hinder proceedings in the country, per Curiam.

118. 1 Cr. 116.

Entry.

The plaintiff shall be compelled by the Court under a pain to bring in his postea, but this before the judgment entred cannot be pleaded in bar of any new action.

119.

Misnomer.

On motion of Bear to set aside plea in abatement, by misnomer Straight for Streight, the Court awarded the plaintiff to plead or take issue, though per Curiam, the plaintiff may plead that the defendant is known by the one name, and the other; and therefore though it were a frivolous plea, the Court would have the writ mended, which being an original, cannot be, but the defendant agreed that the plaintiff should purchase a new writ.

120. STOCK *against* WESTPHALING.

Error.

Error of a judgment in ejectment was assigned in the day of Nisi Prius, which is 20 in the postea, and the 30 of April in the roll. 2. The transcript of trespass and ejectment was in placito transgressionis & ejectionis, without firmæ, which was awarded to be amended here, being of the transcript, but it should be amended in C. B. if it were in the record it self before removal.

[107] 121.

Priviledge.

Nota. The husband that claims nothing but a trust, shall not have the benefit of priviledge, as Twisden Justice said, had been adjudged in this Parliament in the case of the Lord Moon, and this the Court agreed.

122.

General issue.

Nota. That a man cannot now give the special matter in evidence on general issue, nor can he mend plea of another term, or of the same term, as of another, without the consent of the parties.

123.

Nonsuit. Error Br. 6 M. Dy. 245, pl. 64.

Nota. That on rule given to transcribe a record, if in two terms it be not done, the defendant in the writ of error may nonsuit the plaintiff without motion.

124.

Prohibition.

Nota. Pro regula by all the Court, that a prohibition shall never be awarded the last day of a term, no more than restitution: but they confirmed a rule, and made it absolute on oyer of the suggestion the last day of the term, which was de diversis contractibus, and doth not say, infra jurisdictionem of the Court of Cinque Ports, emergent.

125.

Notice.

Notice at the house is not sufficient in ejectment, because this may be, as Twisden cited a case, thurst into the rafters, but at the house with a servant, is good: yet affidavit thereof being amended, the Judges may give a rule thereon for judgment against the casual ejector in their chambers after the term; and the acknowledgment of the defendant that he received it, is not sufficient.

126.

Indictment.

A man may be indicted of a forcible entry although he hold peaceably; and therefore to say that he extra tenet with force, is not necessary, per Curiam, and the last rule on taking that exception, was quasht.

127.

Certiorari.

Nota. The tenor of the record is sufficient to be certified by Inferior Court to the Superior Court, as in *Limry* against *Langhams case* was held, because the certiorari is only to know whether there is any such judgment.

128.

Pleading.

Nota. That on a declaration delivered before the essoyn day, the defendant pleads as of the last term, but not so on delivery after the term begun without agreement of the parties, per Curiam.

[108] 129. *Ante.*

Error.

It was urged on 1 Cr. 296, & 20 H. 7, 9, that the tenant shall take advantage of error against the vouchee in an action of dower, as that a misericordia was entred against an infant vouchee, 5 Co. by Serjeant Bernard for the defendant: but per Curiam, this shall be against vouchee only, and not against the demandant, who is to

have judgment only against the tenant, and therefore the vouchee shall not have advantage of any error between the demandant and the tenant; and this judgment against the vouchee is for the benefit of the tenant, and therefore by Foster Ch. Just. he shall not have error thereon. Also the first judgment is absolute, and only cessat executio until the voucher be tried; but otherwise it should be if the first judgment were against the vouchee, and that the tenant recover in value that is all but one judgment: and per Curiam, he had execution.

130. OPIE *against* WILTON. *Ante.*

Entry. Leonard. 176, pl. 240. 3 Cr. 153, pl. 33.

In trespass upon the case in C. B. judgment shall be in misericordia only without any pardonatur in the margent, notwithstanding a general pardon: and this was certified by the prothonotaries to be the course of the C. B.

131. HOWARDS CASE. *Ante.*

Ch. de Pardon, Br. 10 M.

He now brought in a new pardon which recited the indictment and verdict, but in it was no suggestion, whereupon the pardon was grounded: also it wanted the words murder; but because that the writ of allowance was dated the 3 day of July, of a pardon of the same date where re verâ the pardon it self was dated 23 July, which is not yet come, which the Court would neither amend, nor yet allow the said pardon; whereupon he went into the Chancery, and there had another in the same form, and then that was after allowed.

[109] DE TERMINO SANCTI MICHAELIS, 1661, AN. 13 CAR. II. IN BANCO REGIS.

Foster Chief Justice; Mallet, Twisden, Windham. *Wednesday Octob.* 23.

1.

Supersedeas.

The Court agreed, 6 H. 7, 15, that a writ of error with an over long return, is no supersedeas; nor can such writ, being under seal, be mended here; but in Chancery by motion it may.

2. OPIE *against* KING.

Liew.

In action on a charter party made in B. and the parties living there, Stroud upon affidavit moved to change the venue, being in another term & præter regulam, which the Court refused to grant, being a suit upon a specialty, as upon a bond, &c. and the party must prove his counterpart in L. where the action is laid.

3. JOHNSON *against* WARING. *Ante.*

Record.

Stroud jun. moved in arrest of judgment in action upon escape upon a mesne process by exception to the record, which the Court would not hear till brought into Court; nor if it had been to the verdict, would they have heard it till the po-[110]-stea returned, which is in the will of the plaintiff any time in the term; and the defendant hath four days after its coming in to move, &c. but cannot do it before, though he give notice to the other party, 110, pl. 6.

4. THE KING *against* OSBORN.

Restitution.

Winnington shewed cause against awarding a restitution, because it depended upon a doubt whether H. may devise gavelkind land: and Mich. 59, a verdict was against the custom, that H. may devise; and the first offence, viz. a forcible entry is pardoned, and so the party would be remediless; and this is in the discretion of the Court, and seven verdicts and a nonsuit hath been for the custom, by Finch solicitor: but by Twisden, multitudes of verdicts is no ground because they have been contrary, and restitution was awarded upon quashing the indictment, and so the offence being pardoned, the party cannot be re-indicted. Wild Kings Serjeant shewed that the lease of ejectment made by Osborn is expired, and so no fruit can be had of the verdict before without a restitution. Windham, The jury found 1 Cr. against the opinion of all the Judges, and therefore unless the prosecutor hastned another tryal in another action according to agreement, this term restitution was awarded.

5. KING *against* THE CITY OF YORK.

Dilatories.

In a quo warranto by Keeling Serjeant, who moved for time to plead: Ipswich and Yarmouth had a year to plead, but he desired after a long vacation to have till Hill. term for the City of York: but the Court would give but a fortnight in the term, which may be said initium termini, according to the rule, being only for the private corporation.

6. JOHNSON *against* WARING. *Ante*, 109, pl. 3.

Monstr. Br.

The exceptions which Stroud took were, 1. That it is said L. entered into bond, but doth not shew where, which being after verdict, and depending on it, the Court would not willingly hear it, till the postea come in: yet upon reading the record, it appeared to be only inducement to the action upon the case for the escape, which recited all the former process and judgment on the bond. 2. It is said, he did escape but saith not when; yet it is shewed when he was in prison which is within the time of limitation, and though commit-**[111]**-ted by Rich. Protect. yet if he had no power, then the party may plead, not guilty: adjornatur, till the postea returned, which the attorney for the plaintiff said, was stayd by order at the Assizes, which yet the Court ordered to be moved by the plaintiffs council to stave it in Court, that all may appear.

7. ——— *against* SIR RICH. BELLISON.

Pleading.

Upon a bond for performance of covenants generally, H. may plead general performance; but when to do any particular act he must answer certainly. 2. Defeasance unless made the same day of a stat. and delivered uno flatu, cannot be pleaded in bar, as the whole Court conceived, upon opening of a record in demurrer. Adjornatur.

8. FINES *against* KING. Siderf. 59, pl. 27.

Arbitrement.

In debt to perform an award, which was, that one should pay the other release, &c. Proviso, that if any of the parties were within the Act of Indemnity and Pardon, that for so much the party should be excused. Finch Solicitor upon demurrer conceived the award which was set forth in the replication good, and the proviso not material in the rejoynder after no award made pleaded in bar. Adjornatur.

9. ERRINGTON *against* CHAT.

Respond. ouster.

H. pleaded in abatement that there was no such parish in the said county as supposed; the plaintiff offers an issue, the defendant demurs, which prima facie the Court over-ruled, and respond' oustre, but by the attorney of the defendant in com. præd. was not in at the time of the plea, which the Court regarded not.

10. DOCKSON *against* ELLIS.

Pleading Br.

In debt upon bond for performance of covenants in indenture, to which the defendant pleaded performance; the plaintiff replyed, that one was, that the defendant should not do any act to hinder the plaintiff of water, and sheweth the defendant cut up the cock, and so hindred, to which the defendant demurs. Adjornatur.

[112] 11.

Nota, By the course of the Court after issue joyned, notice must be 14 days at least, exclusive of the day of the date, and of the assize when the party liveth far off.

12. DAY *against* GUILFORD.

Siderf. 54, pl. 22.

In ejectment its found by especial verdict, that the father let for life, and acknowledged a statute to the lessor of the plaintiff, and a scire facias against the heir in reversion, who by scire feci is retorned heir and ter-tenant; wherein he might have pleaded, (*Kilborn* against *Wracks*, Mich. 1657, B. R. F. N. B. 104. Kel. 125) and an action upon the case lieth against the sheriff upon non summons; but shall have no other remedy till the last judgment be discharged. *Townson* against *Barecocke* 1652, Hill. B. R. upon two writs against the bail he brought audita querela; but no writ of error for death of the principal, suggesting no capias went against the principal, which he might have because no notice is supposed. Quære, if a scire facias here had been returned; (Wind.) doubt whether he be not relievable, because this land was never asserted, as in case of tenant in tail, or the other cases it was 6 R. 2, Assize 69. Twisden vigilantibus non dormientibus, &c. and if he come not in and plead upon the scire facias, though he be a mere stranger and in of another estate, as the issue in tail is to a judgment against the tenant, he shall never avoid it, but is estopt and shall never falsifie, *Hanner* against *Mare*, Hub. 283, to which the Court agreed. Adjornatur.

13. DOLBIN *against* WHITE.

Slander.

He is a base fellow, and I will question him ere long, for that he would have taken away the Kings life. Twisden, that H. would have killed the King is actionable, per Curiam; and so they conceived the words well actionable, as well as if he had said, I do question I. S. of treason.

[113] 14. AUSTEN *against* MANDRE. Rot.

Error.

Error of a judgment in B. that the venire facias was to return 12, &c. and in the alias its not said to recognize at large (but only and so forth), which in Inferiour Courts ought so to be; but per Twisden, if the trial appear to be within the jurisdiction it is sufficient, as *Osborn* against *Gregory*, which the Court agree. 2. They do not say that

the process was awarded in, by or at the Court, but only as aforesaid, sed non allocatur. 3. The judgment was of costs ex incremento, and do not say (circa sectam sua expensa) which is necessary according to the usual presidents of this Court and the Com. Ban. as well upon verdicts as demurrers. In Inferiour Courts they draw their judgments by short notes, and the attorneys here enter them at large, and so they shall not be aided by intendment. The Court agree, if it had not been ad requisitionem of the party it had been error; but the principal judgment for damages and costs were, which he had expended in the suit; but ex incremento were found by verdict only guilty pro misis & custag' without circa sectam, of which there were two presidents shewn by Hern Secondary. Adjornatur.

15. PALMER *against* STRATWICK.

In Avowry Br. 37 (Sen. 38) m'.

Barr. Assize F. 63. Moor 7, pl. 26. 47 Ed. 3, 7, pl. 3, per Plisay. Rec. in assize of the latter is no bar of former rent, 9 Ed. 3, 8 b. pl. 21, but in a cessavit tender of the latter accept is discharge of former arrears, 17 Ed. 3, 57, pl. 40, per Shard. Distress Br. 14.

Repl' upon demurrer the question was, when H. avows for a latter, whether after he may avow for a former rent. Jones for the plaintiff conceived that he could not no more than on acquittance, especially having relied upon this estoppel; (for H. may avow for several days arrears severally, 2 Ed. 2, 32, pl. 10. Avowry F. 172. If H. have rettorn irreplevisable award for latter, he cannot after avow for former services, 25 Ed. 3, 47 b. seu 11 b. pl. 38, per Grene). Barre F. 79 is against both cases; but 11 H. 4, 55, and *Penants case* 3 Co. 65, are otherwise. But 2. The avowry was made here betwixt the same persons, but the repl' was by others, but the cause of action is the same in both; yet he admitted in case of change of a baily one shall not be bound by the act of the other. Allen for the defendant, Confess the case of Dy. 271 of an acquittance Bendloes Rep. which is a discharge for all before. But avowries may be made at several times for several rents, and the matter in truth is against the plaintiff, **[114]** because the avowry of the baily cannot make the master lose his arrears, and what he doth is only in his right and as servant to him, F. N. B. 71 L. and recaption lieth not for the lords distress after the baily hath made a former. Windh. conceive clearly they were several duties, and avowry for one is no estoppel; and not like an acquittance which is a release, especially this being betwixt other persons. But by Twisden, When H. doth no more than he must, as giving acquittance for an annuity he shall not lose the arrears: so here when the baily distrains he must avow, and therefore had it been betwixt the same parties it had been no estople, which cannot be of the master by an act of the baily; (contrà per Mallet); but Foster agree that its no discharge. Judgment nisi.

The same judgment was betwixt *Edwards* against ———.

16. LAWSON *against* CROFTS. Syderf. 57, pl. 24.

Administrators.

In action against an administrator he saith, he was durante min. ætate, and that H. came Chaunlers Hub. of age, and doth not say how he had discharged himself. Which after imparlance was pleaded in bar, and a demurrer thereupon. Foster conceive, that when the minor comes of age he shall be specially charged, as shall also the administrator. Twisden, After age he is in as of his own wrong, and by him shall so be charged. Though Jones Judge conceived he should be charged specially, and by him this plea in abatement concluded in bar is naught though it was said he did not administer after the infant came of age. They conceived, he ought also to shew he had fully administred until then.

17. TRICKET *against* HANBY. Siderf. 45, pl. 3.

Assumpsit.

Scrogs in arrest of judgment in an action upon the case upon a promise, that consideration of forbearance in *Yardly's case* generally is not sufficient, which the Court denied. But if it be for paululum tempus, 1 Cr. 241, which is naught, for all any averment that forbearance was till the writ was brought; but for a reasonable time it is good with such an averment, for the Court upon the evidence shall direct the jury whether it be reasonable or not, but not after verdict here, as the Court agreed. 2. The consideration was of forbearance until he and they could go to B. and examine witnesses, &c. and the averment of forbearance was till they could go, &c. But the plea roll was they, yet the Court con-**[115]**-ceived it naught, for one might send when another could not, and therefore they should not be severed, or comprehended in the general word they. Judgment arrest. *Post.*

18. GRAGER *against* HEMBOROUGH.

H. 12 Car. 2, Rot. 889.

Entr' congeable Br. 2. 2 Leonard 91, pl. 114. 3 Cr. 244, pl. 2. 3 Cr. 255, pl. 28.

Upon covenants performed plead generally, and special breach for non-payment of rent assigned in repl' in debt upon bond, a rejoynder that the plaintiff entered before the rent-day is not good, but a departure; because Dy. 290, it might have been pleaded in bar, (as 44 Ed. 3, 42, pl. 45) as a feoffment to use is a departure from a feoffment generally alleadged before, so 5 H. 7, 25, Baldwin for the plaintiff who demurred. Jones for the defendant, that the rejoynder doth corroborate the bar, which could not be otherwise pleaded to pursue the words of the bond, which is for general performance of covenants, as in such case he might have alleadged in the rejoynder, there was no demand, *Baker* against *Spain*, Hub. But in action of covenant he agreed it had not been good. Windham conceive it a departure, and not like the demand, which is necessary to make the rent due, whereas this is only an excuse of what he confesseth, *Chapman* against *Chapman*, 1 Cr. 76. Twisden agree, and that he should have said he performed till such a day. Foster doubt. Adjornatur.

19. HARRIS.

Ch' de pardon.

Thou art a traytor and a rebel, spoken 8 Jun. 1660. The defendant justifieth, that at such a time he was in fight under the command of Seely 28 Sept. 59, against the King. The offenders were pardoned before the words spoken, *Cudding* against *Wilkinson*, Hub. And therefore the plaintiff demurreth, and doth not say as charter of pardon Br. 21, that he is not within the exceptions of the Act, which the Court conceived naught. Adjornatur.

[116] 20. NICHOLSON *against* SHERMAN.

Action upon the case. In devise Br. 6. Br. Cent. 3 Ass. 63, p. 346.

Action upon the case for a legacy devised to H. when he should set up his trade if the executors had sufficient, and its averred that the executors had sufficient, and that the plaintiff came to age and set up. 1. The will was, that the executor should double his legacies if the estate sufficed, which was waived as a sufficient devise of a legacy, and not at their discretion. 2. That an action upon the case lieth. Jones for the plaintiff, Glan. cap. 6, 7, conceived it did, for the breach of trust by the executors. Consideration of forbearance is good for assumpsit against executors, assent upon condition not good, and in an action brought by the rightful against a wrongful executor for them lieth, so far the common law doth take notice of them;

and when men are indebted to another for, 2 Cr. 544, the injury, an action lieth as well as by way of assumpsit. So when any duty is due from one man to another an action lieth; and to say that legacies have not been sued for in specie, may be true as an indebitatus assumpsit, till *Slades case;* but the novelty is not material, being only want of good pleading, for here it is but sued for as a duty of breach of trust. Wild for the defendant, that an action upon the case lieth not, being a testamentary thing, of the original whereof they have jurisdiction, Regist. 38, in the Court Christian, and its the office of this Court, not ampliare but regulare jurisdictionem; and as to the indebitatus assumpsit the common law had jurisdiction of the original debt, and that was only a new action; and the reason why they were countenanced in the late times was for want of justice, the bishops being not then in fact though de jure, and the breach of trust is a personal wrong and dieth with the person, as Dy. 322, or trover lieth not against the executor for tort done by the testator. Windham conceived, that as the bishops are restored to their lands, they should be also to their jurisdiction; and this is a gift after the death of the intestate, and though the Exchequer would send a prerogative writ, yet never any other Court did so for a legacy, for its not payable at common law, nor can an action upon the case be grounded upon any default without some special injury, as for default of rent or annuity, &c. for so men may draw the questions of all laws, what ever to the common law; and as the suit cannot be for the legacy, so not for the non-payment of it. Twisden said, legacies out of land are properly suable in Chancery, and yet in ancient times, as **[117]** in title debt and legacy in the Book of Entries an action lay at common law; yet here, when the breach is in default of a thing of the original, whereof another Court hath jurisdiction, an action upon the case lieth not, lest thereby men bring in question all matters whatever; but especially here if it would lye, it would not lye against an executor of an executor, to which the others agreed, and Foster wondred to hear such an action brought, having never been heard of this 60 years, which he hath been related to Westminster. This was upon demurrer to the declaration, but the usual pleas hereto were not guilty, or non detinet. Baldwin and Stroud relate the Exchequer Chamber, to have given an opinion in the same point, that an action would not lye in a case they argued. Judgment pro def. nisi. Rot. 1540.

21.

Slander.

I. S. was at the stealing of divers cows; not actionable per Curiam.

22. BUSH *against* CHAMBERLAIN. *Ante. October* 25.

Process. 2 Cr. 5, 15, pl. 28. That the sheriff cannot make retorn of resistance, because as Westm. 2, cap. 39, its in dedecus Regis, and therefore the sheriff ought to go in person with power; as Goldsb. 79, pl. 14.

Upon a resistance of execution the council table refused to meddle, because this Court ought to see their own judgments executed; and Finch prayed a writ to the high-sheriff (which all writs are), but with a special rule that the high-sheriff should execute it himself; which the Court granted, and a tipstaff to fetch the under-sheriff up to retorn his writ, which is better than an attachment, which is retornable by it self.

23. EDEN *against* CHALKILL.

Evidence.

In ejectment it was observed in evidence to a jury, 1. That a will under which title (pur le plaintiff) is made, must be shewed to the Court it self, and not only a copy, which they refuse to admit, 1. If it had been only a circumstance, and as inducement, and the will remain in Chancery or other Court, by special order of such Court. 2. An enrollment of a fine or other conveyance not being a bargain and sale, though

acknowledged by the parties themselves, was not regarded without proof of the deed, because it was needless. 3. When trustee to the use of I. S. for life, the remainder to his first son, joyns with tenant for life in a fine, cestuy in remainder is scarcely relievable in equity. [118] 4. Consideration must be considerable, though not to the full value of the land.

24. ROBINSON *against* AMP. In Disceit Br. 2, 276. *Ante.*

Covenant.

In action of covenant in nature of a defeasance of a recognizance, that upon payment the recognizance should be delivered up to be vacated, and caused to be cancelled by the defendant. Allen moved for judgment, and that the action of covenant well lieth, because it doth not terminate in it self, as Com. 38, but is for a collateral act, and engageth the party to further acts, as to be delivered up and to be cancelled, and not only that it should be void. 2. The defendant pleaded generally performance; and the plaintiff said, that the defendant means before delivery he had sued an extent, which 5 Co. 23, is a present breach, though no mony by the plaintiff be paid, because he is hereby disabled to deliver it up when the defendant shall pay his mony. Jones for the defendant, The covenant is to deliver up the recognizance upon payment, &c. and acknowledge satisfaction; and the denial of either of these should have been pleaded by the plaintiff, and so he might have had an action upon the case for this fraudulent taking execution, but no covenant. Windham upon covenant to do a thing, when done no covenant lieth as to stand seized &c. Contrà when executory, as case is, as 5 H. 7. to enfeoff I. S. of D. taking a wife or granting a rent is a present disability. This is an act precedent to the act that is to be done by the covenant, and puts the statute in another plight, which he conceived a sufficient breach. Twisden, This lieth not properly in covenant of it self, being a bare defeasance, (and as the words are not only barely to deliver up, which may be, and the plaintiff hap of it again and so extend); but being to cause the same to be cancell'd is by this act broken presently, because transit in rem judicatam by the extent, and so cannot after be vacated; but per Curiam such special matter should have been pleaded by the party defendant in this action, conusee of the recognizance. Judgment nisi.

25.

Error.

Nota, That upon a non-prosecution of a writ of error, within three terms the clerk of the errors, without motion to the Court, may make out a rule for execution.

[119] 26. WHITCHER.

Slandre.

Matthew against *Craze.* Thou art a whoremaster, and hast had to do with the wife of I. S. not actionable? The principal case was, that the defendant said, the plaintiff dealt out his rent with the wife of I. S. and used her as his whore, as often as I. S. used her as his wife. Bear Serjeant moved in arrest of judgment that the words were not actionable, which the Court agreed.

27.

Variance Br.

In an action upon the Statute of Usury, Buggin moved in arrest of judgment, one contract was to have 7s. per mensem for 7l. &c. because in the declaration delivered to the defendant it was corrupti; but because the postea was corruptè non allocatur. 2. General pardon would not be allowed in arrest of judgment, unless it were pleaded before.

28. DOPSON.

Roll 34.

H. hath got his maid with child. Adjornatur.

29. BLUNKET AND HOLMES. *Oct.* 26.

Devise Br. 1. 2 Brant, 95 b. pl. 250. 2 Leonard 68, pl. 92.

Windham delivered his opinion against the plaintiff, making the single point on the construction of the words of the will, what estate is given to Thomas Wedgwood, who suffered the recovery. The devise was to T. for life, and if he died without issue of his body then living, then to Leonard and his heirs, which he conceived was but an estate for life with remainder in tail, and not a fee-simple, by reason the writings were deposited, that Thomas should not alien; which yet he conceived would not help, nor the contingent which is founded on the estate for life, however confounded with it; because the estates come several ways, and so are not presently, though afterwards they may be confounded. And this is the express words of the will. 2. To make a fee there must be a transmutation of the will, placing the latter words first, which were a strange metamorphase, for all the contingent is to the remainder, not to the estate for life, according to the natural placing of the words. 3. This construction avoids more inconveniences, and is more suitable to the rules of the common law, for otherwise an **[120]** executory devise (which by *Pell and Browns case* cannot be cut off) would be made, whereas it is rather a contingent remainder, against which the rules of law fight with, and will by no means support it; *Colshirst* against *Bajushan*; though it will rather create that than an executory estate, which cannot be created by feoffment, but only in favour of devises; and therefore executory devise, which clogs an estate against the rules of law, shall not be let in by a construction, by transposition and wresting, when the natural construction will make a contingent suitable to the rules of law.

2. When Thomas having an estate for life with such a contingent, suffers recovery, his estate for life and the contingent are confounded, and so the remainders. Lit. sect. 690, L. Co. 262, destroyed.

3. In the mean time, before the contingent there is a fee-simple in Thomas, which (*Seamors case*) being created by the same conveyance, doth not confound the estate for life, *Archers case*, being a stronger case than this is; and if the estate for life had been confounded by an ordinary surrender to an estranger that had had the fee, the estate for life had been utterly gone, and shall not be said in esse to maintain any contingent: and thus Thomas by the record is seised in fee and may well devise to his wife, and the heir of Leonard is barred.

Twisden of the same opinion for the defendant.

1. Supposing Thomas had been a meer stranger and not heir in this case, then he had a bare estate for life, the remainder in contingent, if he had said only to Thomas for life, and if he die without issue, then to Leonard (*Lony's case* 85) this is a contingent in remainder, *Baraston's case*. And he saying further, that being that if Thomas hath issue then he shall have in fee; this is a contingent, and yet cannot depend on another contingent, as in *Chedington's case*; but this is the same contingent operating several ways, as to A. if he pay C. and if he fail of payment to B. this had been a good contingent.

2. Thomas not being a stranger, but heir, he hath the fee simple in the mean time, though Lit. Co. 342, it might be argued that the fee were in abeyance; yet *Berks case* 6 Car. C. B. and *Nappers case* Hutt. and *Coneys case* are of another opinion; and this is by operation of law, and not by the construction of the will, 1 Cr. 158. 3 or 4 Car. *Braughton* against *Player* in the Chancery, devise to two sons equally **[121]** to be divided, share and share like, which was but an estate for life in the youngest son, because the eldest son had no more by the will, but only by operation of law; and

Archers case is the same in terminis with this, and though the reporter took no notice of this, it was because they looked only upon the will; not but that they did see the operation of law admitting, *Pell and Browns case* (which hath been always controverted) to be law, yet it reacheth not this case, being a devise to W. and his heirs, and if he die without issue then to another. And Hut. *Angel and the City of Londons case*, the Court would not meddle with the fee upon a fee, as it seemeth by that case to be; but here is an express devise for life. Mallet and Foster to the same intent. Most settlements of marriages are upon contingents, and therefore great care must be had of shaking them, M. 11 Jac. per Coke Ch. Justice, There are more perplexed constructions in wills than the estates of the will are worth to unfold, and therefore the nearest must be to the intent of the devisor, so as it consists with the rules of law; he agreed the cases and authorities above cited; because as contingents are not lightly to be shaken, so should they be suffered, they would introduce greater inconveniences of perpetuities. This case differs not from *Archers*, or *Nichols case*, Pl. Com. and whereas in *Lampets case* it is in ambiguo whether it fall or not, then it is in contingent till one dye without issue, and no act of the tenant for life can destroy or hinder it. Judgment for the defendant.

30. GOULD *against* DELA BAR. *Ante.*

Assumpsit.

In arrest of judgment (Wild recorder for the plaintiff) the mony was due only to Wood and not to the plaintiffs, and so no consideration; but (by him) it doth appear there is a duty due to the plaintiff on which the mony of Wood depends, and the defendant is to have benefit of this by withdrawing and forbearance of the suit. 2. It doth not appear that the mony attached was mony due to Wood for the fraight but as the mony of the plaintiff, and *Starkie* against *Miln*, Trin. 1651, Rot. 701, B. R. R. grandfather of the plaintiff and defendant delivered goods of the value of 20l. to the defendant in consideration whereof the defendant promised to pay to the plaintiff after the death of R. but by Just. Windham in this case it was. H. hath issue a son and a **[122]** daughter, and would give goods to the son and the mony to the daughter, and in consideration of the goods the son promiseth to pay to the daughter after the fathers decease; which Twisden agreed. H. promiseth to the father to make a joynture to the daughter, she shall have the action, for she is to have benefit of it, as 12 Jac. *Odeham* against *Badenham*. Windham & Curia very much doubted of this consideration, 24 Car. *Evans* against *Jamney;* and by Rolls, If A. sells goods to B. and B. in consideration thereof promiseth to pay to C. that shall be intended as attorney to A. and A. only may have the action, and C. shall never have it unless some special matter appear; and here it doth not appear that the defendant intended to promise to Swinnock. Twisden, Remember the case of *Evans and Jamney*, which in consideration A. hath bought a house of the defendant, the defendant promised to pay to the plaintiff, son of A.; here A. only can have the action. Otherwise in case of a marriage, agreement betwixt parents for their children, (*Sprot* against *Aggot*) the action may be brought by either; if this case had been in consideration the plaintiff would procure Swinnock to remove his attachment it had been good; but as this is 24 Car. Rot, 1010, *Dishborn* against *Donabys case*, is not to the purpose, and so he inclined, that this was no good promise, being not so much that Swinnock at the request of Gould would forbear. Adjornatur.

30. WEB *against* BETTENHAM.

Condition.

Bear Serjeant moved in arrest of judgment in an action upon the case, upon a promise to seal when he should be requested such instruments as should be tendred to him, and by him the tender must be of wax, ink and pens, and necessaries to seal. 2. It is to be according to such draughts as were betwixt them agreed; and its said, he did tender secundum tractationes, Angl. draughts prædict', but doth not set them

forth in hæc verba, which being after non assumpsit is not material, 16 Ed. 4, 9, was upon demurrer, which the Court agreed; but a verdict presumes that the deeds were shewed. And 3. The request was two days after the tender, which by the Court was well done, for he is not bound to seal them on the sudden; but the promise being not to convey land generally, that must be by counsel, and so the party must be requested; but when it is to be done according to such and such draughts, there all must be done by the party promising at his peril; and **[123]** also if it had been only that he tendered to the defendant, and requested him to seal at another day, that had not been good, unless he shews (as here) that he left the writings with the defendant to peruse; for else he might request when he had not the writings present. 4. Allen, There are sealing of writings and conveyance of title to a reversion to be done, and the breach is alledged that he hath not sealed, nor the reversion conveyed, and doth not say that he did not seal two instruments according to the draughts drawn, or none, but per Curiam other instruments then according to the draughts cannot be tendered, and the defendant should have shewed that the draughts were not according to the draughts, *Mansers case*, for after verdict all will be intended well.

31.

Bail.

Nota, That after the discharge of the Court a bail bond shall not be discharged, unless they pray'd it upon the declaration, by rendring the principal.

32. SMART *against* EDSAH. *Ante.*

Debt. Fitzh. 7. Scire facias.

Winnington for the plaintiff in scire facias upon a judgment against two after the death of one against the survivor, not naming the heir of him that is dead. And by the common law upon such judgment in debt, 3 Co. 14, *Harberts case*, the charge should survive: and the Statute of Westm. 2, that giveth the elegit tolls not the privilege of the party at common law, because it was made for the plaintiffs benefit: and 29 Ass. 37, Age Br. 36 giveth no reason of it; but 29 Ed. 3, 39 per Thorp the parol shall demur, because the lands are all equally lyable, Error, Br. 191. So that that judgment only considered, the land (or real) not the personal lien: in the point of this case are 1 Ed. 3, 13, pl. 41. 3 Ed. 3, 11, pl. 31, and the difference is betwixt the lien real, which must be equal, and personal, which may be of any of them, Com. 440. *Davies* against *Peepes*, 11 H. 7, 12 b. Windham agreed to the authorities cited, and *Langfords case* was upon the real lien; which Twisden also agreed, that a warranty real will not survive personal will, 1 Inst. 469, and so of such kind of charges F. N. B. 166, upon execution sued in Chancery before the day, or for more than the judgment, 44 Ed. 3, 10. 10 Ed. 3, 20 b. pl. 18, so when no condition is broken: but this cannot be done after execution returned without audita querela, 17 Ed. 3, 3 a. b. pl. 10 & 11. H. shall not be put to an audita querela, but upon shewing the **[124]** indentures or judgment in the Chancery he shall have a supersedeas of execution. Wild recorder for the defendant. Upon a scire facias the award must be to have execution as the law will, viz. against either in the personalty, or against all in the realty, and so shall charge the heir not named, and put himself to two writs, which he may do by one, which the Court denyed, and that by this personal lien he hath waved the benefit against the heir by an elegit, but it is in his election which he will have, the heir having assets by discent (by the same writ) for the same writ must be executed against all in one manner, 37 H. 4, 30. 4 Ed. 4, 39. Judgment for the plaintiff.

33. ——— *against* BOWDEN.

Tryals.

Keeling cited *Williams case*, that a new tryal for perjury hath been after conviction, but per Curiam that was by consent, but upon an acquittal which was moved,

Windham conceived none was ever had but by consent which the Court agreed, though this was only by defect of a copy of a bill in Chancery, wherein the false oath was not in any of the records, and a verdict against the King only, because he could not be nonsuited, nor can he have an action upon the case.

34.

Bail.

Nota. By the course of the Court upon bonds of vast sums to perform articles in debt for non-performance may be common bail, or according to the value of the breach assigned at the discretion of the Judges.

35. ELLIS *against* YARNLY. Sinderf. 60, pl. 19.

Trover. Stiles 31, pl. 74.

Trover and conversion pro duobos pullis, which Allen moved in arrest of judgment, was not sufficient without an Anglicè, which the Court agreed. *Post.*

36. DANIEL *against* TURPIN. *Oct.* 28.

SIMON AND JUDE.

Slander.

Thou art a forsworn fellow, and we (husband and wife) will prove thee one, and thou canst have no benefit of the law. Judgment arrested, because the words were not actionable, especially being alledged to be spoken by baron and fem.

[125] 37. BEESLYE *against* WALKER, 1661, Rol. 341.

Issues. 3 Cr. 844, pl. 30. 3 Cr. 854, pl. 16.

In false imprisonment, Mallet moved in arrest of judgment after verdict, 8 Co. 2, Leonard. 41, pl. 108, *Crogates ca.* 67, because there was justification by arrest, by vertue of a warrant of the sheriff upon a latitat; the plaintiff replies, de injuria sua propria; upon which issue was taken, which though it had been naught upon demurrer, (being matter of record) is not so per Curiam after verdict, as *Osborns ca.* cited per Twisden. Adjornatur, 22 Car.

38. WELDEN *against* JOHNSON. Siderf. 48, pl. 8.

Slander.

Thou art a knave, and a cheating knave, and I will prove you a cheating knave; without any special colloquium or damage, moved by Serjeant Raunsford in arrest of judgment, and ruled not actionable.

39. THE KING *against* LEPINGTON, &c.

Imprisonment.

Whereas I have been informed by the commissioners of excise, that the defendants subcommissioners lately have sums of money in their hands, the warrant was to go to their houses, or any where else, to attach them, and bring them before the Treasurer to answer, which Keeling Serjeant prayed might be filed without further mending, by three days, which the Court granted being only for appearance.

40. DELABAR *against* YARDLY. In Error, Br. 90.

2 Leond. 4, pl. 4. 2 Cr. 213, pl. 7. 2 Leond. 177, pl. 217. 16 & 17 Car. 2, cap. 8. 2 Cr. 76, pl. 7, pleadr. 580.

Baldwin, after a writ of error, prayed an amendment that the party and his pledges should be in mercy, and by him it is frequent that the sum of the judgment hath been amended, which by Windham is only in a toto se attingent mistaken, but a misericordia for a capiatur can never be amended, but predict. Tho. for Will. hath, and so (shall recover) for (do recover.) But per Curiam, that was upon the translation of the Latin recuperet into English, upon the Act heretofore made, but they conceived that this is part of the judgment, and not surplusage that the pledges be amended. 10 Jac. *Ayms case.* *Post.*

[126] 41. PEG *against* WATERS. Siderf. 49, pl. 10.

Nosme.

Debt upon a bond for performance of covenants, among which was one that the defendant was seized of a good estate in fee, upon which issue is taken, and verdict, after which Newdigate moved in arrest, that the defendants plea was predict. Edward did covenant that R. was seised, whereas the defendants name was Robert, that did covenant: which misrecital per Curiam is not material, because here is a good affirmative, and the bond, if this be misrecited, is single. Contrà, if it had been in an action of covenant, or when the indentures by prayer of the defendant is intred in hæc verba, for here by Windham it appears that the plaintiff hath good title.

42. LANES *against* WHITMARSH. Siderf. 49, pl. 14.

Intendment.

Jones moved in arrest of judgment, in action upon 2 Ed. 6, for tythes, the plaintiff sheweth he was farmer of part of the tythes, which implyeth some other is interessed and so they are tenants in common and must joyn; upon nil debet, it is against the defendant, when a tenant in common doth bring an action against a stranger, 1. Where one brings it against the other for that is in bar, and per Curiam after verdict it shall not be intended that the moityes were in common, in this case the moityes will discend to the heir, which per Twisden cannot joyn with the survivor. 2. The breach was, that the party did not set out the tenth to me, which is surplusage per Curiam. Foster, If two parceners be of a parsonage, when one brings an action for the tythes of a moiety upon nil debet found for the plaintiff, she shall have judgment though of her own shewing (as here) she hath but a moiety, and per Windham though parceners and tenants in common must joyn, yet when a parish is divided there is moieties, yet each shall have the tenth; though generally upon medietatem found it shall be intended in common. And by Twisden, If two tenants in common of a rectory and the one be outlawed the other must declare of his moiety though this action be but for a kind of contempt. 3. The plaintiff hath entituled himself only to a twentieth sheaf dividedly, and yet assigns a breach in not setting forth a tenth, which by Jones is not sufficient, but it was fine extrapositione decimarum; and by Windham a tyth may be of a tenth part as **[127]** well as of a tenth, but the postea was for not setting forth both the twentieth and the tenth. Adjornatur.

43. THE KING *against* READ. Siderf. 49, pl. 12.

Tryals. Nor shall the King have new tryal where the party is acquit.

In an information of perjury and conviction found Twisden doubted whether the party can have a new tryal, Rege inconsulto, and the Court agree they cannot give it in an action of debt, or upon the statute, which is private betwixt the parties. *Post.*

44. WALKER *against* GIBSON. *Ante.*

Monstrans.

In debt upon a bond upon oyer of the condition the defendant pleads covenants performed, and doth not set forth the indenture, which per Curiam upon demurrer he ought, and if he have it not, he may move the Court, and have a copy thereof; though per Twisden it hath been vexata quæstio heretofore who should set it forth.

45. ——— *against* WOOD.

Slander.

Thou art a strumpet and a drunkard, and a whore, and thou dost usually steal a pound of wool at a time beside yarn, from J. S. Adjudged actionable.

46. PAVIE *against* HALL.

Varians. In Bar. Fitzh. 9. 3 Cr. 56, pl. 5. Assize Br. 84. Dyer. Resceit is said by the hands of A. and B. it is not good if by A. only. 10 Ed. 4, 5, pl. 10. Fine by two is the fine of one. 2 Co. 74 b.

In debt upon a bond for performance of covenants, J. and A. were named in the bond, but the indentures as pleaded were only betwixt J. of the one part and the defendant on the other; but were re vera betwixt J. and A. on the one part, and the defendant on the other, and on (2 Cr. 38, pl. 18). Warrant of attorney for satisfaction of judgment had against A. which was against A. and B. or by A. which was by A. and B. is good, but not contrary. Indenture made by A. and B. is not good, as deed of A. sole 29 Ed. 3, 23, pl. 13, by Belknap feoffment of 4 is not maintenance of one by 3 nor contrà. So of cessavit of 6 which is but of 3 acres, 10 Ed. 4, 2, pl. 2, per Littleton. Upon demurrer by the plaintiff, Jones moved that it was a naughty plea.

[128] 47. MASKALT *against* CHIRKALL.

Slander.

Upon error of a judgment in the Common Pleas, saying of a widow at one time, Your daughter is a whore, and a pocky arsed whore, adjudged actionable; and so to say H. is a whore, and hath wholes in her legs, I may turn my fingers in them. And so when pocky is coupled with such a word, that doth shew what the intent is. Judgment affirmed.

48. RAMSEY *against* ATKINSON.

Assumpsit.

In error to reverse a judgment in the Marshals Court, neither of both being of the houshold, which yet was not seen by the parties, but the general error assigned, by which advantage was waived. 2. None of those that were named Judges did then sit in Court, when the judgment was given; this was an action upon the case upon assumpsit, that in consideration the plaintiff hath bestowed his labour and pains within the jurisdiction, about a house in Holborn, which doth not appear to be within the jurisdiction: and by Twisden in a wager to draw wood from such a place within, to such a place without the jurisdiction, the action cannot be brought within the Court; no more when any part of the thing is out of that jurisdiction, but by Wild that case differs, for without performance no action can lye, but here the action is only for the labour and pains, and is not like where the whole cause of action was assigned, out of the jurisdiction of Bristow ad damnum of the plaintiff by losing his trade in B. that is naught. Adjornatur.

49. BROAD *against* HANCOCK. Siderf. 50, pl. 15.

P. 1661. Rol. 250. Slander.

The plaintiff seised of a rectory, and having exercised the cure there, the defendant swore of him, I saw the plaintiff divers times in the Kings army and amongst them, per quod he left his living, the defendant pleads the Act of Indemnity, and that he was not guilty within two years, which being in a special action upon the case is not the just time of the statute, but by Wild Recorder for the defendant, though the plea be not good, the declaration is good, *Ayers* against *Sedgwick*, 2 Cr. 901. For the action will not lye till the defendant be convicted, *Andrews* against *Cheeke* B. R. accordingly adjudged for turning the river of Exon, P. 1657, *and Danport and Simsons case*, 18 Eliz. and other-[129]-wayes none would come in the Crown side, but try all by private actions: but by Williams for the plaintiff, there is no other remedy in this case, as by indictment, 1 Cr. 355. Weld. Presentment per Curiam is in nature of an indictment and legal proceeding, 1 Cr. 280, and by Twisden, when the Court before whom such suit was, had no authority, this action will lye; but here the defendant hath confessed they had an authority, it was agreed that an action upon the case will not lye for false evidence till conviction. And by Twisden 18 Jac. upon a presentment or indictment in Ecclesiastical Court, ex officio, no such action upon the case will lye: but by Twisden perjury will lye upon false oath before any that hath jurisdiction. Adjornatur.

50.

Siderf. 52, pl. 17. Wales.

Williams Senior shewed cause against a prohibition to the sessions at Breckwork to the Court of Equity, which by Jones for the plaintiff have no such jurisdiction as North-Wales hath. 2. It was upon a term extinguished by accepting another, by virtue whereof they awarded a sequestration, *Penelopie Owens case*, 27 H. 8, 26, which they could not do, but only bind the person by attachment; the Court in Northwales is time out of mind, and the statute is, that justice shall be administred in South-wales as in Northwales, by colour whereof the parties moved *Bagnalls case*, 3 Car, to hear them by petition; but it was directed that issue or demurrer be made to the suggestion. Adjornatur.

51. BURTON *against* GUNNEL.

Error Br. 5. 3 H. 4, 4, pl. 16. Com. 393 b.

Error of a judgment in false imprisonment in C. B. trespass and assault against two, one is found guilty of all but the imprisonment, and damages 100l. and the other is found guilty of the imprisonment only, and 30l. found against all, ac quod dampna recuperet, which Jones conceived error, being pro misis & custagiis against them all, which by the course of C. B. is well enough, damna in the C. B. including the costs: but by Twisden, damna pro custagiis, which though not warranted by presidents, is good; and the Court conceived it well. 2. That the writ was directed to B. Ch. Justice to remove a record, coram Foster & sociis suis, and the retorn is by Foster and Hyde only without socio, which yet would not have been good, but the Judges should have been particularly named: a certiorare to re-[130]-move a record before J. Bradshaw Justice, *ante*. And he certifies coram J. B. Chief Justice, and the party took out a new writ.

52. SHEPHERD *against* TOMKINS. *October* 29.

Count Br. 3 Cr. 57, pl. 6. 1 Brant. 10, pl. 22. 3 Cr. 507, pl. 32. Stiles 353, pl. 753. Godbolt 251, pl. 347. Com. 127 b.

In trespass its entred quod cum prædict. &c. which by Allen was moved in arrest of judgment, and per Curiam it was staid. 1 Brant. 208 b. pl. 474.

53. STILES *against* TRIST.

Process. Arbiterment Br. 24.

Nota, That when the Court refers the cause by rule to the arbitrement of J. S. though it be void, yet the Court will force the parties to submit to it, till it be avoided by plea.

54. CAVENHURST *against* CAVENHURST.

Covenant. 1 Brownl 21, pl. 90. Godbolt 13, pl. 18. Moor 875, pl. 1223. Noy 15. Br. 6. 3 Cr. 77. Hetly 56. (Sen. 54.) 1 Brownl. 57, pl. 301.

In debt upon a bond for performance of covenants, that the grantee of part of a term shall quietly enjoy, the grantor dieth, and this action was brought against the executor. Bigland moved in arrest of judgment, that this grant being of so much of the term as shall be unexpired at his death, which (as *Rector of Chedingtons case*, and *Gravenors case*, Dy.) is utterly void, and so the covenants which depend thereon are also void, as Yelvert. 18, *Suffrain and Scarrads case*, and so of a warranty annexed to a void feoffment: and here both the bond and covenants waited on the interest, as obligation Br. 6. Jones for the plaintiff agreed the assignment of the term void, but this is a covenant by itself, and that breach assigned in entring on the grantee by the executor of the grantor: and the difference by Windham is where a deed is void in the fabrick, there the covenants on it are void, as when a freehold is to commence in futuro, and where there is only want of interest in the party grantor, but that deed is good, which the Court agreed. And by Twisden a warranty must have an estate, contrà of a covenant that may be alone. 2. The condition of the bond was to keep and perform all covenants generally, which being void, the bond is single, by Jones and by Foster, If there had been no such indenture, yet the bond had been good single, & quacunque via data, the verdict being against the executor, whe-**[131]**-ther the covenants be good or void, the plaintiff having shewed title, he shall have judgment, Owen 110. Judgment, nisi, 367, pl. 371.

55.

Suggestion.

Declaration of a long time, as 20 years since, and not filed, cannot be entred without motion to the Court.

56.

3 Cr. 754, pl. 16.

Lindly moved to quash the indictment for wanting ad tunc existens liberum tenementum, being only that he entred super possessionem, &c. also per Curiam it ought to have alledged a forcible entry, and not only a forcible detainer.

57. DR. WITHRINGTONS CASE. *Ante.*

1 Brant. 23, pl. 67.

Allen against the retorn that its insufficient, 1. In that its said the master and fellows became bound to W. in a bond not to renew a lease, and that afterwards at the defendants request, asserting he had obtained a release of the obligee, they did renew, and the defendant was present, whereas either he had not obtained any, or refused to deliver it upon request, by reason whereof the master and scholars improbe illaqueati fuerunt, per Finch, Angl. trapand, but the Court had ordered the word to be amended; but this is no certain allegation, and if it were, it was but that he said so, which is no cause to turn him out, unless he some ways convert it to his own use, nor is the colledge really prejudiced, but only in particular, and it was in the time of a predecessor master. 2. Its said that H. gave a pension to the colledge for a

preacher, and that Dr. W. was appointed to that office, but that he did not preach any of the sermons, but that he fraudulently did make default, and agreed with the heir to take the pension in his own name, which was (1645) when the doctor that had it was sequestred, and allowed it by Dr. W. the thing admitted is not any offence to the colledge, because they had no inheritance in it, nor can default of preaching be any cause to lose his office; and it is only said legitimè autorisatus, and do not shew how, and the pension was to cease by not preaching, and so could not be purchased. 3. Its said he exacted of one M. for one quarter more than the commons did amount to, and divers sums of money of others, procuring false bills to be made by the **[132]** manciple, which begins 1653, and its not said that he knew that they were false; and exacting is but a demand, unless it appear it be paid, for these causes he was expelled 1661. And 4. its said, being herewith charged, he went away, and being lawfully summoned and required to answer, refused and run away from the examination of the master and colledge, and affirmed he would not submit, but obstinately and finally persevered; wherefore they removed him, but the statute which gives this liberty, if for the honour or profit of the colledge, doth yet suppose they must shew certainly how it is to the dishonour of the colledge. As to the appeal which is only licebit ei appellare, and doth not conclude him from any other way, another statute appoints other persons to expound doubts, but not to judge of offences; for they have no authority to restore, and also that cause relates not to all their causes, but only to such crimes, inter majora that are greivous, but in this crime the statute is express, and the clause of appeal relateth not to this. Maynard the Kings Serjeant for the colledge, The return is said ad damnum as well as periculum: but he insisted on the last exception, that he made default upon the summons and the appeal, and that such writs have not been heretofore brought; therefore they lye not as Litt. upon the Stat. of Disparagement, & many things may be fit to be punished in universities, which are not fit to be examined here, and the consequence hereof would make this Court visitors of all colledges. 43 El. gives away for correction of charitable uses, and after appeal to the chancellor, there is no other remedy; so here the appeal of colledges being naturally to the Ordinary, and better there should be no remedy for such injuries (as denyal of legacies, or for calling women whores, &c.) then let in greater inconveniences which would necessarily follow; Bourman of the Temple was denyed a writ to be restored to an inn of Court, there being none to whom such writ can be directed therein, being a voluntary society; and so he conceived here. Finch to the same intent conceived, that peradventure if they could have no other remedy on appeal they might come hither; but as Dr. James, Hub. 17, not per saltum come hither first, but must observe all the degrees of appeal, *Herns case*, which was the first mandamus was granted, was only because there was a failer of justice, the arch-bishop being their visitor, but here it is not so, and there Glyn granted it only because he found it. 2. The writ is misrecited. Baldwin to the same intent. There is a local visitor, and therefore this Court cannot have conusans, and the licebit appellare is that he is not forced to appeal, but if he doth he must appeal to such persons as **[133]** appointed by the statutes, though at the darrein resort, they might have come hither, P. 1653, *Jones* against *Wilmot*, error to reverse a judgment upon 2 Ed. 6, which by 34 H. 8 is directed to be brought in the marches, and by Roles shall not be brought here first. 5 Ed. 6. Error F. 89, per saltum: but by Foster and Witherington for the Dr. the Court hath admitted the writ already. Windham conceived the pinch of the case to be, whither any appeal lyeth hither at all, per saltum or gradus where there are local visitors or eleemosinary gifts, to a spiritual end, (Linwood de Relig. Dom. 660, Episcopus) and he conceived licebit, as Baldwin said, and in this case he might have appealed (if there had been local visitor) to the Ordinary, and 8 Assize and 8 Ed. 3 are both against the defendant being upon a deprivation, and thus *Coneys case* in Dyer, an assize doubtless will lye for the master of a colledge, but not upon a deprivation, *Hunts case*, he being deprived could, not be here restored, (7 Co. 43, *Kens case*) this Court being not able to judge of the particular laws, otherways then by the law of the land, he conceived the writ grantable, because it is not certain what it is before the return; and Twisden to the same intent, 15 Jac. *Dr. Lewis case*, he was chosen Master of Oriel by one number, B. by another, L. appealed to the Bishop of L. being local visitor, and was confirmed, the archbishop to whom B. appealed con-

firmed him, and L. appealed to the King in Chancery, wherein it was resolved that the appeals to the archbishop and the King were both void; and the local visitors confirmation of Dr. Lewis good. Adjornatur.

59. RAWLINS *against* MARSH.

Tryall. Stiles 466, pl. 1046.

In trover and conversion for all the goods in a house which the plaintiff possessed, excessive damages being given: Finch moved for a new tryal, paying full costs and giving a judgment for security, though he hath remedy by attaint, and it was granted (nisi) without certificate of the Judge before whom the cause was tryed.

[134] 60. FITZ. *against* SMALBROOK.

Livery.

In ejectment S. had a sister who had issue Ezech. Susan had a son, Ezech. hath issue Eliz. who hath issue the lessor of the plaintiff, Susan dyed without issue, the defendant claimed under the son of Susan. In evidence to a jury, it was observed, 1. The title being waived as heir, the plaintiff claimed by a lease for years from the two sisters and their husbands; which being delivered upon part of the lands, whereof there were several tenants for years, was allowed to be good for the whole. Contrà If there had been any tenants for life of any parts. 2. A witness having been tenant of the lands, and having sold his lands a week before the tryal, having been summoned as tenant in possession, which subjects him per Curiam to an action of trespass, but he had an under lessee in possession, and so only subject to an action upon the case, but because he claimed peramount both plaintiff and defendant, he was allowed. 3. The witness was convicted of perjury, which by the death of the protector was kept from judgment, and therefore no exception against his testimony, which made the counsel of the plaintiff offer it against his credit after his testimony given. 4. This verdict being null'd it cannot now be given in evidence, either to disable or disparage his reputation, for it is but an information and must be here proved de novo by witnesses: but by Allen had the verdict been defective in point of the drawing, yet it might have been given in evidence, but per Curiam all these proceedings are coram non Judice, and only confirmed by the acts of judicial proceedings as to acts past, not to have any validity in futuro, and by the same reason, such verdict may be given in evidence, the acquittal also might; and so the Court should ravel into another cause, which they would not. 5. The deed under which the defendant claims was with power of revocation, but no counterpart sealed, which (though at first doubted) was conceived good enough.

61. MORGAN *against* WELLS. *October* 31.

Verdict.

In evidence to a jury it was observed that the action being ejectment of a mannor, and certain quantity of acres, to part whereof the plaintiff had no title, wherefore by consent the verdict was of the mannor, excepting that part, and not generally of the mannor, and that part only by rule of Court, not to be executed.

[135] 62. TRAVIS *against* MEERS. Siderf. 57. pl. 25.

Proof. In Condition Br. 151. Stiles 304, pl. 661. 2 Leonard 215, pl. 273.

Action upon the case upon a promise; Allen moved in arrest of judgment, in consideration the plaintiff could make it appear that her husband was indebted to the plaintiff, she would pay, &c. The plaintiff said he was always ready to make it appear, which is not sufficient, unless he were indebted, nor then, unless she had been

executor to her husband. *Hume* against *Hinton* cited by Rolls, Tr. 1646, Rot. (1651) in consideration the plaintiff would stay till Michaelmas, H. promised to pay, which was adjudged good, though he was neither executor, or related to him, *Smith* against *Jones*, Tr. 8 Jac. Rot. 182. H. died in debt to the plaintiff, whose goods came to the testator's wife, which marrying to the defendant, in consideration thereof, and that the plaintiff would forbear, he promised to pay, and adjudged sufficient; contrà when the promise is to forbear the person, then he must be charged as executor. Wild for the plaintiff, The consideration is grounded upon the making appear, which is trouble and pains: and by Wyndham to shew a bond is a good consideration, and the consideration of proof is sufficient, *Gold* against *Death*, Hub. which the Court agreed, and that consideration to bring an action, and prove the husband was indebted, was good; and so they conceived that paratus est manifestare, is good enough after verdict upon non-assumpsit, and a special averment of manifestation would not have been sufficient. Adjornatur.

63. Denzel Hollis *against* Edsah.

Count Br.

Count upon a demise at will, Jan. 12 Car. and brings debt for half a years rent ending at Lady-Day 13 Car. which was within three months, which the Court overruled naught.

64. The Case of Clements Inn.

Jurisdiction.

The master and society moved for restitution to a chamber upon a forcible entry, which was granted, but the Court would not meddle with the cause, but ordered the young men to submit, and appeal to their inn of Court, and thence to the Chief Justice, thence to the Lord Chancellor, and they allowed a society may seize a chamber for non-residence, or want of commons of any man, and would **[136]** have laid one or two of the assistants by the heels till restitution and conformity, but would not determine the right of any chamber there; but unless possession were delivered this day, they ordered a tipstaff to do it.

65. The King *against* Lepington. *Ante.*

Execution.

The Counsel of the King desired that L. might be charged in execution, which the Court denied, because it is an indirect way, as to arrest till they have a warrant; and though the warrant was only for appearance, yet the Court would neither file the retorn, nor bail the person, until the Kings Counsel, (absent upon other occasions) were heard.

66. Slebb *against* Smith.

Slander.

Serjeant Merefield moved in arrest of judgment, Thou hast stoln our bees, and they are hidden under the old womans hempstalls, thou art a thief: upon justification it was found against the defendant, and on 43 Ed. 3, Property Br. 37, except that bees are feræ naturæ, and so no felony, & innuendo a stock of bees will not help, 4 Co. *Barhams case*, and these singly is not sufficient, Hub. 77, 331, *Clerke* against *Gilbert*, till H. 8, his time, as Hub. and Winch said in *Lanes case* in the C. B. which he observed; but now the law is otherways, but is here qualified with the precedent matter, and the justification alters not the case if the count be insufficient. 18 Jac. Rot. 1755. K. is a false forsworn knave, and took a false oath against me at a commission at Edgham, after justification ruled naught; and there it was resolved that H. may be forsworn before commissioners of the high commission.

Mr. Stroud, senior, admitting the cases before, yet 1 Cr. 52, there they were (2 Cr. 39. 3 Jac. 2 Cr. 114, 231) supposed to be fixed to the freehold, and have been also adjudged since contrary, but bees are not so; and by Windham the constant difference hath been where thief is coupled with such words, and where not; as you stole turnips is not actionable: but you are a thief, and have stoln turnips, is actionable, and so the Court conceived here. Twisden cited a case of a forsworn fellow, justified by an oath at Guildhall in a tryal ruled actionable by the whole Court, and so Rolls in his time, though Bacon to the contrary, with whom Foster here agreed; and Windham conceived, that if it were impossible for the former words to support the latter, the words are not actionable, **[137]** but contrà where they may support such latter words. Twisden, Thou art a whore, and hast had a bastard, and that will appear by a chain and a pair of cive, adjudged actionable. And so here adjudged for the plaintiff.

67.

Forgery.

An action upon the case for counterfeiting a will, after two trials in ejectment affirming it, *Dr. Ates case* by Twisden was the first of this kind; and Jones moved to change the venue, which was granted.

68. THE KING *against* TRINITY HOUSE. *November* 4. Siderf. 54, pl. 21.

Amendment.

After demurrer by the King to a plea to a quo warranto, the party before he hath joyned in demurrer, may by the leave of the Court mend his plea, because all is in paper till then.

69. THE KING *against* ANGUISH.

Parliament.

Baldwin moved to quash an indictment of perjury upon the Act of Poor Prisoners, that the defendant had taken a false oath before William Steel Justice of Peace; also the title of the Act was English, and the indictment is Actus titulatus, Actus, &c. and the Court agreed that a Latin title may be of an English Act, if it be proper Latin, but contrary where the Latin is not according to the English; and this was upon a plea, and removal of the presentment before trial, wherefore the Court would not quash it.

70. BARRINGTON *against* VENABLES.

Priviledge.

H. after imparlance, pleaded that he was one of the Kings Privy Chamber, and by the law and custom of the realm, ought not to be sued in any Court of England without his consent, but only by licence of the Lord Chamberlain first had, which was intended to the jurisdiction of the Court; but the Court conceived it without colour naught, and enquired the counsel that set his hand to the plea, to have punished him. 2. The plea was venit and defendit vim & injuriam, and doth not conclude, demanding judgment, si Curia cognoscere velit, which is also naught.

[138] 71. THE KING *against* READ. *Ante.*

Indictment. Action upon the case for false prosecution, 364, pl. 61.

Allen moved in arrest of judgment in an indictment of perjury, because by any thing that appears, it is only a recordatur, having no express averment, whereas there should be besides the recordatur in hæc verba, some distinction of the matter of fact from the recital by record. Wild for the King, The recordatur refers to the whole

matter of the record; and it is said & quod prædict. Defendens being testis productus did swear falsly thus, which is well without shewing the particular by any ulterius dat informari of other matter of fact: but the Court inclined that it was a plain fault, and being testis product' doth refer to the recordatur. Adjornatur.

72. STILES *against* TRIST. *Ante.* Siderf. 54.

Attachment. Arbiterment. Br. 24.

Finch moved for an attachment upon breach of a rule of Court to submit to an award, which Wild for the plaintiff said was primæ impressionis, and that the award it self was void, and so no submission could be forced, it was that the defendant should have goods, paying so much money, which by Wild is conditional, and no remedy for the plaintiff to have the money; and by Twisden upon a rule to give bond to submit to award no attachment lyeth, which Finch agreed; but here the rule of Court is the only security the parties have for performance of the award: but by Windham no attachmant lyeth upon this rule, but an action of debt may be brought for the money, and then the validity of the award will come in question, and he conceived the payment voluntary, and not to be compelled, and per Curiam very few references have had any effect: and by Wild, When the rule of the Court is for doing a particular act, an attachment lieth; but contra where it is generally to submit to an award: and by Twisden, The making such references part of the rule of Court is not above seven years old; and he remembred a case wherein he was counsel where attachment was denied, and so it was here per Curiam.

[139] 73. SLANY *against* EGERTON. *November* 5.

Howel moved in arrest of judgment in trespass, for cutting up duo testa, Angl. Floodgates in S. whereby the water could not come to his mill in Chester, to his damage, which being intire, and part arising in one, and part in another county, an assise of nusance may, but an action of trespass upon the case cannot be brought in Staffordshire, 7 H. 4. But the Court conceived according in *Bulwers case*, that it is well brought, and it cannot be forced to be in the County Palatine of Chester.

74. BURTON *against* LASSEL. *November* 6.

Descent Br.

In evidence to a jury, by Twisden & Curiam, the possession of lessee for years is not the possession of cestuy in reversion, unless he hath a lawful title Br. Leases, that the entry of lessee for years should help a discent where the lessor had no title, is an exploded opinion; and without an actual entry of cestuy in reversion upon the possession no discent can be cast: that nothing can be parcel now that was not so in the time of H. 8, and *Embers case*, L. Entr. for betwixt the King and his grantee proof must be made thereof by record, and here cannot be betwixt other parties by other common reputation, that the land was parcel of the Priory of M.

75.

Charge.

This day to the grand jury of Middlesex, being three full juries of 24, Mallet first delivered some articles of charge, 1. Of treason. 2. Of the establishment of the Church, so far as it hath any influence on the Government. 3. Of murders, felonies as well on the land as the Thames, as also all other notable crimes, sacriledge, or burglaries of prisons, and that they be kept in due order. 4. All houses of resort,

that they keep reasonable times and order. 5. Extortions of officers, especially in publick places, and whatever other crimes they themselves know of. 2. Twisden in confirmation, that they enquire of words, writings, &c. and secure the head, without which the members cannot be well. 2. Innkeepers exacting too great rates, which they **[140]** knowing, must present without any information: and by Windham this was the first article in eyre, and in this Court; and the Court must see it remedied, as also the high-ways, and that the waggons of too great draughts are nusanses, and ought to be presented upon the evidence barely of finding a great company of horses in their custody loose, or riding on them, 21 Jac. It is holden that this Court is out of that statute, and so they come off for fines. The jury were desirous to have presented travellers or watermen, or others working on the Sunday; but by Windham that offence is spiritual, and by all, if they present not truly things they know, the Court may impanel another jury to enquire of their defaults.

76. DACY *against* LINCH. Mich. 13 Car. 2, Rot. 1875.

Slandre. Siderf. 52, pl. 18.

D. is a witch, and deserved better to be hanged than W. A. (who was hanged for a witch) to which the defendant pleaded the Statute of Limitations, to which the plaintiff replyed, that he purchased a latitat, 12 Febr. before the filing that bill, to the intent to declare in this action, the defendant rejoyns that not guilty before the 12 of January before that term, Hil. 16 Car. 2, when the bill was exhibited after verdict. Bear Serjeant moved in arrest of judgment in an action upon the case, that these words are not actionable, M. 15 Jac. Rot. 635, *Stone* against *Roberts*, Thou art a witch and an enchaunter, and hast bewitched Strongs children: adjudged not actionable, M. 8 Car. *George* against *Harvy* 1 Cr. 205, the like unless some person be thereby hurt, and *Harris* against *Adams*, 9 Jac. C. B. that H. deserved to be hanged, it is but a collection from the former words, and will not make them actionable. 2. The replication is not good, and so no issue, this Court proceeding not upon any latitat, and also it is no original; but Curia contra, and that this is the constant course of pleading; and Twisden 10 Ed. 4, 7, said that when a latitat was once purchased, it may be continued by the attorney in his chamber many years before the bill, which being a principle, is not to be disputed for, contrary to 14 Ed. 4, men may in these actions alter the day of their declarations in their replications. But for the words, Twisden and Curia, the words witch without special act alledged to be done is not actionable, and here Foster conceived the words actionable, as well as H. is a thief, and a strong thief, and as very a thief as any in Newgate, is actionable, with averment that there is a thief in Newgate, and by Wind. this is a stronger case, the defendant himself having said he was a witch, and deser-**[141]**-ved to be hanged as well as A. which sheweth it to be spoken in the worst sense, which the rest agreed, the scandal being as great as if A. had been hanged, as H. hath kild I. S. is actionable, unless it appear in the declaration that he is alive, although he be revera alive.

77. HALE *against* SLINGSBY. *November* 7. In Error Br. 117.

H. after verdict and also after the day in B. and before judgment, dyeth without any rules or postea brought in (and here the tryal being in London was ruled the same, and that) judgment may be entred; but if the death were before the day in B. it is error in fact.

78. DAY *against* GILFORD.

48 Ed. 3, 19.

The Court conceived, that in a scire facias no party against whom judgment is given can falsifie: contrà of a stranger, Co. but whether he may falsifie in another action, as ejectment here; and Wind. conceived that he may by action of a higher

nature, as of assize in entry upon disseisin; but this ejectment is an inferiour action. Foster cited *Sir William Bowyers case*, that here the heir should have pleaded at the scire facias, riens per discent; but now scire feci being returned, it is too late; Twisden doubted whither ever he can falsifie in any other action, as this case is of the recovery only of a term. Judgment for the plaintiff.

79. STEPHENS *against* BRETHERIDGE.

In Discontinue Br. 38. Stiles 192, pl. 438.

In ejectment special verdict found, Sir F. W. seised in fee, in consideration of a marriage with E. Ayre, covenants to stand seised to himself for life, remainder to her for life, remainder to the heirs males begotten on her, remainder to Sir Fr. W. the son, by a former wife in tail, remainder to the heirs of the father, then they had issue Sarah, who married the defendant, and then they levy a fine with warranty to the use of S. and then the last wife, and Sir Fr. W. the father dyeth without issue male by her, whereby the warranty descended. Allen for the plaintiff. The question is whether this fine be a discontinuance or a bar to Sir Fr. the son by the former wife, wherein he considered what estate the father had by this covenant, whether an estate tail executed **[142]** in him and his wife, for then the fine will be a discontinuance, but if not (as he conceived) then it cannot operate. And he said that the estates are distinct and several as limited, notwithstanding that it be objected, that the estates tail cover the estates for life, and so the husband and wife are seised of one consolidate estate tail: for 1. In this case all the estates are by one conveyance. And *Wescots case* makes the same difference betwixt one and several, 39 H. 6, 2 b. whence he concluded, that if lands be given to A. for life, remainder to A. and B. this remainder is distinct, and mergeth not the estate for life of A. The like reason being for the case at Bar: so an estate granted to the wife for life, remainder to the husband and wife in fee, makes them as distinct estates as if the remainder were limited to a stranger, and the case at Bar is but a degree farther, to the husband for life, remainder to the wife for life, remainder to the heirs males which he shall beget on her body, &c. are all distinct estates. 2. If there be an estate limited, equally limited to two, there if the remainder be adequate to it, as to two, remainder to their heirs, these have no remainder, *Lewis Bowles case*, but one consolid estate: but where there is a particular estate for life, and then a remainder limited not answerable to it, there the estates are distinct; as estates to two, remainder to three or to two, remainder to them, remainder to a stranger; or to A. for life, remainder to B. for life, remainder to the heirs males of their bodies, these are all distinct estates, as in the case at Bar; nor is there any rule or case, that when the estates may stand severally is against it, but that they may be as limited, and the freehold would else be confounded, and so upon devise they would have it divided, whereas he shall in such case have it for his life.

2. Admitting the estates as before, the fine by husband and wife doth neither discontinue nor displace the remainder in Sir Fr. the son, Lit. 658. Co. 347, because they have not the inheritance of the estate tail, 1 Cr. 321, *King* against *Edwards*, is not like the case at Bar, because there are no divided estates but only to two, and the remainder to the heirs of one of them, and they took it without moities, and so the husband had one single estate in fee executed, whereas in this case, although the estate tail vests in both, yet only as a remainder, because their estates are distinct for lives by the former limitation, and this remainder is as a remainder granted over by them. 2. This fine taketh its full operation without harm to any, because an entire fee pas-**[143]**-seth out of the conusors, though made up of several estates, which would pass as well by a feoffment, *Bredons case*, being a lawful interest in the grantor; but where there is an interposed estate, as but for life, remainder for life, remainder in fee, there such a fine cannot pass without divesting the other estates, and so all remainders are thereby likewise discontinued, 10 Co. 96, *Seamors case*, *Garret* against *Blizard*, enter H. 24 Car. 1, Rot. 983. A. tenant for life, remainder to J. for life, remainder to T. in tail, remainder to J. in fee, J. levied a fine, which was agreed to be no discontinuance, yet it was ruled a forfeiture, because the estate of the conusors could not make good the purport of the fine; *Trevillians case*, P. 29 Eliz. B. R. but

here is no estate devested; but it hath been doubted whether by feoffment of tenant for life, remainder in tail, a discontinuance be not wrought, but not of a fine. 3. The remainder in Sir Fr. will not difference the case, but is as it were a meer stranger. 4. The warranty shall not bind an estate, unless it be turned to a right, *Seamors case*, but will determine with the estate on which its limited. Winnington for the defendant, A. seised in fee, covenants to stand seised to the use of himself for life, remainder to his intended wife for life, remainder to the heirs of them two in tail. 1. He conceived, that this fine is a discontinuance to the estate tail, Lit. sect. 28, being not particularly limited to any of their body: and 1 Inst. 22 b. is where an estate tail is limited to the heirs, they are purchasers, 11 Co. 82, that the estate is executed in the husband and wife is manifest, because it is limited by himself; and so 38 Ed. 3, miscalled a remainder, for nothing vested till the inter-marriage, and then they are seised per mie & per tout, and so his estate executed, notwithstanding that the limitation is to the wife also; for it can never be more executed then it is, whichsoever dieth first, *Shelleys case*, 1 Co. 98. Nor shall the heir be forced to make himself heir to either of them. 3 Ed. 3, 31. F. N. B. 212 b. but unto both, 15 Ed. 3. Brief 324. 18 H. 6, 24 b. per Fortescue: else if one should discontinue, the heir would be remediless, and the case of 1 Cr. is a stronger case than this. 2. Admitting it is no such discontinuance as will toll an entry, yet it is such as will displace the remainder, and consequently the warranty binds before re-entry, 44 Ass. 35. 44 Ed. 3, 31. 1 Co. 67. 1 Cr. 103, although it doth not extend to the remainder; and *Seamors case* was only of a bargain and sale, upon which the fine operated only as a release; 1656, *Musgrave* against *Scarf*, **[144]** C. B. bargain and sale by tenant for life is no forfeiture: this case differs from Bredons, in that the estates might have been granted severally over; but not so here, because it is intire, and the construction of law will not make them several, when their nature is not so. 2. In that case the remainder is in several persons, in this in the same, Pl. Com. 418, Bracebridge, and without displacing the remainder, it would be no forfeiture. Windham conceived the remainder distinct, and will not drown the estates for life, being by one conveyance, else would all the remainders be confounded; and if the remainder had been to the heirs of the husband, he might have granted it over without attornment, Co. But he doubted, whether being divided by construction of law after a fine, having the whole interest, he shall not be as a real tenant of the whole, and *Bredons case*, can have no answer. The husband and wife, in the case of *King and Edwards* are joyntenants, and not tenants in common: and one præcipe must be brought against both, and so to some purposes it is executed, to some not. Twisden conceived it good for the wives moiety, because there is no interposing estate betwixt her estate for life and in tail: but he doubted whether all having the whole interest, it shall be good, and no discontinuance. And if lands be given to two men, and the heirs of the body of one, who makes a feoffment in fee, which all agreed is a discontinuance for a moiety: Foster supposed, that if they can any ways put the estate out of them, it is this: all agreed the warranty in this case will make nothing, because it is only upon the estate tail. *Post*, 227, 321.

80. READ *against* CROSTON.

Tryal. 1 Cr. 203.

Upon a mistake material pro for and in Nisi Prius roll, the roll in Court being right on 2 Cr. 673, Jones prayed a new distringas after a nonsuit in action upon the case upon an assumpsit, in consideration of cloth and payment, &c. whereas the Nisi Prius was for the payment, &c. which was granted.

[145] 81. SLANY *against* EGERTON. *Ante.*

Lieu.

Gawens case Dy. and *Bulwers case* both differ from this, because here is no dependant matters, but each are distinct and brought in several counties, and so the

plaintiff hath no election as in beating his servant in one, whereby he lost his service in another, or reteiner in one and departure in another; because there he can have but one action, contrâ here Twisden doubted whether, as this case, any action lyeth in Chester, 11 R. 2, and the Court (Foster absente) gave judgment for the plaintiff.

82. AUSTEN *against* MANDRE. *Ante.*

Error.

Error assigned that execution was made by precept to the serjeants at mace, without special name, which per Curiam is the constant course. 2. The error was to remove a record before the keepers in Curia nostra, which was in the time of Richard Protector, yet well enough per Curiam; for the writ must be in Curia nostra, but the record must be certified as it is. Judgment affirmed.

83. ELLISON *against* ELLISON. *Ante. November* 8. Siderf. 70, pl. 8.

Amendment. Godbolt, 349, pl. 443.

In misericordia, whereas it should have been nihil de misericordia quia infans was amended in C. B. after error assigned, in the same point and in this case, in debt upon a bond against an executor, who pleaded non est factum, which being found against him, judgment was quod capiatur for misericordia, which being in point of judgment after error brought was prayed to be amended, and by Twisden many defects in the judgment, as recovery of a presentment to a vicarage made to a parsonage, &c. but Wild, for the defendant alledged that in C. B. they have a paper book whereby they mend their records. Adjornatur.

[146] 84. TRAVIS *against* MEERES. *Ante.* In Condition Br. 251.

Proof.

Allen for the defendant shewed for cause why judgment should not be given for the plaintiff. 1. That the consideration to make appear is not sufficient, for if by action, such action must be brought against the executor of the husband, and then if the defendant pay not, an action lyeth against her, but not before, if by any other manifestation the averment of always ready; is not sufficient as upon a bond to pay upon imbezelment by an apprentice, the embezelment must first be proved by action against the apprentice, 2 Car. C. B. admitting proof and manifestation to be the same barr, F. 241, *Fosters case;* nothing more manifest per Curiam, than that it may be by the same action, and by Windham the case of the apprentice, is according as the intent of the parties, that he should be first sued, Allen agreed, that if there were any other consideration then the action would be sufficient: contrà where only to make appear and by Twisden where the proof is limited to a time certain; as two months, there it cannot be intended by jury, and the Court conceived the other a nicety. *Post.*

85. THE KING *against* BAILY.

Habeas corpus.

He was brought by a habeas corpus, the retorn whereof was for being, aiding, acting, and assisting at the killing of the French embassadors servants, which by Sir Jeffery Palmer, & Curiam, is sufficient in a retorn to suppose it murder without the word murdravit. 2. When a retorn is made, the party is committed only till the cause be determined, to the Marshalsea, the prison of B. R. but after he may be remanded. 3. The Kings attorney is to have notice and time to peruse a retorn before it may be filed. *Post.*

86. DAVIE *against* BEAR.

Assumpsit.

Action upon the case for promise, 25 Novemb. 1656, there being communication of arrearages of annuity of 15 per annum due to the defendant, out of the tenements of the plaintiff, and in consideration the plaintiff would pay tantas denariorum summas, as was due and behind until the day communicated from the date of the indenture, the defendant if he had formerly paid any before, the defendant would repay so much, which by Bear Serjeant, for the defendant in arrest of judgment is not sufficient, because it doth not appear, that **[147]** the annuity is continuing or of what date the indenture is, H. 7 Jac. C. B. Rot. 131, *Kent* against *Prat*, the defendant seised of the vicarage, and the plaintiff of the parsonage house, and strifes betwixt them, the defendant in consideration the plaintiff would surrender his house promised, &c. Judgment was reverst because it appeared not what estate the plaintiff had in the house, and to pay what is due will not raise a promise, 1 Cr. 5, *Blight* against *Crasd.* 2. It is said that the plaintiff paid all the arrearages being 188 pounds, which was impossible but some might be paid before: *Aderton* against *Dunslan*, 2 Cr. 247. The defendant rejoyned that he paid 61 pound in four years, which was more then the annuity; but the record was of four years and a half, which was just full. Jones for the plaintiff consideration to pay what is due, is good though upon bond; for it cannot else be had without trouble or charge, and verdict being for the plaintiff, and no exceptions taken against the payment before, the Court, conceived all the exceptions without weight, the date of the indenture being needless; and though the annuity was yearly to be paid, and so half a year cannot be due, yet the terms being general after verdict, the Court will intend it payable half yearly: and Twisden cited *The Earl of Northumberlands case*, count in debt by the heir of rent arrear to him, though it might be in the time of the auncester, yet after verdict the Court will intend it due to him in his own right. Judgment for the plaintiff, nisi.

87. TRIBUTE *against* REYNOLDS.

Assumpsit.

Tourner moved in arrest of judgment, R. in consideration T. would assign certain closes, promised to pay to M. the wife of T. &c. and her adminstratrix for 3l. per annum, (whereof the promise was made to be so long as the defendant should enjoyn the lands) hath brought against the executors of R. living T. action upon the case, and he conceived the administratrix of M. a meer stranger to the promise. 2. There wants profert litteras administr', which per Curiam is well enough after verdict. Twisden doubted whether M. might have the action, because there is no duty owing but only a collateral conveyance to be made: Foster & Windham agreed if M. had been a meer stranger the action would not lye: contrà here M. being the wife of the assignor, and if the husband sueth he must do it in her name, or at least may do it so; and this will go to the administrators of the wife, who may be other person then her husband, for the cause approved by **[148]** the delegates. Twisden conceived the husband and wife cannot bring this action, because it is only for her benefit, and an annuity for her provision. Adjornatur.

88. WEDEN *against* BALDWIN. *Ante. November* 9. Siderf. 55, pl. 23.

Wards.

In trespass by special verdict it was found, H. was seised to him and his wife and his heirs, holden by knights service in capite and in fee-simple alone of the lands in question in soccage, and so seized, devised to his wife for life, the remainder to the lessor of the plaintiff, the heir entred (after the devisee died) on him, the tenant for life being alive: yet Windham held this devise good for the whole soccage land.

1. At common law, if H. seised of capite land to himself, remainder to another and his heirs, M. 24 Ed. 3, 33, pl. 28, F. Gard. 48, during the life of tenant for life there was no wardship, but a kind of fee did discend to the heir, but he had no fruit of it, because there was a person able to do knights-service, but when that impediment is removed he shall be in ward, not only for his capite, but all other lands. 2. By the statute where H. is seised of lands held in capite, & of other lands of a common person, H. may devise two parts; but where he hath soccage and no capite, he may devise the whole; and though here he seemeth to have a fee as well in capite as soccage, at least in reversion or remainder, yet upon the construction that hath been made on that statute, this is no such remainder or reversion, that shall hinder the devise of the whole, 10 Co. 81, *Loveys case*, they being jointly seised to the heirs of one of them; or when the remainder is only of a reversion and in expectancy, which cannot be held, as where lands are given for life, reversion in fee, this reversion granted over is such a remainder as is meant by the statute, the consequence hereof falls on the case at Bar; for by the death of the husband nothing discends but a bare remainder, the wife being in by the first grant, and the tenure interrupted by the surviving tenant for life, as where tenant for life, remainder for life, reversion in fee to tenant for life, by the death of tenant for life dying, leaveth a bare remainder to his issue, and it falls on the reason of *Butler and Bakers case;* for when the capite tenure determines, the wardship ceases, and so though he have lands, yet not such as draw wardship, or hinder his devising during the life of tenant for life, **[149]** nor shall it ever be good after, being void at the time of the death, he having only a remainder. 3. The proviso of the statute that giveth the wardship of the body in this case by express words, by consequence whereof it seemeth that the devise is void; but this clause is not to be amplified, because it alters the common law, which when in affirmative words implyeth a negative, *Amy Townsends case*, as here, that he shall be in ward for his body shall intend, and not for any thing else but a bare naked wardship, without any benefit of other lands discended till the death of tenant for life. Twisden of the same opinion, 15 Ed. 4, 11, and *Binghams case*, F. N. B. 144, that at common law, during the life of tenant for life, 25 Ed. 3, 93. 27 Ed. 3, 80, and *Bokenhams case:* and so here, when they are joynt-seised, the tenant for life surviving, the heir shall not be in ward, and the statute was made for the benefit of the lords, not of the heir, 1 Inst. 111, and therefore wheresoever there was no wardship they left him at liberty to devise as he pleased, as *Loveys case:* and if the body of the law will not alter this case, the proviso, which is an enacting clause, shall not be extended, à verbis legis non est recedendum, 33 H. 8, 39. All lands in the seisin of any person liable to the Kings debt, shall be charged; yet the feoffee of the issue, though he come under the tenant in tail, yet because the lands are not in the seisin of the issue, it shall not be liable, because the issue was not liable at common law, 7 Eliz. Court of Wards, *Larimors case*, H. seised as in the case at Bar, the husband died, his heir within age, the wife surviving, adjudged upon great deliberation with the Judges, that the King shall have no benefit of the soccage lands, because the statute provides only for the wardship of the body; and though, as Jones objected, this would have advanced the heir, and so have been for the Kings benefit, yet it went against him, though there was no devise in that case: Mallet of the same opinion; but Foster contrà that it is void for a third part; the case is entred H. 1659, Rot. 478. The question rests not so much upon the common law, as upon the statute, the whole law whereof, as well as the proviso, is enacting and creating the points that have been moved at common law. 1. He conceived that the husband was so seised, that his heir shall in any real action say that he was seised in fee, die quo obiit, as in some cases cited in *Wiscots case.* And 2. By the statute, which was as well for the peoples benefit as the lords, for without this statute the subject could not provide for his children by devise, but **[150]** lest the lord should be prejudiced hereby, there is remedy provided for him, and this inheritance shall be liable to any charge of the auncester, and the heir shall have the inheritance to all purposes, according to the present estates of the husband, especially because non constat, whether this was made during or before the coverture; if before, he might plainly dispose of a moiety presently; and the Judges were divided in *Loveys case;* though the solidity of the case he doubted not: and this case is not of a bare or dry reversion, but a working and beneficial one, as *Bedingfields case*, and the heir must claim by a

dying seis'd of the husband: and so judgment ought to be for the plaintiff for two parts only, and not guilty for the defendant for the third. Judgment for the plaintiff for all.

89. Dr. Withringtons Case.

Mandamus.

Serjeant Keeling conceived none of the causes are sufficient to justifie the retorn, for none of his pupils complained, 3 Inst. 46, they admonished three times within ten days, which besides the shortness of the time, he conceived cannot be intended (as it must be) for several crimes; and this crime is neither within the greater or lesser causes of their jurisdiction; and they gave him but three days time for retorn, which they judged for the honour and profit of the college. 2. He conceived this Court is a proper place to relieve him, nor need he appeal. Mag. Charta 29 contains the great remedials of the subjects oppression, 11 Co. 98. 4 Inst. 71, the custody whereof this Court hath, and must regulate other jurisdiction, P. 11 Car. *Allen* against *Nash*, the last clause whereof this case is grounded on and Registr. 69, and is within the same equity as for mayors, sanctuary-men, &c. for he hath a freehold: but admit they be spiritual things, yet this Court must judge of what causes, as 12 Co. 42, *Fullers case*, the Spiritual Courts have jurisdiction, but fellowships are purely civil, and lay-men capable of them, Registr. 35, and spiritual persons cannot meddle with them, Registr. 40 b. 41 a. 43 b. A prohibition lyeth if the bishop meddles with him; and though it hath been likened to a deprivation, *Kens case*, 7 Co. 44, yet without any warrant of law, 9 Ed. 4, 24, that plea being in abatement not upon complaint, he agreed that if the cause appear to be within their jurisdiction, then error lieth not of their deprivation, *Huntleys case* was discontinued without any opinion, 5 Co. 58. And as refusal, so a fortiori deprivation must be spe-**[151]**-cially certified, Registr. 38, and upon general deprivation without cause, he may be remedied by prohibition: and this care the law hath to keep them within their due bounds, F. N. B. in a significavit, 14 H. 4, 14 b. the bishop must express the particular cause that the Court may judge whether it be within their jurisdiction, M. 15 Car. *Colts case*, retorn by habeas corpus, that he was committed for not obeying the judgment of the Court of Requests, which was not good without shewing the cause, 43 Jac. *Russels case*. So by the Chancery, and so was it in a retorn by the Treasurer, M. 3 Car. *Sir Samuel Vassals case*, and here he conceived the cause insufficient, and so ought to have restitution: 3. The complaint is that he is minus justè removed from his freehold; and therefore the having local visitors is not sufficient to forestall the jurisdiction of the Kings Courts. M. 11 Car. *Lathans case*, upon information brought here was ruled good, as well as it might have been below, because the statute had no negative words; every man is master of his own disposition, and may appoint laws to regulate his gift, but the law of England shall interpret such laws, and the visitor is but a superiour intendant over them; but cannot take away the jurisdiction of this Court, so a will appointing H. to expound a will yet that shall not toll the judgment of the Court. F. N. B. 21, 22 will not alter this case, being Courts created by the publick laws of the nation, but this gives little strength to the private laws or customs, but that they may be leapt over; for as this case is there can be no appeal, because they proceeded not upon their particular statutes, but upon matter out of the jurisdiction, appeals in civil being the same as errors by common law, neither will lye unless as the Marshalsea case, the Court have jurisdiction; nor is this case of the whole jurisdiction of the university, but of private colleges, who if they expel according to their statutes are in no danger. Finch for the college, the founder might have appointed that the censure of the master should be final without appeal, and it had been good, and here in effect it is the same, and therefore they cannot come hither per saltum: *Kens case* is affirmed in *Bags case*, and where the cases are not expressed to be finally determined, Hub. 14, 15, they are reservate, and pertain to the Ordinary of the place, and those laws are confirmed by Act of Parliament: Maynard to the same intent (being no argument upon demurrer) corporations, as mayors, &c. have no visitors but this Court, the King having given them their being of some corporations, as abbies and ecclesiasticks, which the law also taketh notice

[152] that they are, and their relation is mixed, and in *Huntleyes case* the Court ruled, they had no conusans of the cause, and therefore general deprivations was ruled sufficient; some corporations are meerly eleemosynary which are given for the education of youth, and might have been for years, and have their rules of internal government from their founders, and he having appointed visitors, their judgments are final to the party, *Gayer* against *Fairchild*, 3 Jac. H. makes a donation, the patron may visit by commission, and the party cannot here be restored, and yet whether he is visitor or no may be here questioned, error of a judgment of C. B. in Parliament abated, because B. R. is betwixt; and so here, at least they must come hither at the darrein resort. Wild to the same effect, that these fellows are established by Act of Parliament under these manner of by-laws, and therefore they cannot deviate; but he questioned not, but at the darrein resort this Court may take conusance, though not by appeal, yet as by way of inhibition, 24 Car. habeas corpus to remove a prisoner out of the Admiralty, who being in prison by sentence, this Court would not examine the cause: and *Jones* against *Williams's case*, error in the marches of a judgment in Wales: and upon a scire facias, the seal of marches being taken away, wherefore a scire facias was brought here, removing the cause, and the Court over-ruled that it was naught, he being counsel for the plaintiff: also if he hath a freehold, he may have his assise.

Allen for Dr. W. The Act of Parliament makes nothing to this case, because that only confirms it as establisht, which being without negative words do not conclude; and they have no other power then the King may grant, having but the effect of a charter: and so, should a corporation have a law thus confirmed, that they may put out any man without cause, this would be void, Wyndham. *Alden* against *Tottils case*. Twelve men incorporated for maintaining of poor hospitals is intended spiritual till the contrary appears, yet whatever the end be, if it be visited by the patron, its lay, 8 Ass. 29. Br. 137, the end being spiritual, though they were all lay, were capable of an appropriation, which a lay corporation is not; and colleges are a mixt corporation, and he knew not upon what ground Keeling denyed (*Kens case* 8 Assize. 29. 31 Ed. 3) warranting it, 13 Assize 2, and if a jury in Assize had found that he was turned out by the visitors, this Court will not remedy him, but if they have no jurisdiction of the cause, one may have a prohibition. Assise, F. 150. Twisden agreed, *Fairchilds case*, and that right or **[153]** wrong upon a deprivation, no appeal lyeth from the Ordinary, who is fidei commissarius (Windham) said that Rolls and Glyn were of the same opinion, as here that restitution could not be granted, though then there were no visitors the Court agree *Kens case* and *Huntlye's* to be law. Adjornatur.

90.

Execution. 3 Cr. 416, pl. 10. 2 Cr. 364, pl. 3. Godbolt. 372, pl. 461.

Upon a writ of error here of a judgment in the C. B. if continued above a year, yet judgment being at length given, execution may be taken out without a new scire facias.

91. BUSHEL *against* JAY.

Prohibition.

Allen moved for prohibition to the Admiralty upon a charter-party, the plaintiff declared in an action upon the case, upon a promise made on the high sea upon an agreement according to, but not mentioning the charter-party which was only by suggestion, but the same with the charter-party, which really was made upon the land, and the Court granted it. Nisi.

92. ROBINSON *against* COXE AND WARWICK. *Ante.*

Mich. 40 & 41 Eliz.

In debt. Br. 94. Sen. 93.

Ards against *Walker* is a case in the very point that the action of debt lyeth; judgment staid till the same point be decided in the Exchequer Chamber, wherein the Court was here before divided.

93. THE KING *against* COLEBANKE.

Trespass.

Indictment of trespass for counselling a servant to cheat his master, which being not felony, &c. ought to have joyned the servant in an action, all being principals; but per Curiam, All may be indicted joyntly or severally at election, but here it appears the acts were several which the Court doubted. 2. It was to the house of a feme covert did carry, which was well enough. 3. It was that she converted the wine, cheated and delivered to her to her own use, which per Twisden is not to purpose but. Adjornatur.

[154] 94. WHEELER *against* HONOUR. *November* 11. Siderf. 58, pl. 26.

Fines.

In evidence to a jury upon the question of fines of copyholds, it was agreed that the party was admitted, which is the entitling of the lord to it; and it was agreed, that all fines are reasonable, unless the contrary appear it was 40l. which by Sir Jeoffry Palmer needed not be demanded, 2 Cr. *Gardner* against *Norman*, Hub. *Denny* against *Leman*, but notice must be given thereof, and the time and place of payment ascertain'd, and a refusal must be proved, which the Court agreed; but doubted whether without a demand it should be a forfeiture. And by Glyn for the defendant, that it being a forfeit, it shall be taken strictly; if the fine were certain, no notice is necessary, contrà where incertain. And by Maynard for the defendant, Where the certainty is dubious, the refusal is no forfeiture, which all agreed, but *Willis's case*, C. B. cited by Foster contrà *Parker* against *Corke*, B. R. that H. would appear if it were a Court, if none, he would not, and adjudged no forfeiture. And by Windham, When such doubt is covenously made, the tenant shall have no benefit of it, as was ruled at the trial in *Corks case* in the west.

95. HENNING *against* BRABERSON

In C. B. in Ejectment.

Future interest may be granted over by lessee, notwithstanding disseisin of lessor or tenant for life. 2 Brownl. 226, pl. 177. 2 Leonard 99, pl. 121. 1 Brant 25, pl. 76. That such entry is no disseisin, nor hinders commencement of the lease. So to say H. entred virtute dimissionis is also good without the day: only its no disseisin to enter after any communication, if the lease after made relate to it.

Two joyntenants being disseised, one may enter and its good to both by Bridgman Chief Justice, who conceived the estate of the lessee never turned to a right, yet had it by the entry of one of the joyntenant lessors, he doth remove the impediment, 9 Co. 106. M. *Podgers case* is stronger than this case, and none but the lessor can enter, for the lessees were the disseisees: and had they been disseised, yet such disseisor had been liable to the disseisees charge; and though there were no right to the possession, yet its necessary that the lessor enter to purge the disseisin, which was lawful for him to do; and so makes it as if their had been no disseisin in the case, without question the lessor may expulse the lessee, yet *Elvies case*, Hub. 322, doth not thereby gain a fee, nor may be said properly to disseise any, 1 Inst. 249, the same case cited to be contrary adjudged to *Elves case:* and so 12 Car. **[155]** C. B. *Sir Anth. Aucher's case.* H. granted an advowson for years in futuro, during which the reversioner usurps it, doth not take away the lease; for by the usurpation or entry of the lessor the term was never turned to a right, the assignment being made off of the land by a termor is good to an under tenant, and so concluded for the plaintiff, as the rest had agreed before: the case being, A. and H. seised, let to the lessor of the plaintiff for 81 years, to begin at Michaelmas next, if the lessor of the plaintiff lived so long, habendum for 31 years after his death, lessee enters before Michaelmas, after H. lessor enters upon the lessee, and then the lessee assigns to the plaintiff being out of possession.

96. BRICE *against* CURR.

Trin. 12 Car. 2, Rot. 1238.

Covenant. Hitch. 23, pl. 63. Seiles 31, pl. 75. 3 Leonard 119. Godbolt 217, pl. 312. H. may have debt or covenant at election on covenant to pay money. So 42 Ed. 3, 9, pl. 7. When covenant is to pay money, its a single bill, but if it be to pay money on the delivery of any thing, an accord is a good plea, Mich. in *Baker* against *Llenial*, this is the proper remedy, for accompt lieth only against the receiver, 5 Ed. 3, 14 b. pl. 8. An obligation given for money stated on accompt before auditors doth extinct it; contrà of a parol to pay such money, 29 Ed. 3, 25 b. pl.

Action of covenant, the plaintiff declares upon a writing of the defendants testator, acknowledging himself to be accomptable to the plaintiff for whatever money the plaintiff should charge upon J. S. payable to Sir T. V. And by Bernard in arrest of judgment an action of accompt properly lyeth, and not covenant for money so delivered: But per Curiam there is no other remedy against executors; and had it been against the party himself, such agreement being by one person to pay money charged upon J. S. for which an accompt lieth not, he being not chargeable as receiver or baily, the only remedy is by covenant: and its not like *Geens and Resons case*, 1 Cr. 128. 2. No notice is given by the plaintiff to Dixon, who upon such bills was to pay to Sir T. Viner, which per Curiam is not necessary. Judgment for the plaintiff.

97. DE LA BAR *against* YARNLY. *Ante. November* 12. Error Br. 90.

Amendment.

1 Cr. *Smith and Sherley* against *Underhill*, Hut. 41, & 15 Car. *Belch* against *Page* in ejectment, judgment quod recuperet, & said not terminum, yet amended. And by Twisden the judgment in quare impedit was guided by the covenant de ecclesia, and not vicaria: and the other **[156]** of Smith was in C. B. who have a docket book in the hands of each prothonotary, whereby they correct their judgments: but this Court hath no inducement to be amended for the plaintiff, and his pledges are liable the one in default of the other: But *Beechers case* is that the pledges are only averrible upon a nonsuit. But whether this be surplus or no, adjornatur to search presidents.

98. THE KING *against* BAILY. *Ante.*

Bayl.

The retorn being filed, the Court refused till the cause tryed to bail him, because at least it is manslaughter of a high nature.

99. EVESQUE LANDAFF *against* LEWIS.

Quare impedit.

Upon error here of a quare impedit in Wales per Curiam, according to course if the certiorari be here entred, the defendant must have a scire facias ad assignand. Errores if not entred first, and after quare executionem non haberet by writ to the bishop.

100.

Dower.

If the party appeared in dower, and judgment upon tryal be had, error cannot be assigned in default of a mean summons by the common law, per Windham & Curiam. 2. The writ of certiorari is to remove a record by our writ, whereas the record was by a writ of Oliver Protector, the error was assigned that there was no original writ, and

the writ was ill being by O. P. which was in the certiorari, recited by our writ in error brought in the time of the keepers, and so no warrant to remove such record, being after diminution alledged, and plea as aforesaid, but the Court after verdict will presume there was another good writ. Judgment affirmed, nisi.

101. CUDMORE *against* LEWIS. In Assets per Br. 15.

Judgment. Stiles 287, pl. 629. 2 Cr. 85, pl. 10. 1 Brownl. 54, pl. 1 Cr. 437 pl. 513. The heir shall not be fined for denying his ancestors deed Mordancestr. 65, ou riens per discent pleaded if any assets be found the heir shall be charged for the whole, 18 Ed. 3, 51, 6 pl. 59, per Grene. as well in formedon as in debt on obligation, although lands discended after the death of the ancestor, 21 Ed. 3, 9 b. pl. 28, all that he hath die brevis shall be charged, 1 Inst. 102, Com. 440.

So on nihil dicit it shall be general with execution on his own goods, 3 Cr. 263, pl. 1. Tenant in assize was taken for pleading false deed of the ancestor, imprisonment, Br. 61, yet it is said contrà in pl. 62, ibidem.

Error to reverse a judgment in C. B. upon demurrer upon a replication: Allen conceived that the judgment should be against the heir, generally because he pleaded that his father devised for payment of portions beside the reversion, whereof he hath nothing. Plaintiff replyed that the lands are holden in capite, and so as to a third part are not charged by the will, upon which the defendant demurred, and having set out his estate the plaintiff shall not have any advantage by general judgment, *Davis* against *Peeps*, the difference is where **[157]** such setting forth is true and where not, and here the heir sheweth only a reversion chargeable, the plaintiff hath shewn a possession, and per Twisden, it is in the election of the plaintiff to have judgment specially of the land as set forth, but he may also have it generally. 2. It is said the manner was holden in chief by the twentieth part of a knights fee, and doth not say de facto, that it was holden of the King by knights service in capite, all which was assigned special for error, sed non allocatur. Judgment affirmed.

102. WELLER *against* PRIDEUX. In Debt. Br. 22.

Limitations. Pl. Com. 9 b. Owen 57. Bract. 240 b. The King by proclamation may prohibit all suits for rent incurred tempore belli, 9 Ed. 3, 16, pl. 29, but debt lieth notwithstanding invasion. Stiles 47. Resc. Br. 27. Dy. 241, pl. 47 b.

To say the Courts were shut is a good excuse on voucher of record in B. R. or C. B. as appears Tayler de Rec'. Br. 5 Ass. Br. 201, of 15 Ass. 16.

Action of trespass upon assault, the defendant pleaded the Statute of Limitations: the plaintiff saith, that Oliver and certain rebels had usurped, and the Kings Courts were shut, so that he could not prosecute by writ: the defendant rejoyned by the Act of Judicial Proceedings and Oblivion; whereupon the plaintiff demurred. And 1. It was a suit by bill, which by Wild for the defendant is not helped by such plea. 2. If the Courts had been shut up for five years, this Court could not help it, especially being by statute to be brought within a certain time: and the Act of Oblivion hath established all things, as if the King to those purposes had been present. Judgment pro defendente per Curiam, nisi.

103. LAWSON *against* CROFTS. *Ante.*

Debt. Moor 462. Godbolt 104. 1 Brownl. 80, pl. 395.

Debt against defendant as administrator durante minore æte, who said that such a day the infant attained age of 17, and that after he did not administer, which by Allen for the plaintiff upon demurrer is not good; for if he did administer the day that the infant came of age, he shall be charged: but by Twisden, Whether as executor of his own wrong, *Chandler and Tomsons case*, Hub. or as administrator during minore ætate, as sheriff after delivery of prisoners, so is *Knivets case*, C. B. 2 Car. but

another opi-[158]-nion hath been as in *Bagnals case*, and *Palmer and Livertons case*, B. R. 2 Car. that he shall be charged especially: but all agreed that he must plead fully administred; and by him this plea should have been pleaded in abatement, not after imparlance. And Windham conceived that the fittest way to charge him is as administrator durante minore ætate continuing. Judgment for the plaintiff.

104. LORD OF SUFFOLK *against* BETTISON.

14 Ed. 4.

In debt upon bond in nature of a statute staple defeasant, to pay money upon a purchase; the defendant pleaded performance of all covenants generally, which per Curiam upon demurrer by the plaintiff upon the plea, is naught, special things being to be done, it must be shewed specially how performed.

105. COOK *against* NEWMAN. In Det. Br. 29.

2 Leond. 214, pl. Hitch. 2 b. pl. 13. 2 Cr. 483, pl. 19 c. Goldsb. 81, pl. 21 c.

In action upon the case upon promise to deliver books within a fortnight, the defendant plead that within the time the plaintiff gave him order parol to deliver no more till request, which per Curiam upon demurrer is sufficient. 2. After this the plaintiff prayed to discontinue because the plea was false, which was granted.

106.

Retorn.

Sheriff upon a scire facias retorned that none came to shew the goods, which Winnington prayed might be amended, because unless it appear where the goods were it is not good, but the Court gave only time to make it as the sheriff would stand to it, and if false, that the party in forma pauperis be left to his remedy.

107. SMITHSON *against* PAIN.

Prohibition.

Serjeant Keeling, on 1 Cr. 97 & 296, said a prohibition shall not go after sentence, in an action upon a charter-party which although it be not for the penalty, this Court would not stay because that Court hath no jurisdiction, as is conceived in that apocripha, in 1 Cr. 296, and nothing more ordinary then to prohibit after sentence or appeal, yet not without very good cause, & 1 Cr. 96, they had jurisdiction of the cause, and therefore being only erroneous, the Court will not grant it after sentence, [159] Jones for the plaintiff said that by the Act of Judicial Proceedings, that Court (which then had jurisdiction) is confirmed wherefore the rule for a prohibition was discharged.

108. WALLIS *against* UST.

Slander.

Of H. wife of J. S. that she is thy whore, I say H. is thy whore, and I will maintain it; the declaration and verdict being in Tr. 61, and confirmed by that Act of Judicial Proceedings after the declaration, and before the verdict amended, & Wallup for the plaintiff prayed judgment, the words being then by an Act actionable, (and all proceedings) being confirmed, the Court inclined for the plaintiff, as per Windham had been ruled in his circuit, but Foster absent, and Twisden doubting whether any thing not executed be confirmed. Adjornatur.

109. SKIPTON *against* COLE.

Error.

Error of a judgment in an Inferiour Court in an action upon the case for promise, 1. A capias issued out where as summons should have been first, sed non allocatur, the party having appeared. 2. The agreement was for tymber frame (and said not where to entitle them to jurisdiction) and also to plow land, &c. Thirdly, 24 were retorned, and tryed the cause, which the Court conceived a gross error.

110. ——— *against* WELDEN. *November* 13.

Continuance.

Allen for the defendant. If a new fieri facias be taken out, every year one, continuances may be entred at any time by the attorney in his chamber, otherwise not, which the Court agreed; and that continuances upon latitat is sufficient without renewal. And by Wild for the plaintiff, If there be a testatum scire facias served by the sheriff, continuances may be entered without renewal, Sir John Lenthall and Smithsby, B. R. the difference is betwixt a suit and execution; but per Curiam that was upon a cap. taken out of term; but by Wild & Curiam an elegit taken out once, may be continued seven years, which the Court agreed: and by Foster, unless presidents before 1640, be so, its not allowable; contrà by Twisden, and that they that sate here since, knew and observed process as well as their predecessors; **[160]** but all the clerks agreed the course to be as Wild alledged; and by the course of the C. B. continuances may be entred before the retorn. Adjornatur.

111. FOSTER *against* FOSTER.

Trin. 1659, Rot. 751.

1 Brant. 260, pl. 623. 1 Brownl. 141, pl. 503. 1 Brant. 36, pl. 105.

In ejectment by special verdict, it appeared Margaret F. was seised, and did bargain and sell in hæc verba, articles of covenant concluded and agreed upon by M. F. of one part, and Matth. F. her son on the other, for divers causes and considerations, and especially of 20 pounds payable to the assigns of M. F. after her death, granted, bargained, and sold to the son and his heirs, and that she should quietly enjoy during her life, and that she should have a ferm of Matthew the son for her life; and after M. F. did grant, bargain, and sell to N. F. another son and his heirs, for affection and covenant to stand seised accordingly, but there wants livery; and therefore by Tourner for the plaintiff, on *Colthirsts case*, Pl. Com. 25, the first conveyance is not good, being not inrolled according to 27 H. 8, 16, rising neither by transmutation of possession, 1 Inst. 271, nor by way of covenant to stand seised, Winch. 59. M. 6 Jac. C. B. Rot. 2120, *Buckley* against *Symons* in quare impedit, these points were resolved, that to raise a use there must be 1. A consideration sufficient of blood, money, &c. 2. A deed to testifie this covenant, as *Callerds case* 38 Eliz. 3. A seisin of the land. 4. A limitation suitable to the rules of law, the first and last whereof are here wanting, 7 Co. *Bedels case*, & 4 Co. 4 b. *Nokes's case*, the consideration implyed ceasing by that express, 9 Ed. 4, 28 b. 5 Co. 97 b. *Goodales case*, 11 Co. 24, and when money is expressed, the deed must be enrolled. And 2. The juries finding that this deed was as well in consideration of affection as money, Dyer 147, is not material, being not averrable, as 2 Co. 4 b. nor can 29 Ass. 42, the jury be charged therewith, Dyer 140, especially the deed being found in hæc verba, against which they cannot find, expressum facit cessare tacitum, Entry F. 78. F. N. B. 205, and yet there may be one consideration expressed, 1 Co. 76, and another implyed, but not to the same person, Dyer 146, *Beaumont* against *Villers*, the objection, that construction may be made ut res magis valeat must be limited by the rules of law, 8 Co. 94, and the intent of the parties, which was to pass it by bargain and sale, and not by covenant to stand seised. But admitting **[161]** the

consideration good and averrable, yet the limitation is against the rules of law, being to pass a freehold in futuro, *Baker and Symons case*, 1 Cr. 138, after the death of M. F. by agreement of the parties, Tr. 15 Car. B. R. *Price* against *Pitfield*, the father in consideration of marriage of his second son, did covenant and grant his land after his death, no livery being made, it was adjudged void, Dyer 55, and so prayed judgment for the plaintiff. Allen for the defendant, Supposing the 20l. had not been mentioned, yet a use would have risen upon this deed, an use at common law being but an equitable right, and whatsoever contract did give such right might raise an use; and the statute alters not the manner of raising the uses, Dyer 229, but only executes the possession to the use, and so agreed, *Collard* against *Collard*, Popham 47, & Dyer 296, seeming to the contrary that a use would not rise by parol. Mich. 10, 11 Eliz. Rot. 2200 is misreported, for it was only a promise that he would assure in futuro, and not that a use could not be raised by parol. 2. Such consideration as will now raise a use might do so at common law, and è contrà, 1. Negatively, where it doth appear by the deed it self that the estate is to be conveyed, by common law no use will rise, *Foxes case;* Tr. 37 Eliz. Rot. 149, B. R. *Teb* against *Pottlewell.* A deed made by a feme causa matrimonii prælocuti dedi concessi to one whom she intended to marry, and no livery being, no use would arise by Popham, contrà by Clench and Fenner, although there was a warranty against her, and her heirs: but Popham agreed that an averment might be in such case, and upon grant that J. S. shall have my land after my death, an use did rise by him, but no judgment was entred in the case. And in Dyer 302, the deed had the form of a release without consideration: and Plowden conceived that an averment would lye; but Dyer conceived the contrary: but the elder brother did release. But by Twisden the land was enjoyed against Plowdens conceit to this day: but by Allen that was only intended a conveyance at common law as a release. 2. When there is an agreement for further assurance, Dyer 162, no use will rise till execution of such future conveyance, though a recovery be had in order thereto, Dyer 96, 235, but where there is a present execution it rises. 3. When the deed is not immediately declaratory, 21 H. 7, 18, and where immediately to extinct the possession, Dyer 55 goeth upon the same reason; so 1 Co. 129, & *Seignior Pagets case*, & *Rector of Cheddingtons case;* and the case of *Buckley* against *Symons* was upon the same difference, the tenure of the deed being **[162]** only covenants de futuro, and the lands upon granting several rents was to remain and be within words obligatory, which raise no uses, and not declaratory as here all is done and executed immediately. 2. Positively, where the covenants are immediate, and present, a use will arise, though the conveyance be in form of common law by grant, &c. for the word covenant is not necessary, so there be a good consideration, for the covenant in this case hath not properly the effect of a covenant, but is only a writing declaring the use; and *Callerds case* was not reverst, because the words were only dedi, &c. but because there wanted a deed to manifest it. In C. B. Tr. 1649, Rot. 1549, *Wats* against *Dawson:* as to this point, Watson being seised in consideration of affection to his niece, and of several sums of money, the Court conceived it good by way of bargain and sale, yet if not, it had been a good covenant to stand seised, so H. 1655, Rot. 1578, *Sanders* against *Savell*, C. B. *Sympson* against *Keitle*, M. 1657, C. B. Rot. 2421. H. 1656, C. B. *Peer* against —— H. in consideration of marriage had absolutely given and granted to his son, without livery found (although it were endorsed) yet it was adjudged that a use did rise, and there is no case against this, but 2 Cr. 127, an opinion in *Osborns case* in evidence, the case of *Pitfield* against *Price* entred H. 11 Car. Rot. 439, upon a special verdict, the jury found a deed made upon an express consideration, and of affection, but found not the deed in hæc verba; yet the deed was, I give, grant, &c. to J. my son, and the heirs general of his body after my death, which is adjudged against the daughter, issue of J. which could not otherwise be; for had it been by use to the father for life, remainder to the son in tail, the father entring and making a feoffment with warranty, that discending upon her, she is bound: but by Foster counsel in that case, this point was not started; but yet this is but an intent future that J. should have it after my death, habendum to him and his heirs, so that the father kept a fee in himself; the deed in the case at Bar is well executed, being I grant all my lands to my son, I enjoying it during my life, the use well rises, and the fee is out of J.

presently, as if it had been reserving to J. for life; and this case is not capable of any further execution by livery or otherwise, it carrying an allotment of dower within it; and therefore the construction, although dubious, shall be taken for the better. 2. Point, that the expression of the consideration doth not make the deed void for want of enrollment, because this deed is not to execute an estate by bargain and **[163]** sale only, *Manxels case* 4. Feoffment to Use, Br. 26, and had the considerations been both expressed, there had been no question, and although one be expressed, yet *Mildmays case*, if it be not upon a plain bargain, another implyed may be averred; as a consideration of affection being enrolled, may be averred for money: and *Beedles case* is rather taken off then agreed in *Harpers case*, 11 Co. 24, the Court shall not presume any other, but yet another consistent with that exprest may be averred; and Dyer 146 cannot be differenced by being to a third person, for both must be enrolled: but he relyed, that here the deed being for divers causes, 2 Co. 15, and especially for 20l. there needs no averment, especially the party being a son, which implyes of it self a consideration. *Post*, entred Tr. 59, Rot. 751. Adjornatur.

112. TRAVIS *against* MEERS. *Ante.*

In Cond. Br. 151.

To make appear is no consideration, being no more then that, if H. oweth I will pay, which is not sufficient unless it be precedent to the action, brought or grounded upon a precedent consideration, which Windham denyed; and that it is better that the consideration be future, which will not be like if I owe I will pay, which is no consideration; but to make appear is trouble, and therefore is intituled to an action before, yet the consideration here riseth with the promise, and it directs to an action wherein he can have no other advantage but must make appear, which the Court agreed and if there be no precedent consideration, he cannot make it appear, 18 Jac. Grinvil in consideration A. will prove B. beat his son, &c. this was good, and may be by the same action.

113. DAWSON *against* DUNRE. *Ante.*

Information.

Keeling the Kings Serjeant moved for judgment, the information being plain enough, that dat Curiæ intelligi, quod recordatur in hæc verba, and then proceeds to the matter of fact, & quod juratores, and so the tryal, &c. and although this seems wholly to refer to the recordatur & ulterius dat Curiæ intelligi had been better, yet here the Court will take notice this cannot be recorded, what men do at the Assises, and now the best shall be intended, per Curiam. Twisden excepted that it is alledged that the false oath was in a writing, portending a letter of attorney, and the perjury is alledged in the letter of attorney, but Curia contrà.

[164] 114. RIPPON *against* RUTLER.

Trover.

The testator possest of a bond declared in a common trover, the defendant pleaded a delivery by duces by the plaintiff in special verdict, it was agreed that it lay of a bond. 2. Upon delivery no conversion can be without demand: and here the jury having found a conversion. Judgment for the plaintiff, nisi.

115. COLLINS *against* WALKER. *Ante.*

In de son tort Br. 12. The same difference agreed 18 Ed. 3, 10 b. pl. 39. 2 Leonard, 102, pl. 127.

22 Car. *Osborn* against *Broke*, that replication to justification by a warrant to arrest de injuria sua propria sans tiel cause, is but jeofaile. By Wild for the plaintiff,

its good after verdict, as here Mallet distinguisheth betwixt *Peter* against *Staffords case;* and this because this is a travers of the whole; contrà where he had traverst the matter of fact: but per Curiam issue being upon affirmative, its but a jeofaile. And judgment for the plaintiff.

116. SIKES *against* COOKE.

Ejectment.

Burrel shewed cause in ejectment against judgment, being affirmed in error of an entry & ouster without vi & armis, in the plaint, which per Curiam is not helped by verdict for the plaintiff, but is a manifest error, which the Court would not suffer to be amended in the C. B. now, unless it had been before; but if upon diminution it be certified well, the Court here will amend it.

117.

Error.

If error be brought, term. Mich. there is all that term to retorn the record, and if then none be certified, the clerks below per Curiam (it being only for delay) may after the term award execution.

118. CAPENHURST *against* CAPENHURST. *Ante.*

1 Brant. 339 b. pl. 48. 3 Cr. 362, pl. 24.

Jones moved for judgment, & agreed the assignment of the lease void, as *Rector of Chedingtons case;* but yet the covenant that refers thereto shall stand by it self, unless it be such covenants as depend on the estate, and go with the reversion, as to build a house; but contrà of collateral covenants, as that the lessor is seised of a good estate. So P. 10 Jac. *Walter* against *Dean and Chapter of Norwich*, the defendant leased to T. and after to another for 40 years, **[165]** with covenant in the last for quiet enjoyment, which was resolved with this very difference. 2. Here is but one covenant in the indenture, and so if it be void, the bond is single. Bigland for the defendant. The Court now waived that the bond was single, and insisted on the covenant which here relates to a precedent grant. A bond for performance of an award, if it be void, the plaintiff shall never have judgment on the bond, *Vallet* against *Fletcher*, Yelvert. because it was not for money, but originally to perform a collateral thing, Windham in the case of the Dean and Chapter of Norwich, covenant lyeth, because no other remedy, though the party cannot have the whole effect of his suit; but here the intent is that the covenant shall go with the lease, which if void, that falls: and Twisden conceives no difference betwixt this and suffran & scurro in Yelvert. The covenant was of omnia superius concessa in forma prædicta. Foster cited lease of tenant for life for 21 years, with covenant to enjoy during the term, and bond accordingly, by his death the bond falls, and the Court granted a nil capiat per billam, nisi. *Post.*

119. BUSHEL *against* JAY. *Ante.*

Prohibition.

Powis shewed cause against a prohibition, that it was suggested on the high sea by agreement; which yet the Court would not regard: that suggestion, for the prohibition being that the agreement was grounded on a charter-party made on land.

120. BARROW *against* HEWIT. *Ante.* Siderf. 64. Error Br. 13.

Variance. The general directions are justiciario. Co. Entr. 225 b. § 1.

The mittimus to remove a record out of Chester was directed Justiciario of Chester, who returns a record before the Ch. Justice, which by Buck is well enough, Hub. 138.

34 & 35 H. 8, cap. 26, § 6, because but one justice there, 1 Cr. 189. Had the writ been to J. Bradshaw, it had been well enough, and the word justice but surplusage: and so prayed judgment for the plaintiff in the writ of error. *Post.* Adjornatur.

[166] 121. WHEELER *against* HONOUR. *Ante.* Siderf. 58, pl. 26.

Tryals.

Twisden said he never remembred but two new trials at Bar, one a Welsh case upon a robbery, and *Wood & Gulstons case* upon 1500l. damages given for words: and although this verdict were against the opinion of the Court, yet being in ejectment, and the matter barely of fact, and in their conusance, per Curiam no new trial can be: but by Twisden, The lord may bring debt for his fine, *Allen* against ——— and so is not without all remedy, which Windham agreed: and trials at the Bar are to the end to have the most discreet persons; and therefore to clap on ordinary persons upon a tales in such case was not fitting, yet without a practice in the party himself, no new trial may be, but only the sheriff punishable.

122. KING *against* ALSOP.

Assumpsit.

A special action upon the case upon differences about an indictment of perjury, and for dyet: the defendant promised that if T. did not prove that J. S. who prosecuted the plaintiff in a certain sum was perjured, that (then if the plaintiff would release to Taylor) if he did not prove the said J. S. in any action brought by the plaintiff against him, was promoting of the said perjury, then he would pay 400l. But there being no certain issue, nor Court where, and the Court conceiving the matter ill, being that one conspirator should pay 400l. or prove it against the other. *Post.* Adjornatur.

123. BENS *against* KING. *Ante.*

Arbitrement. 3 Cr. 291, pl. 1.

Debt upon a bond for performance of an award, which per Jones, who demurr'd for the defendant, is void, because it is not final but contingent and conditional, if one party be not discharged by the Act of Oblivion, 13 Car. 2, he was to pay. 2. The plaintiff upon the day of payment was to make a general release, which is a discharge of the bond it self; but by Finch for the plaintiff, The money being payable at certain days, H. 34 Eliz. (Popham) *Sherly* against *Richardson*, and therefore the proviso is void, Hub. *Worly* against *Beck*, but the award good: to the 2, that it is mutual, and the submission bond not released being July 30, the award Septemb. 1, payable at first feast after, and on Febr. 10 follow-**[167]**-ing: the releases not to be given till after the last day of payment. Allen for the defendant that the award appearing that it is wholly to be performed before the releases are to be, is good but this is not so, for releases were to be made February 10, whether payment were made or no. 2. *Capel* against *Allen* this is not a proviso, but the body of the award it self, which is to release upon payment which per Curiam is void, as if it had been to pay if it be not pardoned, *Winch* against *Sanders*, 2 Cr. 584, and by Twisden according to Hutton, a release to the time of the arbitrement is good if nothing appear contrary. Finch, perceiving the opinion of the Court against him, prayed to discontinue, but the Court conceived it fruitless being in debt upon a bond. Judgment for the defendant.

124. BOILSTON *against* RATLIFF.

Bankrupt. Godbolt, 195, pl. 282. Noy, 442.

R. in debt to S. & B. joyntly. S. becometh a bankrupt, and the commissioners assign this obligation to B. Finch for the plaintiff relyed upon the book of 22 H. 6,

47, that an attachment of such a debt by the custom of London was good, but per Twisden that case fell off upon the pleading, but that being forfeitable by one and grantable by one to the King, the assignees of the commissioners must have the same remedy that the bankrupt had, and therefore this or none: but per Curiam, this is a penal law and to be taken more strictly as to other persons, then to the bankrupt himself: and by Windham the Kings tenant in common shall present every tourn, contrà of a common person as assignee of commissioners of it, for the bankrupsie of the patentee; & per Twisden one may have debt by Special Act of Parliament upon a joynt obligation. Adjornatur.

125. HALL *against* PAVIE. *Ante.*

Variance. In Bar' Fitz. 9. 1 Brant. 205, pl. 477. H. pleaded that A. bargained and sold by indenture made between A. B. and C. and H. good. So certiorari of a record recovered coram J. S. et socio is good for sociis. And in count on lease by A. its sufficient; if A. and B. did lease, if A. survived, 6 Ed. 3, 4 b. pl. 12, but in waste against baron et feme as lessees, is not good against him, being sole lessee. 6 Ed. 3, 9, pl. 24.

In writ of entry supposed by one, H. may say he entred by two, but not è contra; if it suppose by two, H. cannot say he entred only by one, 48 Ed. 3, 29, pl. 14, by Belknap: obligation on which A. and B. count was made also to C. and that they three have another action pendant, is ill, 3 Cr. 202, pl. 31. Quære if indenture for seven will support count on lease for three years, Moor 35, pl. 116. Action by A. as executors of B. is abate, if by the testament there appear to be more, 5 Ed. 3, 59 b. pl. 93. Formedon in remainder eo quod A. le Bar. (ou tayl al males de baron et feme) obiit sine, &c. is good. Judgment apres view. 6 Ed. 3, 12 b. pl. 7.

The indentures were betwixt L. and J. Pavie and Joseph Hall without shewing betwixt who of one part or the other in the condition of the obligation, and the plea was that the indenture was made betwixt Hall and Leonard Pavie, and so a variance, by Jones for the plaintiff, in demurrer upon the plea; but by Windham it is the truth, although not the whole truth; but the Court conceived it a variance. Entr. in le per, Br. 4. Judgment for the plaintiff, nisi.

[168] 126. JAMES *against* PROCER. *Ante. November* 15.

Stiles 150, pl. 337. Brownl. 29, pl. 28. Godbolt, 431, pl. 496.

That Wales is annexed to England, and 24 H. 8, whereby sessions was appointed twice a year of all pleas as fully as the Chief Justice of B. R. or C. B. and shall exhibit omnem aliam justitiam, by color whereof they claim, but no Court of Equity should arise, nor if it did, had they conusans of this cause. Williams è contrà; but because he had neither demurred nor pleaded to the suggestion, a prohibition was awarded.

127. ELLISON *against* ELLISON. *Ante.*

Error. 3 Cr. 101 c. pl. 1. Hub. 127, pl. 158. Rot. 1116. Yelverton, 106, 148.

Maynard moved that a capiatur for a misericordia might be amended, because it shall be esteemed an error of the entry by the clerks, not of the Judges pronouncing it, M. 33, 34 Eliz. Rot. 230, *Wild* against *Wheler*, in ejectment, judgment quod predict. A recuperet against J. whereas it should have been T. Tr. 19 Jac. *Maston* against *Shrimpton*, and so when the clerk hath no presidents before him, as M. 14 Car. *Everard* against *Bosvill*, debt upon 2 Ed. 6, part found for the plaintiff which was well, part for the defendant quod sit in misericordia, but omitted eat inde sine die, and adjudged amendable here; nor can any distinction be made betwixt matter in fact and matter in law, in a judgment which is intire, and if ill pronounced is not amendable, and the party is not concerned though the King be that there be a

capiatur or misericordia, nor revera was this ever the error or mistake of the Court, and therefore why the rule of this Court should not be as effectual as the dockets of the pronotories, in C. B. M. 12 Jac. C. B. *Nelson* against ——— a misericordia against one whereas it should have been against both baron and feme, though doubt whether a capiatur can be against baron and feme, and this is an execution and therefore to be favoured; Wild è contrà; every judgment entred is intended so pronounced, especially no declaration or president being before him, the pronotories dockets in C. B. are like the **[169]** imparlance rolls, whereby the issues are amendable, and no president is against this opinion: but the truth was, the clerk found none in this point. Twisden conceived, that concessum for consideratum hath been amended; but 2 Cr. 32, not so here, although in the C. B. for the reasons before it may. Windham conceived, that though in fact it were the act of the clerk, yet having been an ancient land-mark, it is not amendable, as it might be if it now began. And though concessum for consideratum be amendable, these are different judgments; and it were convenient it were amendable, though the non-amendment hath caused good laws and good clerks: but by Windham, the best way to reform clerks is to fine them on defaults. *Post.*

128. GODIER *against* CLERK. *Ante.*

Remainder. 3 Cr. 26, pl. 5.

In ejectment by special verdict its found, that M. C. and Ursula his wife, in her right was seised, and in consideration of a marriage of their son W. C. and Margaret the daughter of Bromely, they demise to them for provision of daughters children of W. and M. for 100 years, to begin when they dyed without issue male, in trust for payment of legacies to the daughters of W. and Margaret, then M. and Ursula levy a fine, and suffer a recovery directed by a deed endorsed with this lease, William and Margaret have issue male that dyeth without issue, and whether this lease should commence or no, was the question.

1. Allen for the plaintiff, being to begin from and after the death of W. and Margaret his wife, without issue male, he agreed that the lease is good in point of creation, as hath been by all in C. B. and here agreed, being in the power of him that hath the fee to contract for. 2. The fine doth not destroy the lease, as *Chenyes case*, nor whether the recovery destroyed it or no, though dubious, he waived as immaterial. But 3, insisted on the words in the habendum, as the single point, whether the words shall be construed without issue male living at the time of their death, then the term is gone; but if it be construed whenever W. and M. dye without issue, then its for the plaintiff, and so is the literal grammatical construction and sense; it being one thing to say H. is dead without issue, another that H. died without issue male; the former being true though he had issue, if it die without issue, contrà in the latter. 2. This is the most vulgar construction to say after the death of the issue male, that H. is dead without issue, and so according to legal construction, which in such **[170]** points of limitation is to be observed, as in a formedon in remainder such a supposition is made, and not that all the issues male failed, and if so in writs à fortiori in deeds, this being a common limitation to J. S. after the death of A. without issue; *Sundays case*, lands given generally to A. and after his death without issue, to B. this in a will is tail to A. 4. If the meaning should be at the time of the death, it is common experience to distinguish and express it in the deed, else is there no reason to take such difference but must take the case as it is. 5. When there is a doubt (Bishop of Bath and Wells) it shall be taken strongest against him that made the deed. The objection, that it is made for provision of daughters, it is gone by having issue male, and such contingent can be no provision, yet this is not the bare intent, for if there had been neither son nor daughter yet the executors of William the son were to have the term; and therefore it is as much for their benefit, and countrymen and citizens do usually provide for daughters upon a failer of issue male, and it is usual to limit to sons particularly, and then in trust for daughters, which though minus prudentèr is very frequent, and a remainder hath the same inconvenience as this if in expectancy; and 6. Where the

intention of the parties is not certainly exprest, the Court must interpret according to the purport of the deed.

2. Kettlewell for the defendant, agreed the case as opened, but conceived that his purpose, that executors should have it, was as much confined to his death as if it were for provision, and this is a condition precedent and so destroyed by having issue male, *Dike* against *Lake* P. 1657, B. R. the possibility being extinguisht by having issue and the commencement after the death of the issue, is only from the event, and so arbitrary, and verdict likewise should this term hold, no alienation could be made by fine or otherwise for payment of debts or provision for children; the Court conceived the words in equilibrio to either construction, and therefore the intent of the parties must be searched by perusal of the settlement. Twisden who argued this case before, as Mr. Kettlewell, yet knew not why upon the recovery. Windham cited the case in Chancery under the hands of the Judges. H. in trust ordered provision for daughters upon the dying without issue male, they certified that when A. had issue male though that issue dyed without, yet the daughters had no portions in their opinions. Adjornatur.

[171] 129. ALEWAY *against* ROBERTS. *Ante.* In Damages Br. 52.

Dower.

In scire facias reciting, that in Mich. 18 Car. the plaintiff recovered against G. heir of C. Roberts, and that she should have judgment against him of the seisin of her husband J. R. and by the Kings writs she had seisin, but no writ to enquire of damages: after which Giles R. dyed, and this scire facias is against W. the heir and ter-tenants who come in; some plead non-tenure, others specially, that Cesar R. made a lease for 99 years to one of them, from whom the lands descended to G. and from him to William retorned heir, and a lease for years if three lived so long, to another: and the plaintiff replies, that Cesar made a feoffment, and so traversed the dying seised. Allen for the defendant, conceived this writ lyeth not in this case: 1. Not for damages only, the defendants being not parties to the judgment. At common law there was no damages: and the Statute of Merton calls him deforceator that must render them, which is he that doth detain the dower. 2. The cause of the damages is for the wrongful deteiner of the dower, for without refusal, if always ready, the plaintiff shall have no damages, nor shall he be charged for such profits he receives not. 3. If there be a writ of enquiry, and judgment given, yet its personal, and affects only the lands of that person that is party to the judgment, and the execution is general by fieri facias or elegit of the lands the heir had at the time of the judgment, à fortiori, where the alienation is before judgment. 4. It doth not appear, till the execution of the writ of enquiry, that she shall have any damages, therefore no scire facias lyeth against the ter-tenants to know why she should not, and whether the damages shall relate to the death of the husband, which is unreasonable as this case is, or to the recovery, he knew not, nor what judgment or execution can be in this case, that she should by this alienation be defeated of her dower is a mistake, and no inconvenience, for she may bring her writ against the heir, who is lyable, & vigilantibus non dormientibus; and should he alien, yet she may proceed, but the damages being a personal wrong, it dyeth with the person; nor doth he know any president that the ter-tenants shall be in this case charged. Also he excepted, 1. To the recital of a judgment in this Court, and sheweth not betwixt what parties. 2. She hath destroyed her own supposition, that tenants pleading leases before the judgment mentioned by her, 18 Car. and she pleaded a **[172]** feoffment in fee to them long before, and alledgeth both seised; and so she hath judgment against Giles the heir of Cesar, whereas others of her own shewing were tenants. Serjeant Say's for the plaintiff, By the scire facias it appeareth to be error here of a judgment in C. B. and judgment here but in 18 Car. and so default appears in the plaintiff in the scire facias, because this shall relate to that, and the judgment in the C. B. was long before such feoffment pleaded, that the scire facias well lyeth against the ter-tenants of the two parts after judgment for the third, supposing the error well brought, and so the judgment in C. B. perfect, Tr. 17 Car. 1, *Steward* against *Steward*, Rot. 1270, before

the writ of enquiry taken out, and the error here was a supersedeas to that writ of enquiry, and that this Court may award a writ of enquiry, which takes off any default in the demandant, but that she may come here at any time, Dower Br. 13, although judgment be by default, or upon demurrer, Dyer 313. 14 H. 8, 25. After judgment by confession, this writ was allowed upon search of presidents; for by the judgment the damages are attached by the Statute of Merton, as a duty, and so he conceived damages should relate to the time of the husbands death, and there hath never been any particular means to recover them but only the Court ex officio do enquire of this as of the other points in dower comparable to 1 Cr. 342, 348, *Lorton or Corton* against , 2 Cr. 175, *Earl of Pembroke* against *Bostok*, damages given generally by the Statute of Quare Impedits is ascertained by the Court without any writ of enquiry, if it doth constare of the loss, but otherwise a suggestion and writ of enquiry issue, and yet damages may be against ter-tenant, Yelvert. M. 5 Jac. *Bromley* against *Littleton*, where the principal was never charged as the executors were in that case of Yelvert. P. 39 Eliz. *Williams* against *Williams*, error in B. R. of a judgment in C. B. and if there the executors be lyable without the principal, à fortiori here where the principal was charged that these are a duty by statute, *Vicount Mansfield* against *Worsley*, M. 1658, C. B. debt upon 2 Ed. 6, by Vicount M. as executor, H. 1656, Rot. 148, for tythes not set forth in the life of the testator, which were then a duty, and so not lost by the death of the testator; thus as to the matter that the damages remain. 2. As to the manner it is well brought against these ter-tenants, this land being originally charged with dower, and so most properly lyable and scire facias have often, 10 R. 2, Dower 158, been against others then parties to the first judgment, as against a guardian, 17 Ed. 3, 67, against a meer stranger, **[173]** 10 Ed. 3, 41, and it is well enough brought against this land only, as Dy. 81, 149, or of all at election, though it would have been hard to have charged the other tenants of the third part of the other lands, 4 H. 6, 49. Br. Assets per 3 is much stronger then this case, and dower is found when as here there is no default in the party plaintiff, but of him that brings error, and so praid judgment for the plaintiff, in scire facias defendant in error. Twisden, A scire facias against bail doth not recite any capias against principal, and they do not recite all, but are short, and therefore it not appearing it was dower unde nil habet, is not material, which the Court agreed. And per Windham, All the cases cyted are after judgments to recover damages, but here is not any judgment; and it is 48 Ed. 3, 19, a question, whether he that in the first had pleaded that he had nothing, and after purchaseth the land in scire facias, may so plead, and this is a personal tort and they are given by death; as per Twisden, In ejectment if the defendant dye before the writ of enquiry executed, the dammages are gone, yet the term is recovered, and the statute will not help, nor per Foster are the other cases like, being certain as here they are not, in quare impedit is quod recuperet presentationem, and the defendant dyeth before the damages be known. Twisden conceived, that if the same jury hath not given them, they are gone by death; which Foster agreed: and by Twisden, The scire facias as to the two parts only is well enough: and the plaintiff demanding dower of John, which might be before all the others, the pleas are frivolous, and had been naught upon demurrer. Windham conceived the pleading suitable to the scire facias, and both strange. Adjornatur.

130. *November* 16.

Slander.

In an action upon the case for calling the plaintiff whore, by which she lost her marriage. Stroud sen. desired special bail, such special damages being alledged in the declaration, and sworn true, Twisden having refused common bail in his chamber; and here the Court ordered special bail.

[174] 131. COLLINGWOOD *against* PACE. In Denizen Br. 7. H. 56, C. B. Rot. 1740. *Ante.*

Alien.

In the Exchequer Chamber, Ramsen a Scot had issue four sons, aliens, the eldest had issue three daughters, aliens; N. the second son had issue Patrick, who was born in England, and had issue W. born at Kingston; after the third son, J. Earl of Holderness, being naturalized by Parliament; as also George the fourth son by another, after John conveyed to himself for life, remainder to his wife, remainder to his heirs, and so seised, devised 6 Jan. 1 Car. 1, to his wife and her heirs, if he dyed without issue of his body, and other lands to his executors, paying to his brother N. an annuity, and to Sir G. and to Sir Tho. for forty years, and so to Alexander another brother, and then to the heir of Nicholas, and his heirs, he devised all his lands in question, paying his debts, and then dyed without issue, his wife surviving, and entring, married the Lord Willoughby afterwards; G. dyed having issue John, who after dyed, and after by inquisition its found as before, and that J. Earl of Holderness dyed without heir, and that the lands in question are escheated, and that Ed. Ramsey took the profits till his death, W. R. after, which the King granted to Murry, who conveyed to the defendant the lessor of the plaintiff, and the Earl of Elgin claimed by the heir of N. which appeared by special verdict. *Post.*

132. VEERE INFORMANT *against* SAMPSON, &C. IN THE EXCHEQUER CHAMBER.

Drapery.

In an information by bill qui tam pro domino Rege quam pro seipso, for not paying subsidy for new drapery to the aulnager. Finch for the King prayed, that all the Judges here assembled would settle it by order; but it being difficult, and not debated before, as the other cases had been, and the Judges of each Court divided, by Bridgman Chief Justice, and by Foster, this case is not adjorned for difficulty, nor is like *Calvins case*, which was primæ impressionis; this hath had a course in the Court. Hale Chief Baron, The consequence is so great, and it hath been already adjorned into this chamber; and therefore this was brought hither by the Barons, not by the Kings Counsels advice. Bridgman Chief Justice, conceived it more fit in this case to deliver their opi-**[175]**-nions at Serjeants Inn, as the Kings Counsel; which Hyde agreed, but contrà by Hale, Atkins, and Tourner Barons, and Bridgman Chief Justice doubted whether in this place any interlocutory order can be made to settle the possession; and 2 Jac. P. & Tr. cited by Foster, that by the opinions of all the Judges, this case was settled upon the Kings sending to them, which Twisden also conceived necessary here; wherefore they waived it.

133. THE KING *against* FIELD. *November* 18.

Coron.

The clerks conceived, that being retorned by habeas corpus, indicted for seditious words, he need not come to the Bar, because he might have appeared by attorney, which the Court denied. 2. The indictment was upon the statute 13 Car. 2, cap. 1, by direction of six of the counsel. 3. If any be indicted of any high crimes, as præmunire, he must be arraigned at the Bar, but contrà where he may put in bail. *Post.*

134. PENDAVIS *against* COLLINS.

Amendment.

Upon the plaintiffs amending his declaration, he hath election to pay costs, and so go to trial, or to give an imparlance; but if the defendant mends also, he may proceed, and costs need not on either side.

135.

Amendment.

In action upon the case, Jones. The record was for deteyning in prison, which was omitted in the writ of enquiry, and for that varyance he desired the writ may be quasht; but because there was only a paper copy and not the record itself. Adjornatur.

136. WAGSTAFF *against* TEMPLE.

Amendment.

After issue or demurrer, the continuances are helped by verdict, but when the plaintiff hath liberty by rule to discontinue, the defendant by proviso must take care to enter continuances; and because nothing was set down in the paper, the Court would not adjorn the jury, to give occasion to the defendants attorney to enter continuances.

[176] 137. TUBB *against* WALLWIN.

Averment.

The plaintiff in ejectment moved by Winnington in arrest of judgment, because the life of the party, 10 Ed. 4, 18, during whose life the defendant hath a lease, was not averred; which by 21 Jac. 13, is to be inquired by the sheriff, or other, as the Court think fit. And Foster cited a case of the Lady Morley, where the like rule was made before the statute, after verdict as here.

138. JOHNSON *against* DRAKE. *Ante.*

Admiral.

Howell prayed a prohibition to the Admiralty, because in a suit there upon a charter-party, the plaintiff in his libel suggested an agreement upon the high sea for performance of the same; which the Court granted, upon putting in a suggestion here, that all was done on land.

139. ELLIS *against* YARROW. *Ante.*

Trover.

Trover pro duobus pullis, Calthorp moved for judgment, that this properly signifies a colt, L. Entr. 38, though it also hath a signification of any young thing. Foster & Curia conceived that an Anglicè would not here help. And by Twisden, Although the colt loosed in Scripture be translated pullus, yet it hath been adjudged contrary in C. B. & 1 Cr. *Sprig* against *Rawlison*. A nil capiat was awarded, and here judgment per Curiam was staid.

140. TOWES *against* LEWIS. *Ante.*

Bail.

Account in an Inferiour Court, and upon it bail, (upon retorn of it by habeas corpus hither) enter into recognizance, that if the defendant be convict to account he shall appear, and if he make default the plaintiff shall have execution against the body lands and goods of the bail, the breach was assigned, that the Court assigned a day for his appearance after judgment quod computet, and he made default and they rendred not his body to prison. Judgment for the plaintiff, nisi.

[177] 141. BOOTH *against* BEARD.

Error. Godbot. 408, pl. 488. Yelvert. 108, pl. 151.

In error to reverse a judgment, because the original certified was (as the case of *Batchelor* against *Tanor*) subsequent to the imparlance, which the prothonotaries certified, being before judgment, was good enough to support it, though the contrary had been resolved by Roll.; and that the Court shall not intend any new original. But this Court was of another opinion, and left it till the prothonotaries certifie the course in C. B. by which this Court will be ruled. *Post.*

142. WEB *against* MARTEN.

Assumpsit.

Action upon the case upon promise, that if the plaintiff would deliver a writing upon request to the defendant, the defendant would redeliver it, and pay 40l. upon request: the defendant pleaded non promisit within 6 years, to both which the plaintiff demurred, as no good plea to the one, and good to the other, which on general demurrer by the plaintiff cannot be good; the last was a promise in law accrewing by delivery of the deed, and requests no more then the law implies but per Jones. This is fact and collateral and a request necessary, and waived the insufficiency of the plea which reacheth only one part; Twisden conceived that when the promise raiseth a present debt as upon delivery of a horse to pay, request need not be exprest; and per Curiam, such is the payment of this money; and Twisden conceived that a plea in bar of the whole answering but part, is insufficient. 2. The deed which was the ground of the consideration, was the defendants own deed, because it concerned his title, 9 Ed. 4, and so the consideration void, but per Curiam, though this be not good by way of accord in trespass, yet it is for an action upon the case. 3. The promise was to deliver a parchment deed or writing, which per Curiam is frivolous, and *Bridges* against *Hide*, such a plea of the statute was ruled naught for the whole, being an annuity to be paid yearly, whereof part was within, part not in the statute. Adjornatur.

[178] 143. HAMES *against* BAILY.

Covenant.

The plaintiff covenants, that if the defendant would pay 40l. he would convey as the counsel of the defendant should advise: and in action of covenant for the money, the defendant pleaded, that the plaintiff did not convey as the counsel did advise, which per Curiam is naught, without particular shewing the manner, and what the counsel did advise. And 2. These being mutual covenants cannot be pleaded in bar one of another, which was assigned for error. And judgment affirmed. Nisi.

144. GRANGER *against* HEMBOROUGH. *Ante.* Entr. Congeable Br. 2.

Departure. 3 Cr. 62, pl. 5. 3 Cr. 828, pl. 33 c. Dyer 253.

On *Chapman* against *Chapman's case* adjudged in this point, Hut. 90. Jones conceived this no departure, nor the same with that case which had payments in the condition, as well as general words of performance: and Hub. 8, *Baker* against *Spaine* is the same, that its no departure; for he might have pleaded nil debet generally, this entry being as an eviction or release. Foster, If the covenant was to pay during the term, the term must be continuing, contrary if it be generally for payment of such rent, which difference hath been agreed in C. B. Twisden, It should have been pleaded, that the defendant had performed covenants specially, paying his rent till such a day that the lessor entred, which the Court agreed, and that this general performance is intended of an actual performance, Yelvert. 3 Jac. *Jeoffrey* against *Guy*,

and so this entry a departure in action of debt, a breach of covenant being assigned by the plaintiff; but the defendant must excuse himself in his plea in bar, 1 Inst. 303. And by Twisden upon general performance pleaded, the plaintiff replyes rent arrear: the defendant cannot rejoin by want of a demand, though he might have excused himself by pleading a tender in bar. Judgment for the plaintiff, nisi.

145. BURTON *against* GUNVILL. *Ante.*

Error Br. 5.

Damages in action upon the case for false imprisonment, are joynt against all the defendants, and several as to the assault, which was agreed well enough; but the error assign'd and relyed on in the judgment in C. B. it was quod recuperet twenty shillings damages pro misis & custagiis, beside the damages de incremento distinct from & ultrà his [179] damages for the trespass; which by Allen is well enough, being surplusage, and only to ascertain how much of the damages are for costs, how much for the trespass, but all are damna, and in the end are sum'd up quæ in toto se attingunt. Jones conceiv'd the forms are so strictly observed in judgments, the concordatum & concessum hath been ruled void. Windham conceived that this is no more expressed then was implyed in true construction, which the Court agreed; but that this is variance from the ancient form, therefore adjornatur to search presidents; though Twisden thought the damna pro misis had been for interest. 2. The writ was directed to remove a record coram Roberto Foster & Sociis, and its retorned by F. and Hyde, which by Wild the Kings Serjeant, is not good, but both should have been named in the certiorari, which is the course of fines pleaded, 1 H. 7, 10 b. But by Twisden, Since the statute of 4 H. 7, all need not be named; and so they conceived this retorn well enough, and could not have been socio. *Post.*

146. ——— *against* WEST. *November* 19.

Bail.

Common bail is only requirable in action upon the case for slandering of a title, without special order, which the Court would not grant.

147. JAMES.

Treason.

He was indicted (and found guilty) for compassing and imagination of the Kings death, and intending his deprivation, manifested by preaching at White Chappel, after the 24 of June 1661, viz. 18 October, affirming of the King and his nobles, that the King was a blood-thirsty and tyrannical King, and so of the nobles; and that the cup of their iniquity was almost fill'd with the blood of the saints a year ago, but the putting of the Covenanters to death in Scotland, had (to fit them for destruction) filled it fuller; and he was sorry he had neglected his opportunity of fighting the Lords battel, but hoped that if ever he had it again, he should consider it more fully. Serjeant Keeling opened the indictment (the Court on his desire refused to allow any friend to take notes for him), Mr. Attorney General further observed, that the intent and imagination was the prime treason, the preaching an evidence of it, which was the law before any [180] statute made in the world, as antient as monarchy it self; but the uncertainty is bounded by the statute, 25 Ed. 3, which is only declaratory of the common law for the ease of the subject, bare words at common law being treason, this is more then that preaching is an overt act, at least by the statute of 13 Car. 2, cap. 1, of preserving the Kings person, that he endeavoured not only to overthrow the King, but monarchy (that divine rule from all antiquity) in this land. After the evidence that swore the words punctually, the prisoner objected against the testimony. The Court summ'd up the evidence, and verdict pro Rege.

148. TRICKET *against* HANBY. *Ante.*

Varyans.

In action upon the case upon promise of forbearance to sue the defendant as executor, de son tort, and stay till he and they could go to Liverpool to fetch books. Lindly moved for judgment that it is well, the consideration, being till he or they could send, and the breach assigned that he staid till they might have sent to L. which is well enough after verdict, and it is said he did forbear to implead him, them or either of them, till, &c. but per Curiam, the promise must relate till he and they may send, and therefore must be so aplyed, especially being conjunctive and not disjoyned, he or they. *Post.*

149. WALLIS *against* UST. *Ante. November* 20.

Slander.

In Tr. 1660, the defendant pleaded not guilty; the words were spoken in July 1659, and Wallop conceived the judgment ought to be upon the Act of Judicial Proceedings, which by the word proceedings had confirmed the pleadings, as here the words being indefinite in the title, and so what is not excepted is confirmed; the intent of the lawmakers being evident in what they intended not to confirm. 1. Process in High Courts of Justice. 2. Outlawries or indictments of persons for their loyalty, these as malitious were left out; but all civil proceedings were intended to be confirmed for civil peace, not only such as were executed by judgment, &c. but such as were executory, and depending not only upon ancient, but also by any latter laws, which was the principal provision of the Act, and so the declaration being well begun, here they are as effectual as upon a good Act of Parliament, though **[181]** by the reason of the common law these words might be proved a foul scandal, and it would have been fruitlesly confirmed if proceedings cannot be upon it. Bartholomew contrà, and that the Act doth not extend to make these words actionable, but only to be so far good as in English or wanting legal power, and the words were only actionable, as a consequent of a pretended Act that inflicted a punishment on such offences, which is now taken away, and so the words cannot be said actionable at the time of the speaking: and had there been a libel for fraight pending without sentence, he conceived this Court would send a prohibition. Twisden, If H. before the Act be indicted for adultery, he cannot now be hanged for it; and per Foster, according to this rule all actions pending by writ or declaration should receive judgment now as upon effectual Acts which he conceived not in private interest, but only in matters of publick concernment and good, and by Windham it would be dangerous thus to proceed, because they made many laws against the King himself, and therefore the Acts were only to help defects of power in the Courts, not of the laws made, unless only that they were in English, but if any of these actions had received judgment, they may be said pending within the Acts. 2. The words are actionable, because this Court may punish it by fine and imprisonment, 3 Inst. 206, 1 H. 7, which the Court denyed, which is the ground that a procedendo is grantable to London where such words are actionable, and no appeal lyeth hither, though a bawdyhouse is punishable as a nusans, so of a pimpe, *Dimmocks case*, nor was ever the jurisdiction of this crime of adultery in this Court. Nil capiat per billiam awarded per Curiam.

150. DACIE *against* LINCH. *Ante.*

Slander.

Of a minister that he is a thief and a witch, and deserves better to be hanged then A. To the latter part, the Statute of Limitations was pleaded, and a replication that a latitat was taken out before and continued, which is good enough. Adjornatur, 184, pl. 158.

[182] 151. DAWSON *against* READ. *November* 21. Siderf. 66, pl. 39.

This would have abated the writ, as in account. 4 Ed. 3, 31, pl. 11, but not a scire facias or charter de pardon where he was named J. S. the elder, 18 Ed. 3, 7 b. pl. 24, nor J. S. generally named although he be the younger shall not stay seisin del terre on default at grand cape, 9 Ed. 3, 20, pl. 5. 3 Cr. 57, pl. 7. Hitch. 9, pl. 31. 1 Brownl. 55, pl. 294. Such variance betwixt counts and specialty hurts not, 39 Ed. 3, 22, pl. 11, nor between the count and warrant of attorney, so L. 5 Ed. 4, 23, pl. 20. 2 Leond. 147, pl. 181, but 8 Ed. 3, 20, pl. 5, is exprest that writ against J. S. by averment that the defendant is named J. S. le fits and not J. S. barely is abatable.

The venire facias was J. S. of Dale generally, and the pannel was J. S. of Dale junior, *Wilson* against *Stubs*, Hub. 330. By Allen in arrest of judgment that this is a material variance as *Gregories case*. And the distringas being right, by Windham, here is no contradiction but one persuant to another, and per Curiam if he be the same man, of which the sheriff shall be examined, all is well enough. Adjornatur.

152. GIFFORD *against* SMITH.

Scire facias. 3 Cr. 738, pl. 9.

By the course of the Court, scire facias against the bail must have seven days betwixt the teste and retorn, (*Sanders* against *Holday*) else are all proceedings after void, per Finch Solicitor General for the defendant, which the Court agreed, and that one cannot be taken out retornable more, and the other within less then seven.

153. SCUDAMORE *against* BELLISON.

Leases.

Tenant in tail baron and feme, remainder to the husband in fee: the issue after the fathers death, and in the life of the mother levies a fine to J. S. after which the mother leases for 21 years to the plaintiff, in evidence to a jury, the Court conceiving this no lease within the statute, *Croker* against *Kesly*, 2 Cr. 688, and Bridgman but at common law, and so only avoidable by the issue, not by feoffees or conusees, per Curiam, wherefore they would not have any special verdict *Beaumonts case* in fine per Windham is to the like effect, there being no reason the fine of the issue should abridge or shorten the power of the wife. The lease of the bishop not warranted by the statute, is only avoidable by the successor, not by himself, per Curiam.

[183] 154. WINTLE *against* DANBY.

Varyans.

Errors of a judgment in C. B. per Windham. 1. The venire facias is Cam. and the distringas Cham, which per Curiam is no variance, if it were the party, shall be examined per 21 Jac.

155. TAYLOR *against* SMITH. Entred Hil. 60 Rot. 1413.

Arbitrement.

In debt for nonperformance of an award, the defendant pleaded no award made, the plaintiff sheweth that at such a day and place the arbitrators took upon them, &c. and awarded, &c. which per Jones upon demurrer by the defendant is not good, no place appearing where the award was made, but per Curiam being but one sentence, it is well enough; contrà if it had been that postea suscepit onus arbitrandi he awarded, &c. Judgment for the plaintiff; but Twisd. doubted, because every mans plea shall

be taken strongest against himself, and therefore ad tunc & ibidem should have been added.

156. CAPENHURST *against* CAPENHURST. *Ante.*

Assignee. Godbolt 24, pl. 35. 3 Cr. 9, pl. 2. 3 Cr. 128, pl. 4. 3 Cr. 796, pl. 42.

Wilmot conceived that this assignment by lessee of the lands for so much of a term, as should be unexpired at the time of his death, &c. good; and *Child* against *Bailys case* was by devise to J. S. of so much as should be unexpired at the death of the party, which affixeth the devise to the land, but per Wil. the limitation being uncertain what ever the devise be, it is void, as *Gravenors case* in Dy. 150, pl. 83, which Twisden agreed, and that it had been the same in a grant, contrà where the limitation had been certain, and the commencement uncertain. Judgment for the defendant, Foster and Mallet absent.

[184] 157. WHITACRE *against* PELLINGTON. *November* 22.

3 Cr. 853, pl. 18. Stiles 216, pl. 493. 1 Brant. 310, pl. 748. 2 Cr. 5, pl. 5. Godbolt 382, pl. 469.

Error of a judgment in C. B. that the plaintiff in trespass and ejectment was an infant, and yet appeared by attorney; but the verdict being for him, it is helpt by 12 Jac. of Jeoffailes. Per Curiam contrà, if the judgment had been against him. Judgment reverst, nisi.

158. DACIE *against* LINCH. *Ante* 181, pl. 110.

Slander.

The words per Windham are actionable, whether A. were hanged or no; and by this aggravation such a witch is shewed, that 3 Cr. 62, pl. 4, is felony by 1 Jac. which Twisden and the rest agreed; contrà if it had been generally witch, or that he deserved to be hanged. Judgment for the plaintiff.

159. THE KING *against* STORY.

Peace. Den. 206, pl. 248. 279, pl. 340.

Lindley excepted against indictment for peaceable entry and forcible deteiner, because it was quod parifice ingressit in liber̃ without a dash, for both which the indictment was quasht, per Curiam, and fine set on the clerk of 40s. 2. Restitution cannot be given the last day of a term, nor without day given to shew cause against it.

160.

Replevin.

On 8 H. 4, *Spencers case*, when the sheriff upon a replevin of goods saith, that none came to shew him the goods, this by Winnington is no good retorn, without saying they were eloined; sed Curia contrà, for he cannot know the goods without shewing of the party; but the writ not being filed the Court would do nothing.

161. LEE *against* PAVE.

In Det.

The defendant entred into bond to the sheriff, whereupon the sheriff was to discharge the defendant of another execution, which was taken out double after satisfaction of the debt; but by Twisden, he never knew the sheriff ordered to deliver the bond, which is his only security; which the Court agreed.

[185] 162. MAIRE *against* SPENCER.

Bail.

Scire facias against bail upon 3 Jac. 8, in a writ of error: the defendant pleaded that the principal M. did prosecute with effect, and that the judgment was reverst. Jones conceived, that because he had not concluded by relying on the record, but only hoc paratus est verificare, that the plea was not good, he having demurred for that cause, and that he only prayed judgment si actio; the Court conceived, although nul tiel record were pleadable, yet they ought to have pleaded prout patet per recordum, per Curiam.

163. GUNNEL *against* BURTON. *Ante.*

Error. Br. 5. An attorney may plead a misnomer in the surplusage of his masters name, 2 H. 6, 11 b. pl. 1 A. Indenture pleaded betwixt C. and B. which was betwixt C. and A. and B. good. Issue that money was not paid for White Acre, if it were paid for that and Black Acre is against pleader. H. Count in dum fuit infra ætat. on lease by him, which was by H. and A. good, 6 Ed. 3, 55, pl. 61. Repl. of beasts is void, if but one were taken. 7 Ed. 3, 15 b. pl. 12. Baron cannot vouch sale on warranty to baron & feme, 10 Ed. 3, 53, pl. 34, contrà, so record certified as before three which was before four justices, is good, 2 Ed. 3, 4 b. pl. 13. Contrà in attaint on oyer coram four, which was before but two, 2 Ed. 3, 8 b. pl. 2. So a recordare of suit inter A. plaintiff, and B. defendant, is no removal of suit inter A. plaintiff, and B. &c. defendant, 2 Ed. 3, 35, pl. 23.

The Court, as hath been ruled in the Exchequer Chamber, will not hear such as by motion endeavour to feel the opinion of the Court before they have given their positive judgment, it being before them. And in this case by Windham, sociis for socio is only false Latin, which will not abate the plaintiffs own writ of error; contrà by Twisden, it being an original, its not answerable to the writ, which Mallet agreed. Foster conceived it a case fit to be moved at Serjeants Inn, and therefore would not deliver his opinion. Adjornatur.

164. GRANGER *against* HENBOROUGH. *Ante.*

In Hub. 8 this never came in question; but 1 Inst. 304, by Windham is exprest, and so he conceived it here a departure. Twisden conceived no difference betwixt this and *Chapmans case*, and the rest to the same intent. Judgment for the plaintiff, nisi.

[186] 165. PARNELL *against* ROWE.

Trespass.

In trespass for a pedibus ambulando, and eating with cattle in 6 closes. The defendant justifies in two closes by a foot-way, and to three of the rest, that it was contiguous to his land, and the plaintiff ought to repair. The plaintiff replyed, that three closes were well repaired, and that the defendants cattle were unruly. The defendant demurreth, because the travers is absque hoc, that they were not ruinous; as also that the tenants of those closes ought not to repair by prescription, as the defendant alledged, is not good, not repaired being a good issue. And by Serjeant Bear for the defendant, the custom is alledged, that all the tenants of the six closes ought to repair, and the plaintiff answers but to three. Also this is double, 19 H. 6, 41, and hath immaterially traverst the contiguity of the rest, 20 H. 6. Yelvert. H. 9 Jac. *Durrant* against *Child*, which dividing the pleas is not good. By Windham, all these are but several causes and inducements to his traverse, his conclusion being only relying on one, and the contiguity of the other three may be well enough traversable, although the plaintiff be bound to repair; for the cattle might go through one mans ground into another, because he is hereby excused as to the defendant, which Twisden & Curia agreed, 16 Car. adjudged that H. seised of Bl.

that ought to repair against B. yet if the cattle of A. come through the lands of B. 21 H. 6, in trespass by H. A. cannot plead default of repair in H. Adjornatur.

166. WILLS *against* GRIFFITH.

Bail.

Rolls would not take bail of the real debtor to the garnishee upon the removal of the suit in London by certiorari, but Berclay contrà; in action of debt, the party in whose hands the goods of the defendant are attacht appeared, being the garnishee, after which, to try the truth of the debt, the defendant removed the suit; but the garnishee prayed he might here put in bail to him, or else a procedendo might be awarded; which Hern clerk, upon search of presidents, reported as aforesaid, and it was awarded. Nisi.

[187] 167. JONES *against* PHILPOT. *November* 23. Entr. Congeable, Br. 140.

Baron & feme. 2 Leonard 222, pl. 282.

In ejectment by special verdict its found that R. was seised, and enfeoffed C. W. and his wife, and the heirs males of their bodies, they had issue Giles and T. They make a feoffment, and then the husband dyes, the wife enters and makes a feoffment in fee, for which G. the son enters by 11 H. 7. The case was, husband and wife, tenants in special tail to the heirs of the husband of his provision, make a feoffment, which being a discontinuance, the wifes entry by 11 H. 7, cap. 20, being lawful, notwithstanding the use limited to her, and so her feoffment quoad, the tail is a forfeiture, by Jones for the plaintiff, which the Court agreed, because her entry was congeable; but during the life of the husband she cannot be remitted. And by Twisden, although H. shall not be remitted against his own feoffment, yet if a disseisor will make a feoffment to the use of H. tenant in tail, H. is remitted, if the feoffment of the wife, being to him in reversion, be a discontinuance (which the Court would not positively say, but conceived not) yet if not, the heir is also heir in tail, and so his entry congeable, quacunque via data; if the reversion be in the donor, the tenant in tail by feoffment to his own issue cannot bar him; contrà where the reversion is in another. Judgment for the plaintiff, nisi.

168. BARROW *against* HEWIT. *Ante.*

Error Br. 420.

Buck moved for judgment, because the mittimus to the justice, certified by the Chief Justice, as *Harrison* against *Morpeth*, 1654, C. B. is well enough, as in that case to the Justice of Ely; and so *Jones* against *Williams*, 1658, a record betwixt generosos retorned inter armigeros, is well enough: and 2 & 3 Ed. 6, cap. 28, calls him the High Justice; and 43 Eliz. calls this justicer: and had the certificate been by his proper name, 1 Cr. 189, *Bethels case*, it had been well enough, 2 Cr. 368, *Lister* against *Ravenscroft*, præcipe guardianis, the writ of view was guardiano, yet well. And Hub. 138, & Hub. 135, comes not to this case, being direct to the justice of peace, certificate by Clerk of the Rolls, Trin. 24 Car. 1. And the case of a writ directed to the commissioners of the sewers, certified by their clerk, and ruled **[188]** good: and so here by Twisden & Curiam, for the Court will not presume any other. Judgment for the plaintiff, nisi.

169. TIRRY *against* BROWNE. *Ante.* Siderf. 64.

Marriage.

In trespass for entring his house, spoiling his goods, and taking away his wife: as to the former, they find the defendant guilty; and to the wife, they find the Act of Marriages (which was made 1656) and that after Febr. 1658, the Act was to end:

and that the marriage was in April 1657 and dissolved by the justices in their sessions within six months after the marriage, according to the direction of the Act, by petition of the wife and her parents, being without their consent, which is confirmed by the Act of Judicial Proceedings, which comprehends orders of sessions. But by Windham, this sentence should have been upon the verdict of a jury, not by petition; which Foster Ch. Justice agreed, the words of the Act being, that they should do it by tryal, which cannot be by private information in this manner, but by jury; and their proceedings being erroneous, are not confirmed. But by Allen for the plaintiff, this was the general way of fact that was practised in those irregular times, and the consequence of this would be great: and (by Windham) when they are once well married, all the world cannot dissolve the marriage; for an Act of Parliament in this sense, against the law of God, is void; and this doth properly belong to the Ordinary: and *Bales case*, being a second marriage, at which sentence (by Wild) Rolls Chief Justice would not be present, that dissolved her first marriage, but conceived it could not well be dissolved. And by Twisden it hath been resolved, that a process by petition before the justices of peace is void upon the general law, and the same causes that might legally adnul it then, will do it now in the Spiritual Court, and therefore the party is at no inconvenience: but the Court would give no judgment, because the verdict hath found that which is not here examinable; and this is not by force, but only without the consent of friends. And by Allen the power of the Ordinary is delegated to the justices: but per Curiam, not that they may proceed by the course of the civil law. Curia advisare vult.

[189] 170. HELIER *against* GRAY.

Tryals.

Error of a judgment in Bristow, if they trye by twelve, they may summon an hundred by custom; but by custom a tryal cannot be by fewer or more then the law appoints, per Curiam. 2. In Inferiour Courts it is needless in the distringas to retorn the jurors quorum quilibet habet so much, because the statutes only include the greater. 3. The venire, by Jones for the defendant, by custom may be to 24, ad recognoscendum, so but twelve execute it. And by Foster, it is in pursuance of the rules of law, and so good, which Twisden agreed, although they cannot nominate by general allegation of custom; but it being here specially pleaded, the Court conceived it well enough. Judgment affirmed, nisi.

171. BARS *against* DESMAN. See Baron & Feme, Br. 1.

3 Cr. 370, pl. 9. 1 Brownl. 46, pl. 254. 2 Cr. 445, pl. 23.

If the sheriff retorn cepi corpus, the wife may have an idem dies, 2 Cr. 58. 11 H. 4, 71, 89. Dy. 271. And upon an exigent if the feme will appear, she shall be received, and he have an idem dies; and so if he be outlawed the wives appearance may be received, and when the husband comes in by process after, he shall not be received, as *Mayherns case*, till he bring in his wife: the case at Bar being an action of det against baron & feme, upon the latitat the feme appeared, and shall be accepted, per Curiam; but where the feme is in execution, she shall not be discharged; nor could the Lady Baltinglass, who was in custodia only upon process. But per Curiam, she ought to be discharged, and that without bail, if it appear upon the writ that she is a feme covert, but if she be sued as a feme sole, she shall put in bail. And per Twisden, it is an unreasonable course, that the wife because she cannot appear by reddidit se, but in custodia, therefore she should not be dismissed, as in C. B. else would this be as good as a divorce, a continual non est inventus being retorned against the husband, and no declaration can be against her, and so she shall be always in prison; and the clerks conceived, by the course of the Court, she could not appear, and discharge her self. Sed adjornatur to search presidents.

[190] 172. RUMSEY *against* ATKINSON. *Ante.*

Jurisdiction. 3 Ed. 1, cap. 35. 3 Cr. 105, pl. 15.

In consideration that the plaintiff had taken pains at A. about a house in B. which appears not to be within the jurisdiction of the Marshalsey, which was here assigned for error: but by Wild for the plaintiff in error, defendant there, that the principal cause of action is on a thing executed, and the promise the ground of the action, and is not for a quantum meruit, whereby the house should come in question. Allen for the plaintiff. It is not enough that it doth not appear to be out, but it must appear to be within the jurisdiction, which hath been a constant rule. 2. Though the consideration be past, yet if it had been for going to Windsor, it had been naught; which Wild agreed. And here this procurement of the lease of the house in B. is local, and must be shewed to the jury: and by Windham, had this only sounded in damage, without the jurisdiction, 1 Cr. 570, it had been well enough; but this procurement is part of the thing it self, which the jury mus tenquire of in the issue; the taking pains is not sufficient, or about a lease generally, but about a lease of this house in B. particularly. And so by Twisden; all Inferiour Courts are tyed up, but these Courts may enquire, any where; and he conceived this a flat error, and Foster likewise. And this is not like a promise at Hull, that if the plaintiff would deliver his horse at Hull for the defendant to ride to Beverly, the defendant would deliver him at Hull again; here all enquirable is only at Hull, & not the riding. Judgment reversed.

173. SERJEANT MORTONS CASE *against* SPENCER. Siderf. 65, pl. 28.

Priviledge.

He being to attend in C. B. the Court conceived, that this Court could not award a prohibition to the Admiralty, in a cause wherein he was concern'd: but by Allen the Court may be prohibited, although any party could have priviledge, because it appears upon the libel, that the cause is not within their jurisdiction, and priviledge in this case lyeth not, for no suit is commenced against him. And if a serjeant would sue in an Inferiour Court, this Court might reverse that judgment by error. And by Foster, this action was commenced before he was serjeant, and he was not named serjeant, and therefore non constat he is the man unless he comes in by plea. And by Twisden, If a serjeant had sued in Spiritual Court for a legacy due out of the Orphans Court in London, a prohibition would lye here: but by **[191]** Windham, priviledges are not to be pleaded as other pleas, and therefore this Court waiveth not their jurisdiction by leaving it to the C. B. where he is resident; but they can also award a prohibition, and conusans is thus demanded à latere at the Bar by motion, as this is. But by Allen, Conusans is ex debito justitiæ, and without special favour, its claimed by matter of record put into Court; but this priviledge is not claimable of right, but of favour without a plea; and plead it he cannot, here being no prohibition: but the Court refused to allow his priviledge without plea, otherwise than by agreement of the parties. *Post.*

174. DAWSON *against* READ. *Ante. November* 25.

Error. 1 Brant. 12 b. pl. 27.

Keeling, the Kings Serjeant, prayed judgment, because H. 11 Car. Rot. 703, B. R. *Price* against *Isake*, adjudged, that if he that is mis-named in the venire, if he be not sworn, its not material, P. 11 Car. which the Court agreed, being in an information at common law, not upon any statute, and therefore needs not the help of the Statute of Jeofails. Supposing that there had been but 23 retorned, if 12 had tryed, it had been good enough. Judgment for the plaintiff, nisi.

175. SABIN *against* SABIN.

Franchise. Procedendo.

An ejectione firmæ brought in the City and county of Canterbury, and removed hither by habeas corpus; and because the Judges of Assize come not hither, a procedendo was prayed: but by Twisden its not grantable, but the rest doubted. But because bail was here put in, all the Court denied it, because thereby they were seised of the cause. And by Wild, the Kings Serjeant, upon an ejectment in the county, H. may declare on a demise in any part of the county of Kent, and so try it at Maidstone; for the venire facias comes always from the place of the demise; which Windham denied, the body of the county being as another county from that of Canterbury.

[192] 176. LEVIT *against* CRANE.

Common. A. may plead warranty made to A. and B. as to A. sole in bar, without shewing death or assignment by the other. Contrà in a count, 10 Ed. 3, 48, pl. 16. In a cessavit tenant must tender arrears above two years; but H. shall recover damages in intrusion de gard for no longer time then the count, 7 Ed. 3, 58 a. b. So certiorari to remove a record coram J. S. et socio suo, for sociis suis. 2 Leonard 112, pl. 149. 3 Cr. 79, pl. 42. In assumpsit, the jury find it for the consideration alledged and another, its void. Demand of lands in A. and B. is good, if the whole be in either vill, 7 Ed. 3, 46, pl. 11. So issue that A. ought not to repair, is found that A. and B. ought, is against A. 22 Ed. 3, 1, pl. 3. Formedon as heir to baron & feme being only heir to the baron, good. 3 Ed. 3, 5 b. pl. 16. So action by A. and B. as executors against B. another not so named, yet good, 3 Ed. 3, 23 b. pl. 12. Darrein seisin pleaded in J. S. in a writ of ayle, if J. S. and T. were seised joyntly, its sufficient. 4 Ed. 3, 12 b. pl. 19. Alden.

In evidence to a jury, the issue directed out of the Chancery, was whether money was paid for the mortgage of White Acre; if it were paid for White Acre and Black Acre its well, per Curiam, as if it were upon, whether a common from Lady-Day to Michaelmas, and the jury find from Christmas to Michaelmas, and well by Twisden.

177. TRIPPIT *against* REYNALDS. *Ante.*

Assumpsit. Stiles 393, pl. 861.

H. possest of a term, and being in treaty to assign it to B. B. promises in consideration thereof to pay to the wife, which by Lindley for the plaintiff is good enough, being advantage to the wife, M. 1654, *Thomas* against *Geere*, B. R. in consideration the father would assign to A. A. would pay to the daughters, who brought an action, and adjudged good. And so in the case of *Sprat* against *Agar*, M. 1658, and the same term the like betwixt Fountain and his wife, there being a relation betwixt them, it is sufficient to support the action. And 2, although of right it belong to the husband to be administrator to the wife, yet he may refuse, or for consideration, the Ordinary may grant to another. Tourner for the defendant. It doth not appear the husband of Mary the executrix is dead, and so her administrator not entitled. 2. The wife is a meer stranger, as in *De la Bar and Golds case*, and not like the case, Yelvert. 1. But the husband is intitled to all the arrears in his life time. And 3, it appeareth not to whom the promise was made, as in H. 1651, Rot. *Shun and Beelby*, in consideration that H. would surrender, the defendant promised to pay, and said not to whom, ruled naught; but per Curiam the promise shall go along with the interest and consideration, unless it be collateral, and vests no duty. And here by Allen for the plaintiff, needs no promise to the wife; or if it had been made to the husband, yet if the duty accrue to the wife, she after his death may have the action, and lay it as **[193]** made to her self, for by law it redounded to her: and by Windham this is a plain bargain: but upon promise by A. to pay to C. for wares sold by B. B. only shall have the action, as hath been ruled, unless B. were in debt to C. And if it had

appeared, that if the father would assign to A. he would promise to pay to the son, that vests not any interest in the son, unless it appear in the declaration that it was intended a gift of the father to the son, and so in the case at Bar. But by Allen for the plaintiff, the payment is to be to the wife, her executors and administrators, and so the propriety appears hers, which the Court doubted. And by Twisden, this rent is collateral, as a promise to stand to an award is not good, unless it appear to whom it was made; but when the consideration is of marriage of his daughter, there the son performs the promise, yet either may have it, *French* against *Evans*, in consideration of conveying land to the son, H. promised to pay, here the son hath no remedy, because its collateral. By Foster, the declaration is upon a communication betwixt the plaintiff, tenant to A. &c. and said not what estate, which is ill, although the promise be to assign all his term of years. *Post.* Adjornatur.

178. TRISKET *against* HANBY. *Ante.*

Assumpsit.

Allen moved for judgment, and conceived the averment good enough, that he did forbear to sue the defendant, and the others, till they could send to L. which after a verdict the Court conceived it well enough. Foster absentè. Judgment for the plaintiff.

179.

Fish.

Indictment for eating and dressing flesh on Friday, quasht, because it said not that he did inform any magistrate that his guests did eat, &c.

[194] 180. PALMER *against* LADY CHAWORTH. *November* 26. In Default Br. 52.

Baron & feme.

Upon a judgment confest by her husband alone of debts contracted after the marriage, as if they had been dum sola, as *Drakes case*, C. B. by which practice the wife and husband was taken in execution; but notwithstanding the course of the Court, that the wife taken alone, should remain till the husband comes in; the Court discharged her, and conceived such custom unreasonable.

181. BROWN *against* MARTEN. Detinue Br. 2.

Assumpsit. 3 Cr. 870, pl. 2.

An indebitatus assumpsit, the defendant saith that the money promised was but a pledge for his appearance, which amounts to the general issue, for which cause the plaintiff demurred, and well.

182. THE KING *against* FIELD. *Ante.* Siderf. 69, pl. 6.

Treason.

He was indicted upon 13 Car. 2, cap. 1, § 2, for preservation of the Kings person, upon that clause which for seditious words gives the same pein as in præmunire: and now by Bramston, prayed to be bailed; which the Court would not have denied, but for good cause, viz. because the times and person were dangerous. *Post.*

183. TOMLINSON *against* HALL. In Debt, Fitzh. 183.

Assumpsit.

In action upon the case, in consideration the plaintiff would accept a lease, the defendant promised to make him a lease by such a day: the plaintiff saith that he

was and is ready to accept any demise in scriptis, which by Baldwin is not good: but by Wild for the plaintiff, the averment is but surplusage, for the defendant is bound to do it at his peril, which the Court agreed: but the record was express that he promised to seal and deliver a lease, &c. which is intended in scriptis. Judgment for the plaintiff.

[195] 184. THE KING *against* JONES.

Trials. 14 Ed. 3, 16, § 1, n. 11.

Either party by agreement may carry a cause, where the King is party to tryal, as in perjury, &c. but cannot try it by proviso. 2 Leonard 110, pl. 144.

185. NEVE *against* NELSON.

Priviledge. Stiles 197, pl. 446. Godbolt 286, pl. 412. 22 H. 6, 7.

It hath been doubted whether priviledge be pleadable after imparlance, by Twisden; but by Windham it cannot; contrà of ancient demean. *Post.* Adjornatur.

186. THE KING *against* ———.

Peace.

Its said that A. Justice of the North R. in Y. went to view the force in a place in Yorkshire, and said not that it was in the North Riding: for which Simpson prayed that the indictment might be quasht. But per Curiam this is a judgment, and must be reverst by error; though the clerk affirmed presidents were, it might be quasht.

187. KING *against* ALSOP. *Ante.*

Assumpsit.

In action upon the case upon communication of an indictment that had been against King for perjury, the defendant promised to pay, &c. if T. did not prove the defendant in an action of conspiracy to be guilty, if the plaintiff would give Taylor a release, &c. *Sharps case*, 1 Cr. 352, the plaintiff saith, that although the defendant was produced in a suit betwixt the plaintiff and D. and H. the said Taylor did not prove, &c. and sets not forth what the issue was, which might be collateral, or upon any other matter. 2. Its not said where the trial was wherein T. was produced, for which causes the defendant demurred, Hub. 233. And 3, the matter of action is not sufficient, because it doth not appear that Hutton and Dow had indicted the plaintiff before, and so it was but a bare promise, that if the plaintiff, who had no cause of action, would bring an action, the defendant would prove or pay, &c. Adjornatur.

[196] 188. PRIDEAUX *against* SHARSWELL.

Trespass. 1 Leond. 314, pl. 438. Pleader 61. Noy. 107. 2 Brant. 204, pl. 487. 2 Brownl. 168, pl. 154. So 30 Ed. 3, 19, pl. 2. Act.

The plaintiff possessed of a close to which the defendants is contiguous, and A. next his, B. next, his cattle come out of the defendants to the plaintiffs to B. and so to other land of the plaintiffs again, which the plaintiff ought to repair his, A. his, and B. his, this hath been adjudged, *Binions case* 15 Car. by all the Judges, that the stranger may have trespass, and so here may the plaintiff for his close that is farthest off, 2 Jac. Cited by Windham contrary, and that the plaintiff, where many closes of his own are without any strangers intermediate, because all was his own default he cannot punish such trespass: but he agreed this case as the rest did. Adjornatur.

189. ELLISON *against* ELLISON. *Ante.*

Error.

In debt, the executors pleaded non est factum, and a capiatur against him, which Maynard praid might be made misericordia, as it hath formerly been done, as well here as in C. B. *Nelsons case*, as the rule in Bosvills being shewed did warrant, being quod eat inde sine die, and *Ireland* against *Key*, M. 4 Car. B. R. In this very point, by rule of Court, it was amended misericordia for capiatur, 1 Cr. 474, *Heling* against *The Mayor, &c. of London*, cyted by Wild for the defendant to the contrary, that this is not amendable; and the difference betwixt B. R. and C. B. taken, 3 Cr. 497, *Harecote* against *Bishop*, and the difference betwixt *Bosvills case* and this, is great in respect of the consequence; this alters the nature of the judgment. Baldwin for the defendant: in *Nelsons case*, there (as 2 Cr. *Mason* against *Foxes case*) was reason to apply the misericordia to the baron, and not to both; and the want of eat inde sine die the judgment was not compleat without it, and therefore it was amended. Scrogs contrà, *Smith* against *Smith*, and Amendment Br. 27, 28, that the prothonotories book is only of weight the same term; but H. 15 Car. *Mayor of London* against *Hill*, judgment to recover without ad requisitionem, was per Curiam reverst for that error notwithstanding, 8 H. 6, c. 12, and he conceived this Court had as much power to amend as the C. B. especially the form being constant and usual, though the matter be substance. Adjornatur.

[197] 190. WEB *against* MARTIN. *Ante.*

Request. 1 Brant. 39, pl. 113.

Jones for the plaintiff, The promise is to do two things, to deliver writings, and pay money, and therefore being all to be done upon request, is intended of a request indeed only: but by Yarnly the money is presently vested without request, contrary of the other, 3 Car. *Hern* against *Tub*, Co. Entr. 189, *Burnels case* against *Parkers*, the Court agreed an action of detinue lay without request, but not an action of the case, where only dammages are to be recovered: and here the plea being applyed to both, being void for one, is naught, *Remington* against *Remington;* action against an executor, who promised upon shewing a bond to pay money on request, and ruled by Rolls, that an action lay not without request, which Twisden and Curia agreed; distress is a demand for rent, and so detinue for money. Judgment for the plaintiff.

191. BOOTH *against* BEARD. *Ante.*

Error.

It was certified by the clerks, that an original filed after imparlance in C. B. and judgment given, is good enough; and it shall be intended the suit was begun de novo, contrà where there never was but one original that is so entred, and shew the reason thereof; which the Court would not allow till conference with the Judges there.

192. DANBY *against* WINTLE. *Ante.*

Error.

Stroud jun. shewed cause against affirming judgment upon error of a judgment in C. B. the record being of 12 that were retorned in the habeas corpus and distr. but the nomina juratorum had only the names, omitting jur. in some, which is the usual addition to such as tryed the cause; but per Curiam, If twelve really tryed the cause, that is amendable by examination of him that returned the postea. Foster absent.

[198] 193. KING *against* WILLIAMS. *November* 27.

Process.

The Court refuse to grant an attachment against witnesses, though the King were party, as in judgment of perjury, &c.

194. BARS *against* DESMOND. *Ante.* In Baron & Feme Br. 1.

Baron & feme.

Powis prayed she might be discharged, as in C. B. 2 Cr. 58. 11 H. 4, 71, 89 being but an arrest on a mean process; and to say she is in custodia, is no reason, because when he comes in, he shall find bail for himself and his wife, and so the plaintiff may declare against them both in custodia; and per Curiam she was discharged, nisi. Twisden said three opinions have been; one that she should lye in prison till the husband come in, which is unreasonable. 2. That she ought to file a common bail if another will be bound for her, which may prevent a fraud in arresting her at the beginning of a long vacation: this the Court conceived reasonable; but at the election of the wife, whither she will or no. The third, that she ought to be discharged without bail, which the Court also conceived reasonable and so awarded here.

195. THE KING *against* READ. *Ante.*

Error. 1 Brant. 167, pl. 362.

As *Wilson* against *Stubs*, Hub. He is not the same person nor can have an identitate nominis; and *Gardiners case* 5 Co. this is admitted to be naught at common law, 1 Cr. 223, *Zamhill* against *Stoler*, and not helped by any statute, although the party were not sworn; for if they were distinct persons, the sheriff hath not well retorned his nomina juratorum, which must be according to the distringas and venire, which is his warrant; and the statute 18 Eliz. which only helps such retorns, is general, and extends to no case where the King is party, 8 Ca. 163, *Blackamores case* being not named, and Hub. 101. 1 Cr. 311. Noy 1657, *Wildbores case* in a quo warranto, H. pleaded to part, and nothing to the rest, which was ruled a discontinuance, in which Allen who now moved in arrest of judgment was counsel. Windham, 14 Car. it was resolved, that if the sheriff retorns 23 in defect of which jury a tales is awarded, thats not aided: and here he doubted whether this, being but by intendment only, **[199]** shall be said an absolute misnomer, and therefore the Court will now intend him the right person. Twisden doubted whether when 23 are retorned in distringas, though the venire facias be 24, and 12 sworn, it be not good at common law: and by stat. 21 Jac. that remedies only informations upon penal laws are excepted, all others may be examined, as well as in an action betwixt party and party, and so this being an information at common law: but by Allen, that statute is only where the parties be sworn; but per Curiam, à fortiori where he is not sworn. But Twisden doubted whether Sir Thomas Fanshaw, Clerk of the Crown, informer pro domino Rege, be a plaintiff within the stat. 21 Jac. 2, he excepted to the body of the information, which chargeth the defendant to swear that the warrant of attorney aforesaid was sealed and delivered as his act and deed; whereas the action original was a writing, which was affirmed to be a warrant of attorney. *Post.* Adjornatur.

196. BRATHWHITE *against* LEE.

Variance.

Yarnly moved in arrest of judgment in an action upon 5 Eliz. for exercising a trade, &c. because the distringas, as 1 Cr. 336, was not in an action tam pro domino Rege quam pro seipso, as the original was, but only inter B. & L. generally. Adjornatur.

[201] De Termino Sancti Hillarii 13 & 14 Car. II. B. R. Die Jovis 23 Januarij, Anno 1661.

Foster, Chief Justice; Mallet, Twisden, Windham.

1. Moreton *against* Spencer.

Officer. Stiles 203, pl. 458. Stiles 87, pl. 180.

The Court refused a certificate subscribed by the Secondaries of C. B. because the prothonotaries are the immediate officers for that purpose: and by Twisden, Certiorari to the deputy of the custos brevium was refused by Rolls, but after granted for good cause; but he never knew any directed to the Court, certified by the Secondaries, nor to the bishop done by the commissary. 2. For the matter, this Court will scarcely grant any prohibition (however grantable) if once denied in C. B. before, especially after long proceedings and appeal hanging, which was the reason that (it being in discretion of the Court) was denied in C. B. But by Allen for the defendant, A prohibition is not ex gratia Curiæ, but grantable ex debito justiciæ; and if they proceed, H. may inform against them: but by Windham, Though the hanging in appeal will not alter the cause, yet if they have conusance of the principal, any incident property there arising (and of such nature might this cause be originally) may be tryed by **[202]** them. Twisden conceived (and Foster doubted) that its not honorary, as a grave opinion hath been. Mallet agreed the like. *Post.* Adjornatur.

2. Bendison *against* Sir John Lenthall.

Escape. Stiles 465, pl. 104.

Powis for the plaintiff, prayed to have the defendant, who is marshal of the Marshalsey, in execution: and by Foster and Windham, If he will not pay his debt, the Court will appoint another marshal in his stead, and so commit him, else it would be an escape of all the prisoners, per Curiam.

3. Tridaham *against* Top.

Admiralty.

Jones moved for prohibition to the Admiralty, the libel being in nature of a trespass, for taking away money and cloth, suggesting it on the high sea. Granted, nisi.

4. Ellison *against* Ellison. *Ante.*

Error.

Maynard prayed the opinion of the Court in the entry of capiatur for a misericordia; Twisden agreed, *Keyes and Irelands case;* but being in trespass of assault and battery, upon not guilty found against the defendant, a judgment in misericordia for a capiatur, but that was only upon the postea, by which the other was used to be amended; and of this nature was the eat inde sine die; and this was by the omission of the clerks about 4 Car. when the Secondary could not enter it up by the numerous company of causes, and so entred only quod recuperet, and assest the costs, but the other he left to the clerks, which mistake. But by Windham, (who would be as near to an amendment as possible) This is the very standard of all, and more stronger then that case of a misericordia against the wife, made against husband and wife, 1 Cr. But the case of *Everard and Boswill* in debt on 2 Ed. 6, on not guilty pleaded, part was found for the plaintiff, and part against him, and no eat inde sine die for the defendant: but Twisden doubted upon the books, *Beechers case* 59, & *Blackamores case*, & Hut. All take this pro confesso, but not much mischief can ensue hereon, no more then in the Common Pleas, where they amend by their paper rules (not properly dockets) which the prothonotaries make among themselves. *Post.* Adjornatur.

[203] 5.

Peace.

A justice of peace prayed a supplicavit against H. that was so unruly that the justices in sessions could not rule him; and the Court conceived, that to go armed is good cause to bind him to good behaviour.

6.

Baron & feme.

If the husband confess an action for a debt against baron & feme dum sola, the wife may be baild; but not so where both are sued and taken by mean process, she cannot be delivered till the retorn of the writ or habeas corpus, if no prosecution be within three terms, by Twisden, which the Court agreed.

7. CHILD *against* NORTH AND TIMBERLEY.

Conspiracy.

Lindley moved to quash an indictment of conspiracy to charge H. with having carnal knowledge of a woman, and did so; and that the child she went with was H.'s, which he said was matter not within the conusance of this Court. But per Curiam This is likely to be a charge and loss to H. and therefore the indictment is well layed; contrà if it were only for getting J. S. with child, especially being after verdict against the defendants, though there were no child born. And by Foster Its no ground, that because the Court have no conusance of the principal, therefore they may not punish the conspiracy; for if it be to do an act unlawful, the very conspiracy is a crime, & præsentatum extitit, per Windham & Curiam, is (and hath been ruled heretofore) good enough. Judgment for the plaintiff, nisi.

8. HODGES *against* HODGES. *January* 24. In Error, Br. 90.

Amendment.

Powis prayed amendment here of a variance betwixt ven. fac. & hab. corpora, being after diminution alledged by the plaintiff in the writ of error here, and amended below after: but per Curiam, whatever they may amend below in C. B. we may amend here after the record removed, and not they properly; though by custom of the Court they do so, yet how justly, Twisden doubted; and having not the rule of the C. B. he came too soon to remove this motion: and by Windham, If any amendment, its better to be here by authority of the Court by that below, and not to go thither to amend. [204] And the Court ordered the clerk of the Treasury to bring in the roll into the Court for that purpose.

9. PRIDEAUX *against* WELLER. *Ante.* Debt Br. 22.

Limitation. Bar.

In false imprisonment, Bear for the plaintiff agreed, that being laid (10 Oct. 57) for 18 months, to which the defendant pleaded 21 Jac. of Limitations, alledging the session to end 29 May, and that the assault and imprisonment, only named in the writ, was done (29 Oct. 55) and a bill exhibited 12 Car. 2, which is not within one of the sessions, or four years of the cause of action, the count being of assault, battery, and imprisonment. The plaintiff confesseth the trespass to be the 29 Oct. 55, from which time till 29 May, 1660, no Court was open, where the subjects might have justice, by reason certain rebels had usurped till 29 May, the Kings retorn: the defendant confesseth the replication, but pleads the Act of General Pardon, 13 Car. 2, (not shewing he is no person excepted:) also he pleads the Act of Confirmation of

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Judicial Proceedings specially, &c. and that the C. B. 29 Oct. 1656 to 29 May, 1660, were open, & hoc paratus est verificare, not saying prout per record. The plaintiff demurs, and sheweth for cause that the defendants plea is a departure. 1. The Act pleaded in the bar is not good, because he saith nothing of the battery, wounding, and ill intreating, and every one of them is a special trespass, which the statute names particularly, and no vi & armis, whereby the fine is due to the King for every of them, Dyer 65, and the rent abridged, cannot be the same as that whereon H. counted. So Dyer 36, when one answers not vendition, though he answers all the rest of the count, its no plea: and so in the case 6 Ed. 6 of *Cliffords*, error, one must not answer non ejecit generally to ejectment, and carrying away of goods; and so the statute being only pleaded as to the assault, its ill: but by Wild for the defendant, One never pleads to the vi & armis, where he begins with the Statute of Limitation, which the Court agreed: and as to the other, the record was quod transgressio insultus & imprisonamenti. Bear excepted to the day, which is impossible, being but of one day, 1 Cr. 370, *Thornton*, & 414, *Owen* against *Long*, and this for 18 months, *Read* against *Price*, 1 Cr. and the 18 months are within the four years given by statute, and so repugnant to the plea. 3. The imprisonment was till the defendant paid 100l. to a stranger, which extortion is a new trespass not before mentioned, but distinct, **[205]** *Cramp* against *How*, Tr. 11 Car. Rot. 308, B. R. in trespass of assault, battery, and imprisonment, till the defendant paid a fine. The defendant justifies the imprisonment by a warrant, whereby he took the defendant in execution till he paid, &c. and as to the rest, pleaded not guilty; and not answering to the fine, which was held a distinct trespass, not depending on the execution, it had been ill, but that it was held to be within the not guilty pleaded to all the rest. And here the plaintiff procuring, the defendant is trespasser, as 27 Ass. 59, commander of a trespass is a trespasser. 4. The replication sheweth that it was impossible for him to commence his action before he did, and so not within the purview of the statutes pleaded in bar, West. 2, c. 49, as where plea abates for false Latin, one shall have the view, because its apparent to the Court he had it not before, Pl. Com. *Stradling* against *Morgan*, 25 Ed. 3, 16, and so Marlbridge 21, for necessity the sheriff may enter a plaint before himself, and after returns it to the County Court, that so the cattle may not perish; and for this reason of impossibility, uses in contingency shall not be executed; and by reason of this disability, the Statute of Fines hath excepted feme coverts, infants, &c. And here is an apparent disability, that the plaintiff could not prosecute, there being no Courts of the King, and there was a disability in the person, who could not sue without taking an oath of engagement; and had he sued all the process had been coram non judice, as all had been if the Act of Judicial Proceedings had not been made, Pl. Com. *Chapman* against *Dalton*, lex non cogit ad inutilia: so *Butlers case*, when men are disabled to render benefit, the other need not perform the condition; likewise here were none of the justices of the King sitting, Dyer 270, and therefore proceedings could not be good, 2 Cr. 230, *Point's case*. And the rejoynder pleads the Courts of the C. B. were open, not saying the Chancery was open, without which the C. B. cannot proceed; and whether they sit or no, cannot be tried per pais, but by the records: and by Foster, the rule being judgment, nisi better cause, &c. the counsel cannot argue de novo, but ought strictly to observe the rules of Court. Wild for the defendant, The plea concludes with a traverse absque hoc, that he was guilty of the assault, battery, and imprisonment, prout, &c. which is well enough, being but inducement; else by Twisden he must plead not guilty. Hereby also all that is in the plaint is taken in, and had been by the word trespass only, and being modo & forma, it goeth to the whole 18 months; and if it be false in part, the plaintiff shall recover pro tanto, **[206]** and the payment of the money is but an aggravation of the offence, and depending on it; and the replication is ill, the engagement being not pleaded, and the action being per billam, and he saying he could not have any writ, which is naught; and so the bar being good, and the replication naught, the defendant ought to have judgment. Windham, The trespass can be pleaded but at one day, and the aggravation from it continuando, &c. which if any part be within the statute, the plaintiff must shew it, and all is taken in by the travers, & per Curiam, Had those persons not been excepted, they had been bound, as all else had, as casus omissus. Judgment for the defendant: and by Windham, The bar is better pleaded then if it had recited

particulars; but he conceived the recital, that no writ could be had, was sufficient, and that bill is but a special priviledge, but the Chancery being shut, its tempus belli: also men might have sued heretofore without taking the engagement, though his suit would have been staid; and those proceedings are by these Acts owned and aided.

10. MANBY *against* SCOTT. *Ante. January* 25. In Contract. Br. 15.

Baron & feme.

In the Exchequer Chamber, all the Judges of England being present, Jones for the plaintiff, that the husband is chargeable, because what ever she had, or can acquire, must be to his benefit; and so nothing more reasonable, then that the husband should allow his wife, in his life time, as well as after his death, they being but one person. And 43 Eliz. 2 doth provide, that impotent children shall be kept by parents, and è contrà; but no provision for this case, wherefore it was intended not to be questioned; and the Spiritual Court hath no power to give any remedy, Registr. 34, 38, or at least not sufficient, though marriage doth appertain to the Spiritual Court; and de catallis, as necessary thereto: but where the marriage is not in question, 31 Ed. 3, attachment upon prohibition, F. 8, they cannot hold plea de catallis, as the principal prohibition F. 21 doth also implye this difference, when they have adjudged a divorce, they may allow maintenance, 1 Cr. 220, but not originally upon suit for alimony, *Waters case*, 21 Car. in the House of Lords, referred to the Judges, Bacon, Rolls, &c. who allowed, that the wife might charge the husband, as here alledged; (but the Judges disallowed that case, because of the irregularity of the times, and they no rightful Judges:) and that the reme-**[207]**-dy in the Spiritual Court is not sufficient, is evident, in that the wife can have nothing to enable her to sue; to this end was the quarentine allowed to them, Magna Charta 7. 1 Inst. 32, and the common law would be deficient, if no provision be to maintain her in the mean time; and all the Spiritual Court can do, is but to excommunicate; and if he will obstinately lye in prison, they have no jurisdiction over the estate to compel it. 2. All the books agreed, that the wife cannot charge the husband, without assent precedent or subsequent, expressed or implyed, but those cases are not understood of necessaries, in which cases persons otherwise unable are made able; as infant, upon a promise in law, may plead nil debet, contrà if for necessaries, there his contract shall bind. And a feme covert, if the husband be exiled, may contract, rather then be without a maintenance and subsistance, 2 H. 4, 7, and so of a moin in the vacancy of an abbye, 13 H. 8, 3, and the inconvenience pretended; if the wife may charge the husband, this is not greater than that will be on the contrary; for women will be more tempted by want of maintenance than by abundance, 11 H. 6, 20, by Marten is express in this point; and of latter times, the opinion and practice hath been this way wholly 22 Car. Rot. 1151. Tr. B. R. *Dent against Scot*, in this very point, which the Court agreed; though for want of an averment in pleading, the judgment was not given, and trespass or trover lyeth against the baron and feme for her default or conversion, and the count shall be ad usum of the husband: 2. The finding she lived from him, or that he prohibited, will be little material; supposing the former true: and at common law, although the wife elope, 2 Inst. 435. Westm. 2, 34, she should have had her dower, and here being no cause, the best shall be intended, that she went away for good cause; Baldwin for the defendant, That the husband is not chargeable at the common law, nor was ther ever such an action brought before, Debt Fitz. 163. 20 H. 6, 22, by Newton. F. N. B. 62. 21 H. 7, 40, per Fineux. F. N. B. 120 G. Dy. 234, *Points case*. M. 5 Car. *Bi against Lake*. C. B. Hull 106, all which books shew the law to have been to the contrary, that she cannot charge him: and the opinion of Marten sheweth not by what course or action she shall charge him, and this was but obiter, not the principal point. 3. The law in no case doth charge the husband without his consent, to which the will of the wife is subject, and so all contracts by her, by all laws what ever, is a nullity; but an infants contract is only voidable, she cannot confer a benefit on him, à fortiori, 27 H. 8, 25, **[208]** not a charge without his consent, 2 Cr. 917. A feme sole leasing, rendring, rent payment to her after coverture, without notice of the marriage, is nul; and to allow her a will against her husband is to erect a double

judicature in one family, and very inconvenient, and an occasion to make them unchast, 1 Co. 139, which is the reason of the not maintaining contingent uses, and this is a necessity of her own making by departure from her husband, which the law will not favor; and though it may be an excuse against, yet it shall never introduce a charge upon a third person; and there is a proper remedy (if any) in the Ecclesiastick Court, by the Ordinary, taken notice of by the Judges here, and always allowed by the King; and all the prohibitions are, that they hold no pleas except de causis matrim. & testamen. Old Mag. Chart. 78, which only appertained to them, all the rest to the Crown, *Linwoods case* de foro competenti; and till 13 Ed. 1, Circumspecte Agatis were, excepting only those two sorts, and that statute introduced the rest, which now are in them and alimony, divorce, and promises of portions, and all other accessories of marriage, as well appertain unto them, as the principal, 14 Ed. 46. F. N. B. 44. Dr. & St. 16, and for these reasons, legacies, bastardy, and legitimation, which are accessaries, Dr. Cozens Apology; for this reason concerns, divorces, though for the dissolution of the marriage, do belong to the Ordinary: and Westm. 2, c. 34, doth implye, that the Ordinary may compel the husband to receive his wife, and to separate them for his severity, and to enquire who of them is pars peccans, and the Temporal Courts never medled, but in aid of the Spiritual, Rot. Cl. 7 H. 3, Membr. 7, Emie de Pinckney, she, when he is excommunicated, may have a writ de estoverio capiendo: and a little after this, the next term. Membr. 14, it appears that the sheriff had seised the land for her maintenance, according to the like case the year after, 8 H. 3, Memb. 19, *Frechingtons case*, donec maritus ipsam lege matrimonali tractaret, and conformed to the award of the Spiritual Court, or put in a cautione admittenda; and though this course hath been neglected, and not mentioned in Articuli Cleri, Circumspecte Agatis, it is not material, because this was at common law, and those statutes introductive of new laws: and upon this reason, 2 Cr. 364, *Hiats case*, the Court denyed a prohibition, because the Ordinary had power Mich. 1 Car. Gr. *Greens case* 16, and the Spiritual Court, when constat, that there is a marriage, do allow maintenance presently ante finem litis; and a prohibition was in *Drakes case*, because the High Courts **[209]** had no power, but only the Ordinary. 2. Admitting for all this, that the husband is chargeable, yet not against this prohibition; no more than if she had lived with him; for without his fault or assent, he cannot be charged. Bridgman, If none will trust the wife, what remedy? Jones, No more then if none would trust the husband: Hyde conceived the opinion of Marten not valued to this purpose: and if the husband might have waged his law, this remedy had been nothing worth, and de debitis & catallis that concerned not matrimony, they have no jurisdiction in special Court; nor for alimony, as such, no remedy were in special Court originally, nor unless she be pars læsa, at all; but when constat de matrimonio, if no default be, she shall be allowed it. Hales agreed the proper remedy to be by excom. cap. Adjornatur.

11. THE KING *against* FIELD. *Ante. January* 27.

Religion.

Field, a parson in Lincoln, was indicted on a clause of the statute 13 Car. 2, c. 1, for preservation of the Kings person, for preaching, that the government of the Church of England was popish, superstitious, and will-worship; and that God would say to such, as observed it, the last day, who required this at your hands; and at the same time, that an other day would come of their delivery, whereby he encurr'd a præmunire, 11 Aug. 13 Car. Mr. Attorny enlarged upon the charge, that sedition was either armata, in open hostility, or togata, which was the worse of the two, being secret, and enflaming more than the other; to prevent which this Act was made, and because this was the first offence of this kind, he desired the preamble and this clause of the Act might be read, et ei conceditur, which was, that if any said the King was an heretick, or Papist; or any thing to the disturbance of the Government now established, &c. This by warrant of the council came to tryal here, (which was read) and Mr. Attorney conceived, that if the words were spoken before the time in the indictment, yet if they were spoke after 24 June it is sufficient, which

the Court agreed. Allen for the defendant, excepted after evidence against the order, which was grounded on a petition of the inhabitants, and recited, that the attorny should indict for treasonable or seditious practices, not naming any point of the Act particularly, there being divers branches of the statute. Glyn, ubi lex non distinguit, non est distinguendum; and the law that requires this order, doth not re-[210]-quire particulars, which the Court agreed; that notice of the crime, so it be any within the statute, is needless in the order; but the attorney may prosecute, as he thinks fit, were it only by personal parol, command. Moreton excepted to the indictment, that it was voluntaria adoratio, Anglicè will-worship, which the Court over-ruled as immaterial: and by Allen, The words must be malicious and advised; which by Twisden, being by preaching, it is so intended; also the Court refused to examine witnesses, whether they were indicted at the suit of the defendant for forcible entry, but they must shew the indictment: but by Allen, They may be asked at large, whether there were no suits or differences betwixt them. *Post.*

12. RAYMOND *against* MATTHEWS IN DEBT. *January* 28. Br. 43.

Amendment. 3 Cr. 455, pl. 2.

Jones for the plaintiff, moved for repleder in action of covenant to perform articles, and payment of money. The defendant pleaded payment of the money after the day, which the plaintiff accepted, which being not pleaded by way of accord and satisfaction of the covenant, wherein damages also is recoverable, is ill, 3 Cr. Nichols 455. But this issue being insufficient, and found for the defendant, its not aided by the Statute of Jeofails. And by Twisden, Payment pleaded to a single bill, if found for the plaintiff, he shall have judgment; if for the defendant, there shall be a repleder. Adjornatur.

13. BARROW *against* HEWIT.

Trover.

In an action of trover for a cow, after argument, Miller for the defendant prayed the priviledge of a Parliament man, which the Court would not allow on suggestion without a writ.

[211] 14. DAKERS *against* WHITEACRE. *January* 29.

Error.

After the general error assigned by the plaintiff, he may assign diminution, but else diminution cannot be pleaded till error assigned in some particular: also by the course of the Court errors cannot be entred till the certiorari of diminution retorned, and the rules to plead are out. *Post.*

15.

Amendment.

Nota. If a record after removal into this Court for error be amended, it must be done here by the officer of that Court from which the record cometh, by Hern Secondary.

16. HOLLAND *against* BLEST.

Covenant.

In an action of covenant upon bargain and sale, that the defendant had a pure and good estate of inheritance, and a power to alien; the breach was, that he had no pure and good estate, &c. whereto the defendant demurred, and none attending, it being a concilium, judgment for the plaintiff, nisi.

17. HAWKESWORTH *against* JORDAN.

Trover.

In trover for fifteen tun of fur-stake-wood, the defendant pleads, that before the trover J. S. was seised and indebted to the defendant, who by custom of Bristow attached it in the hands of J. S. The plaintiff said, that he was possest at the time of the plaint, and ever after, absque hoc, that J. S. was ever possest: to which the defendant demurred, because the replication was at large. Judgment for the plaintiff, nisi.

18. BILL *against* NEALE. Siderf. 67, pl. 42.

Slander. 2 Cr. 196, pl. 22. Moor 247, pl. 389. 3 Cr. 589, pl. 25.

Of one, that he will be like Mr. Major Bill, who is a fool, and an ass, a coxcomb, and a buffle-headed justice of peace. Windham doubted whether any action lay, H. 2 Jac. *Hollis* against *Bristow*, being no scandal to his profession. Wild for the plaintiff, No greater scandal can be to a justice, then to call him fool. Adjornatur.

[212] 19. MORTEN *against* SPENCER. *Ante.*

Prohibition.

Wild for the plaintiff, that the Court is not bound de jure to grant a prohibition, upon a bare surmise after sentence against the libel, 12 Co. 77, (Winch. 8, *Jones case* Hub. 79) this prohibition is brought by the defendant to his own appeal five years after sentence. Stroud Senior, for the defendant, The libel it self is of a property, (Hub. 10, *Bridgmans case*) not mentioned to be done on the sea, and so they can have no conusance; and to have a prohibition after sentence is usual, and the Court ought to grant it de jure, as in 2 Cr. 252, *Worts* against *Bliston*, because it is a thing coram non Judice. Allen ad idem, that it ought to be granted it is evident, because nothing appears proper for their jurisdiction, else a suggestion contrary to the libel should not be received so long after without scruple; but this Court doth regulate all inferiors when ever complaint is made, and the defendant is a proper person to come in, because he is a creditor, and comes in for his own interest, and so the question was whether the property were in Harrison or the defendant Spencer; and so the original cause of action is in nature of a foreign attachment, or else he might have trover. Powis for the plaintiff, All is confirmed by the Act of Judicial Proceedings, being conusans of such bills of lading was given heretofore to them by a former Act of Lords and Commons which upon perusal reached not this case: Twisden, I cannot admit, that prohibitions are prudential, but if they do incroach, this Court must prohibit. But if one will lay a transitory action on the sea, and the other admit it, then the party against whom the sentence is, hath only remedy on the statute. But when one against whom sentence is given, will appeal after execution made, and the money delivered, the Court think fitting that he should reimburse the money before (Spencer) he have a prohibition. And by Windham, Things done beyond sea are of a mixt jurisdiction, but do not properly at common law belong to this Court, 48 Ed. 3, 3, 4 Inst. nor to the Admiralty, but to the Court of the constable and marshal; but 4 H. 4 is that they shall fight in debt for such a thing; but this Court hath given relief of late for necessity, suggesting the fact done in England; and the thing being not properly invasive of the com. law, he conceived it in discretion of the Court, to which Mallet agreed, but Foster denied it to be meerly of discretion, though much of discretion be in them, to keep them from doing **[213]** any oppression, for the party grieved hath another remedy by action upon the statute 2 H. 4, to which when any seek delay by prohibition, the Court will leave them: also the defendant being not wronged in his property, which is tryable in trover, he conceived he should have no prohibition, (which was upon conference also, with the C. B.) unless he would redeliver the money to Serjeant Moreton, parties may consent verdict shall be final, or that no writ of error be brought, but not that H. shall not

sue by statute; and by three Judges, whose opinion was, that Spencer should have a prohibition, because Moreton refused to bring the money into Court, and try the property. But after Moreton agreed.

20. THE KING *against* READ. *Ante.*

Perjury.

Keeling for the King. There are three perjuries assigned in the warrant of attorney, and that he owed not the money and that J. S. was not a witness produced, and if any of them be well assigned it is well, and therefore the information being of a warrant predict. pro ducentis (omitting libris) is well enough. Also the communication was of a writing, which H. affirmeth to be a warrant of attorny; and the issue by the defendant, is, that it was a warrant of attorney, and so sworn by him to be sealed, and the plaintiff cannot call it a warrant of attorney in the information. Windham absente, adjornatur: but the Court conceived it well enough, the course of information by a memorandum quod recordatur, &c. was since 5 Eliz. and begun by Twisden, upon custom to bring in the issue to transcribe it, by which referr'd to a record of another term, and recited a bill to be filed (which was usually never filed) and falsities crept in hereby, which was the reason of introducing this course lately. But all the Judges doubted of the recital of the irrotulatur. Adjornatur 214, pl. 22.

21. CRANMER *against* ANDREWS. *January* 31. Baron & Feme.

In Default Br. 52. Stiles, 226, pl. 511. Goldsb. 127, pl. 19. 40 Ed. 3, 34 b. pl. 1.

H. was arrested in London, and there charged with a latitat against H. and his wife, and so turned over to the Marshalsea, and process against them as in custody, but by Wild, for the feme, that judgment cannot be against her, she never having been arrested, nor the husband having not appeared by attorney; which if he had, he must have filed a common bail for him and her, but not so where he enters in-
[214]-to custody. But by Hern Secondary, The course in both cases is, that the husband though only arrested, must put in bail for both, though she were never arrested. Twisden, *Elsey* against *Mandit* an attorney and his wife, who was forced to appear, though he could not have priviledge for both. Adjornatur.

22. THE KING *against* READ. *Ante* 213, pl. 20.

Perjury.

Upon a communication betwixt Dunne and Dawson, of a writing, which Dunne affirmed to be a warrant of attorney, whereon (if he proved it so) Dawson would pay, &c. And on issue thereon, the defendant R. swore that he sealed the said warrant of attorney, and that R. Rumsey, a witness to the warrant of attorney, shewed a wrong person to the plaintiff Dunne, &c. Keeling moved for judgment after verdict against the defendant; as to the recordatur, he left it to what exposition the Court would make, because its dubious. 2. The habeas corpus is R. D. junior, of H. whereas he was only named R. D. in the other process, but 24 in all; and additions are by 1 H. 5, 5 given, and so not necessary in retorns of the sheriff, as the case 3 H. 6, 16, which because process of utlary lay not, it was ruled the addition was well enough, 44 Ed. 3, 34, because needless. 3. Its said that Dawson sealed and delivered the warrant of attorney aforesaid. And 4. That it was for 220, not saying what, which being but the cause and ground of sealing the warrant, and is several in it self. Allen for the defendant, The recordatur is but new, and therefore making no distinction, but only (& quod) which may be intended either way; but indictments shall not be so aided. 2. As to the retorn of the habeas corpus, its but of 23, and so not holpen by the statute, being in an information, no more than in a quo warranto, and here this person cannot be intended the same, as when one writ relates to another that may be supplyed with averment, but not so in a retorn, where no averment can

be, being at large, and so its insufficient at common law. 3. The oath is relative to that which is not (viz. the warrant of attorney) but as to the pro 200 he waived it. Winnington for the defendant, as to the recordatur, cited *Wimbish* against *Talbois* in Pl. Com. That the plaintiff must positively affirm the record, and a recital is not sufficient, as *Browning* against *Bestons case.* And as to the second, he cited *Gregories case*, 5 Co. And by Windham, *Blackmores case* is express, that an information at common law is within the Statute of **[215]** Jeofails, contrà if upon any penal statute. But by Allen, The body of the statute is of suits betwixt party and party, 32 H. 8, which yet extends not to retorns. Also by Keeling, In all indictments, when new matter is offered, it begins only & quod, and not dat Curiæ intelligi. Windham, Judgment, notwithstanding the exceptions, ought to be for the King. And 1. The recordatur runs not through all, but is guided by the subject matter, which is only till the issue joyned, not what the witness said, which is only matter of fact not entred, and so shall not be intended to avoid a perjury found. 2. For the variance of the venire facias and habeas corpus, I shall not intend it to be another, but a farther ascertaining of the same person, 24 being retorn'd; and had there been no such, yet it had been good; and so if any real variance had been in the name, if that person were never sworn, which is parcel of all those cases that are cited to this purpose; and he said he had seen a judgment in the Exchequer with this difference. As to the third point, that informations at common law were within the statute, but not so of such as are on penal or popular actions, which may be vexatious: and the stat. 18 Eliz. is in any action or suit (not only betwixt party and party, but generally) and this information is a suit grounded betwixt the coroner and the party. And 4. Its better being pro 220 (without libris) then with it, the substantive only giving the signification, and so warrant. prædict. is full, and not contraried by the other Twisden ad idem. Though he generally disliked the recordatur, as not being in old Keelings time, but since; and is but an argument that there was such a thing, and no positive crime charged; yet as this case is, its positive, because only the suit is recorded; but the usual way was, dat Curiæ hic intelligi, that at another time isto eodem term. such a one placitasset, which was supplyed by the former records; and so this allegation is, that the defendant was produced as a witness in causa prædicta, which is a sufficient averment of it self; and as to the variance, its well enough, and 24 retorn'd, and good at common law: and 39 H. 6, 46 by Prisot, the addition of junior doth but ascertain that which before might be intended to either, and tried by examination of the sheriff, if he had for this reason been challenged, and might have affirmed him to be the person intended. Also 3. This is not within the 32 H. 8, or 21 Jac. which are pursuant one of another, but its within the equity of 8 H. 6, which is generally of amendments in all cases, except appeals and indictments, &c. And 18 Eliz. hath a proviso, that this shall not **[216]** extend to popular actions, but informations, as an appeal of maihem is out of the statute, it is not an action, because no queritur, nor any suit, because no producit sectam; but he conceived it might be within the word demand, because the informer petit advisamentum of the Court: but he waived these, and relyed on that, that he was not sworn. And for the warrant of attorney nothing could have been said better: Mallet, ad idem; being after a verdict, and so Foster in omnibus, judgment for the King. *Post.*

23.

Appearance.

Nota, pro Reg. per Curiam, None may move to quash an indictment for crime, before or after a verdict, unless his client, who stands indicted, be present in Court.

24. ——— *against* WICH.

Games. Contrà per Brown and playing is not prohibited by c. law, as 11 Co. 87 b. nor is it cause to retorn a clerk criminous. Dyer 254 b. pl. 2. It lyeth for mony won on wager del upshot at Butts. Moor 549, pl. 736.

An action upon the case per Curiam, will not lye for money won at dice, it being no consideration for an assumpsit; yet H. losing it when drunk, hath no remedy to

avoid bond or warrant of attorny to confess a judgment, for such money, by motion, as in this case, or otherways, unless some practise and deceit appear.

25. DRURY *against* HERKFORD.

3 Cr. 891, pl. 8. Records.

When the record is part before one, and part before another Judge in C. B. the certiorari must be special, reciting so much before A. &c., and so much before B. &c. and being generally of a record before R. Foster, all the process (except the judgment) being before O. St. John, the Court doubted that it is abated.

26. COLLINGWOOD *against* PACE. *Ante. February* 1. In Denizen. Br. 7.

Alien.

In the Exchequer Chamber in ejectment; Allen for the plaintiff, R. hath issue four sons, aliens, one hath issue after the union, then another is naturalized, and deviseth to N. and his heir, and the heirs of such heir, &c. The first question is, whether the issue of an alien may inherit to his brother, both the brother and his father afterwards being naturalized; he conceived that he might: and that which is the foundation of discents in nature is love, **[217]** as Grotius de Jure Belli, l. 2, c. 7, § 4, 5, & 9, and him, whom one is presumed to love most, he shall take. And this is regulated by particular customs of nations and places, whence comes the distinction of sanguis naturalis, which is the same among all, or civil, which is either by birth or donation, as denization by patent or naturalization; and to be inheritable is a term of relation, which requireth a person from whom objectivè, and by whom subjectivè, the copula of which is the blood, which is either hindred per defectum, which only incapacitates, or per delictum, which destroys the inheritance it self; and this is a necessary introduction to the main question. R. having issue three daughters, aliens, and N. the second son had issue P. Angloy, neither of which can hinder the discent to John the son, 42 Ed. 3, 2, of George the youngest son, 22 H. 6, 38. P. 31 Ed. 3, tit. Cosinage 5, from John Earl of Holderness, 1 Inst. 8, both Dr. & St. 13. Denizen Br. 7 being under that like reason; and this point hath been already admitted, and therefore he only takes it in transitu to the main point, whether J. the son of G. the brother of John Earl of Holderness (both being naturalized) may inherit to J. Earl of Holderness. The only objection hath been, that by the Act of Parliament the brothers are but in the same case, as if subjects born, in which case 1 Inst. 8, they could not inherit to each other, R. the father being an alien: and as to this its answered, 1. Though the Act seem relativè, and here to terminate in making them subjects, yet is it express, that they may resort to their pedigree to convey their discents, which had else been idle: but admitting they are only as subjects, he conceived them inheritable, which he proved by answering objections, because as this case is, few ancient proofs affirmative can be had. 1. He denied the rule, that where the sons cannot inherit the father, they shall not inherit each other, unless when the son conveys by the father, 1 Inst. 84, its admitted that no dower shall be given to a feme alien, or who marrieth an alien, 7 Co. 25. *Calvins case* 3 H. 6, 55. 1 Inst. 31. And in case of attainder, the right line is not disabled, unless he conveys by the father, 3 Co. 38, 41. 13 H. 7, 17, the husband shall be tenant by the courtesie by issue after attainder, Bract. l. 3, c. 13, & Brit. c. 5. 1 Inst. 12. And though it be here objected, that the blood of the mother is uncorrupted and pure, yet the son must convey by the father, though not from him. 2. In relation to the collateral line, the same reason holds in *Hobbies case*, which in the record, Rem. Escheq. M. 43 Eliz. Rot. 292. In information of intrusion, it was adjudged that the **[218]** daughter might inherit to the brother as heir to the mother, though the father were attainted, because there were no heirs of the part of the father; contrà where there wants no heir on the part of the father, but he is disabled to take, 3 Inst. 241. It was also objected against *Hobbies case*, that there was once hereditable blood, which is a worse disability notwithstanding, then that of nature, and therefore the true reason is,

being a denizen, which is not in this case; so it is, had the father been made denizen any time before his death, though after the death of his son, these are all as bastards, beginners of new families, and so their collateral line not inheritable to each other; and their case cannot be better then if they had been born subjects, in which case they could not inherit, and they have no auncestors created by the Act, but only they are enabled to claim from auncestors, from which a subject might have claimed. And that this case hath received two judgments, is a mistake; for as to the one, betwixt *Dawson* against *Pace*, 1655, was but a nonsuit for want of an entry sufficiently pleaded, and no judgment entred; another 1656, betwixt *Foster and Ramsey* in B. R. and so not being satisfied herewith, he prayed judgment for the defendant.

27. KNIGHT *against* DANCER. *Ante. February* 3.

Entred Tr. 13 Car. 2, Rot. 1500.

Pope.

Recusant presents H. who is instituted and inducted by the bishop then sequestred · and another presents by a usurped power, who is confirm'd till 25 Dec. The sc question made by Jones for the defendant, was, whether this presentation be sufficient plenerty against all strangers. Adjornatur.

28. VANDEVELDE *against* LLUELLIN.

Priviledge.

If witness, coming to testifie in a cause in Middlesex, be arrested in London by one knowing the cause, he hath no remedy but by habeas corpus to examine and deliver him thereby; but if there be any contempt by the officer, &c. an attachment may afterward be awarded against him, for they are as well to have priviledge as the parties.

[221] 29. NEAVE *against* NELSON. *Ante.*

Priviledge.

The defendant pleaded priviledge after imparlance specially made, and concludes ill, being unde petit judicium si H. respondere compelli debet, which ends in piscem in a different manner, 36 H. 6, 17, by Billing, from the matter, being rather to the writ, or in disability, then to the jurisdiction: in all cases the conclusion must be directly warranted by the substance of the plea, 7 H. 6, 36. Bract. l. 5, p. 415. 36 H. 6, 18, per Littleton; and this should have been, judgment si Curia cognoscere debet. 2. Here is no averment (which is necessary in all pleas traversable) 36 H. 6, 37 b. per Choke. Pleading Br. 135. 1 Inst. 303, and the omission thereof is erronious, Amendment Br. 112, especially as to the clerk of the philizer, though he himself be an officer of record, 9 Ed. 4, 53. 3. The imparlance is salvo of all exceptions to the bill only, after which he cannot plead to the jurisdiction, 9 Ed. 4, 35, though where it is apparent the Court hath none, they ex officio will oust themselves of jurisdiction; and a plea to the jurisdiction is within the salvo of pleas to the bill, and so he is estopt 7 H. 6, 36, by the general imparlance, whereby he hath admitted it, 22 H. 6, 7. Windham conceived this is no plea to the jurisdiction, but apt enough for priviledge, which Twisden agreed; but per Curiam, the plea should be amended, unless he produce the record, and is ill without it. 2. Unde non intendit quod Curia cognoscere velit, is not so apt as this: the case of *Crumpton* against *Colling* is express, that such plea, though brought in in person, must be averred. Adjornatur.

30. HORN *against* MIDDLETON.

Condition.

In consideration the plaintiff would continue his horses with the defendant, he would save him harmless from all differences against Anne Godfry, who had done

a wrong to the plaintiff, in beating his horses from watering, by reason whereof varyances arose betwixt her and the plaintiff, and she had arrested the plaintiff, and made him spend divers sums of money, by reason of the said difference, and so the defendant had not saved harmless: which by Jones in arrest of judgment, is totally incertain, and no cause of dammage to the plaintiff by the disturbance of Anne, which was in a watering place. But per Curiam, this was but the ground, and causes of action may arise on both sides. **[222]** 2. It is said, that Anne and her husband caused the plaintiff to be arrested, not shewing by legal process, which per Curiam after verdict, shall be intended: but had the arrest been illegal, being by reason of those controversies, the defendant is bound to save harmless from it, per Curiam. Judgment for the plaintiff.

31. TOWS *against* LEWIS. *Ante.*

Account.

In *Legay* against *Amery*, it was ruled, that by death after judgment, quod computet, the action is abated; which Foster and Twisden agreed, contra to Allen and Jones. 2. The bail in account is only to render the final condemnation, which cannot be, unless the party be retaken after the judgment quod computet, whereby he may enter into account: but by Jones, The recognition of the bail upon a judgment, quod computet, is that the party shall appear de die in diem, &c. this being only on motion, and the bail taken in execution at the suit of executors by scire facias after judgment quod computet, quare executionem habere non debet, the Court refused to order any thing, but referred it to the Secondary to examine the practice of the Court, the recognition being in no certain sum. But by Windham, The better way is to have error, which the Court agreed, and that it was erroneous. *Post.*

32. TOOMES *against* ———.

Slander.

Thou art a whore, and a common whore, and hast layen with every man that came to thy house, and hast played the whore with J. S. without special dammages, not actionable.

33. BROOK *against* HANCHIF. *February* 4. In Error Br. 37.

Entry of it at any time before exception taken, was good by 26 Ed. 3, 64 b. or 10 b. pl. 6. 2 Brownl. 167, pl. 148. Goldsb. 91, pl. 3. 2 Cr. 186, pl. 7. 1 Brant. 196, pl. 435. Hitch. 2 b. pl. 11. 2 Cr. 418, pl. 8. 2 Brant. 79 b. pl. 215. Hill. 13 Car. 2. 1 Brownl. 46, pl. 253.

Want of a warrant of attorney is not aydable, but if ever there were any, or a bill, the Court will cause it to be filed, though it be lost.

[223] 34. KETTLE *against* MEERS.

Uses.

If judgment be entred upon a warrant of attorney (which is usually on confession) if it be contrary to the agreement in trust made at the same time, the Court will vacat it, per Curiam, upon suggestion by affidavit.

35. THE INNER TEMPLE BENCHERS *against* LEGINGHAM.

Peace.

The Court committed him for a rebellion made in the House whereof he was principal, and ordered an information against him, and that all the rest be bound to their good behaviour: resistance in particular societies being, quodam modo, against the King, and the original of the late irregular times, by Windham.

36. PRIDEAUX *against* SHARSWELL. *Ante.*

Trespass. Godbolt, 55, pl. 68. Stiles 357, pl. 762. Godbolt, 54, pl. 68. Bulstr. 133. 2 Cr. 165, pl. 19.

Jones demurd upon the replication, because it answers but to the interposition of part of the closes in which, &c. and so verdict for the whole, 10 Ed. 4, 7, by Bear for the plaintiff, is express, that if cattle estray through the close of a stranger, who ought to repair, into mine, the defendant shall pay dammage for the whole, because the plaintiff is not bound to enclose, and the defendant cannot justifie in the lands of a stranger, 22 Ed. 4, 5, 49 b. pl. 15. This is the reason why H. shall pay dammages for delay in turning his plough, though not for a sudden. 2. The bar is insufficient, because being a justification against inclosure, must prescribe in the person. Bar F. 168. 10 Ed. 4, 7. 22 H. 6, 36. Dy. 365 b. *Baker* against *Breman*, in action upon the case 15 Car. 1, Rot. 352 being a local thing, is ill; so *Semains case:* this is more properly a personal previledge, and it doth appear the defendant hath no title to that close where the beasts strayed. But by Jones, This prescription in the person was not the constant way of pleading; but being uncertain, and the defendant not knowing what estate the plaintiff hath, it is better to plead it as a custom, being alledged in another man, contra, if it were made in himself; which the Court agreed. And by Windham, If cattle stray into one close in default of the plaintiff, and so through other closes of strangers, which the stranger ought to repair, into other closes of the plaintiff, the defendant may justifie in all, for causa causæ, is causa causati, though he **[224]** shall not have benefit against the stranger, like a disseisor that conveys in the per cui & post, yet if it comes to the disseisor again, an assize lyeth as at first. Windham, Suppose the bar ill, the trespass being laid in three several places, and the defendant saying that the owners of one ought to inclose against his, out of which the cattle strayed, which is no good justification of the cattles going into other closes, that were fenced, if it had been out of repair, and so the plaintiff had been in default; (entred M. 14 Tr. 13 Car. Rot. 151, *Hudson* against *Binion*, Yelvert. *Child* against *Durrant*, 21 H. 6, 2, for the park of Chedinglye is contra) to all which Foster agreed, 22 H. 6, 33. Tr. 2 Jac. *Goldsmith* against *Harris* in replication, taking cattle in five acres, the defendant pleaded they escaped out of the way into a yard into the plaintiffs close, and so into a strangers, and so into the plaintiffs, or continue always in the plaintiffs closes, adjudged a good justification. Twisden, This special prescription, is but in nature of a licence to put cattle into Bl. Acre, which cannot go into other closes, unless contiguous and out of repair, which Foster and Mallet agreed. 3. The defendant said the fences of the plaintiff were minime reparata; the plaintiff sayeth, they were sufficiently repaired; the defendant, ut prius, saith, that they were out of repair, Dy. 22 Eliz. absque hoc, that they were sufficient, which is the proper way of pleading. But by Twisden, When the defendant had said they were out, and the plaintiff after saith they are in good repair, he must conclude & hoc petit quod inquiratur per patriam, and not leave the defendant to a traverse; but if the defendant had not positively affirmed they were not repaired, then the plaintiff cannot conclude the defendant from his traverse, by concluding & hoc petit quod inquiratur, &c. which Foster agreed. Adjornatur.

37. SMITH *against* SCOLFIELD.

Records.

The postea belongs to the Court, by Jones for the defendant, and the Court may cause it to be brought in by the plaintiff, though they will not force him to enter his judgment, which the Court agreed.

[225] 38. THE KING *against* MUCKLOW. *February* 5.

Certiorari.

Certiorari is not to be allowed, without putting in sureties in open Court; yet if the party will not, the clerk of the peace must retorn it, and that the parties did not

put in sureties, as by Twisden was adjudged in the time of Judge Baron, and for not returning it, the Court granted an attachment: also the statute extends not to endictments of forcible entry, but only to ryots, &c. as hath been conceived, and the justices cannot make any order against returning it. Adjornatur, 231, pl. 51.

39. CRANMER *against* ANDREWS. *Ante.*

Baron & feme. In default Br. 52. Stiles 475, pl. 1060, contrà.

The Secondary, upon search, reported all the presidents to be, that unless the wife be arrested, or the husband give bond for her appearance, he shall not be forced to put in bail for both, if he will lye in prison, but else he shall, before he can be bail'd in debt upon a statute entred by the feme dum sola against baron & feme, which the Court agreed.

40.

Issue.

Nota, per Curiam after special issue joyned, the parties cannot waive it, and plead general issue without motion in Court.

41. FURNAGE *against* NORTON. In Error, Br. 93.

Error. 2 Cr. 443, pl. 24. Godbolt, 407, pl. 18.

After in nullo est erratum pleaded, none may have a certiorari to disaffirm the judgment, contrà to affirm it, though when it comes in advantage, may be taken of errors; and though the plaintiff may have it before without motion, yet not after such plea pleaded.

42. FOSTER *against* FOSTER. *Ante. February* 6.

Assurances.

Demise, grant, bargain, sell, and set over, were the words in articles of agreement, the causes being divers, especially for 40l. to be paid to her assignees after her death, betwixt Margery and Matthew Foster, the demise was to commence after the death of Margery, and she to have a **[226]** ferme of Matthews, during her life: and this deed is found to be made as well for love and affection as 40l. and after there was another feoffment for affection and money to Nicholas the brother of Matthew, and son of Margery, executed by livery. Raymond for the plaintiff, conceived nothing passed to Matthew, which had been clear if the 20l. had been left out. He agreed, *Tib & Poplewells case*, and *Foxes case*, and *Wingfields case*, Dyer, that uses will not arise, but according to the intent, 21 H. 7, 19. Dyer 59. Pl. Com. 301. Crompt. Jurisdict. 60 b. & 27 H. 8. By the word agreement use at common law might have risen by parol: he also agreed *Beedells case;* but nothing will arise by such bargain and sale for affection and money without enrolment, 11 Co. 25 a. 4 Co. 81. 8 Co. 118. 8 Co. 154, *Pagets case* in the Rector of Chedingtons, comes to the case at Bar, that no averment could be contrary to express one in the deed, *Wats* against *Dixe*, Stiles 189, pl. 431. 2 Cr. 127, *Osbornes case*, 3 Cr. 394, *Ward* against *Lambert*, so *Althams case*, the finding of the jury shall not alter the case, as that a deed to H. and his heirs was in tail, or the like; 5 Co. 26. 1 Co. 176. Pl. Com. 114 b. 2 Co. 75 a. 2 Co. 24, and here the finding of the jury consists not with the execution of the estate, nor with the estate of Matthew, nor with the interest of Margery, who was to have money for it; also the intent of the parties, which is to be observed, Dyer, 56 b. per Shelly, must be construed ut res magis valeat, 3 Cr. 601, but yet that is to be collected by the best consideration, Dyer 261, Bridgman 100, *Nusam* against *Carew*. 2. He conceived this to have reference to a future conveyance, and so not effectual to pass an estate present, Noy 128, P. 33 Eliz. *Ashford* against *Barton*, B. R. Covenant that H. should have in tail after the death of J. S. was ruled ill. 3. Margery hath not title to the barn of Matthew but by the covenant, and so neither should

Matthew take otherwise. 4. Here is a particular estate reserved out of the feoffment, which is void, 1 Co. 129. 26 Eliz. Tr. 3 Cr. 29. *Clamps case*, Dyer 309, the case of *Pitfield* against *Price*. Also this appears by the acts subsequent, 9 Co. 11 a. not to be the intent of the parties, because she made another deed: also her mentioning the 20l. appears she intended it not as a covenant to stand seised, for then her executors have no remedy for the 20l. which would be mischievous, 2 Co. 35 b. and hereby also it would be unsafe for relations to article upon valuable consideration, because all would be wrapt up in the covenant to stand seised, *Darby* against *Bois*, Yelvert. 123, and no recompence can be had for it; and the case of *Symp*-**[227]**-*son* against *Guines*, Mich. 59 C. B. Dyer 19 a. 7 H. 7, 14. Owen 33, and the case of *Sanders and Savil*, come not wholly to this case. Windham conceived the defendant may well be sick of this case, it being now found mischievous to construe deeds otherwise then the clear intention of the parties; and the case of *Pitfield* is unanswerable, which was, give and grant to his son, which of their nature transmute an estate, and shall not be a covenant to stand seised without particular intent. A second reason of that judgment (which was after long argument) was, that it was in consideration of marriage; also the fair and plain meaning of the deed in the case at Bar was, in relation to a future settlement; Twisden to the same intent; and *Symson* against *Calye*, in ejectment, the father for affection to his son, and marriage, did give and grant, and livery was indorsed, but not found by the jury, and that was adjudged to be a good covenant to stand seised, which was a hard case. Also *Wats* against *Dixes case*, where *Pitfields case* was cited, it was given as a rule, that if the intent was to pass it one way, it shall not pass another; and he was counsel in that case. Foster was counsel for *Pierce* against *Pitfield*, which was said to have the opinion of the C. B. (but he decryed Noyes and other private reports). Adjornatur.

13. STEPHENS *against* BRETHERIDGE. *Ante.*

Tail. In discontinuance Br. 38. 1 Inst. 322 b.

A. covenants to stand seised to the use of himself and his wife for life, and to the heirs of their two bodies, the remainder to his eldest son by a former ventre, and after they have issue a daughter, and then they levy a fine after feoffment, &c. 1. Jones for the plaintiff conceived this but one intire estate executed, however called a remainder by the parties, 35 H. 8. Estates Br. 75, but when there is an interposition betwixt the particular estates and the remainder that hinders their union, and the law will construe them to be distinct estates, because they may serve to several purposes, 37 H. 8. pet. Br. 303. 3 Co. 5, *Morgan* against *Owen*. And in the case at Bar, the baron and feme do not take by moieties, the estate being not made before coverture, and so by a divorce the wife cannot take the profits during his life, and at common law upon such an estate before, 32 H. 8, c. 28, the wife might enter for a forfeiture of the husband, and so his estate, and the reversion to the son, cannot unite. 2. Admit the estates distinct, by this fine and warranty there is no discontinuance; not by the fine alone, Litt. no discontinu-**[228]**-ance can be of an estate tail, unless he were once seised of it. *King* against *Edwards*, 1 Cr. 320, was by three against one adjudged: and the reason all go on, is, because the estate tail is executed; yet contrary to *Owen* against *Morgans case*, and so is not like this case at Bar, though to many purposes, as to have a mortdancestre, or writ of right, 1 Inst. 184, &c. such an estate shall be said executed; and here the baron & feme take not by moieties in that case as they do in this. 2. The warranty doth not make any thing, unless there be some precedent devesting of the estate, 10 Co. 95, *Seamors case*, that cannot operate; and that there was none here is evident, no more passing by the fine then what they may pass, and this is expresly *Bredons case*, when the estates are in several persons, which judgment was never denied, though the reasons of it have; and in this case the baron & feme have several rights, 3 Cr. 828, as *Pecke* against *Channels case*, 13 H. 7, 14, and so the warranty can never affect them, being not devested or displac'd.

(2). Maynard for the defendant, agreed the case, and conceived the first point to be, whether this fine be a discontinuance properly so called, which he conceived it

was, because the estate is executed, that is, in him that makes it, but it is not requisite, that he be seised to all purposes; this is evident by the very conveyance it self, the limitation being as to the baron for life, reversion to the feme, which shall be for life, the reversion to his heirs of her body begotten, which makes them tenants in tail of the same inheritance which is limited to the husband; and though it be not altogether the same, as if limited to the husband and wife, and the heirs of their bodies, yet it is as much in him without any severance, Lit. sect. 672, and they must be remitted to the whole: and *Bredons case* went far enough, and hath been often questioned, but yet differs toto cœlo from this, being several persons of separate estates, and this reversion in the wife is inseparable, and not to be granted alone, *Hacker* against *Baker*, 1 Cr. 387, was upon this reason adjudged a discontinuance; and in the case of *King* against *Edwards*, it was said, that the estate tail was so in the husband, that he might discontinue, though not so as to bar the issue from his mordancestre, or writ of right, or scire facias, &c. and the surviving of the wife in that case was considered, and though H. in reversion, as well as the wife, shall by 32 H. 8 take advantage of a discontinuance by the husband, by feoffment alone, yet fine it self would not have alone made a discontinuance, but both together, being but one assurance; **[229]** and the fine in the case at Bar, is come ceo, which supposeth a feoffment before. 2. This will at least devest the estate, according to the plain intent of the parties, in the second fine, which passed a larger estate then the base fee before, limited at least by the intent, and on the reason of discontinuances many estates depend, and is the security of most purchasers, and therefore not to be weakened, the learning thereof being for quieting possession, is to be favored, as it hath been against the church; yea, Acts of Parliament themselves, as quod ipso jure sit nullus, *Pecke and Channels case*, could not be a discontinuance, because the husband could not surrender to the wife, and she could only pass her own estate, and there could not be an union; and so being divested, the discent of the collateral warranty doth bar the plaintiff. Windham conceived the present freehold of the husband is not drowned by the limitation, but the estate is in him quodam modo, all joyning in the fine, he is tenant to the præcipe distinct, and they had all the estate in them. And by Foster this may be granted, and if any way this; and by Twisden, this estate is executed, and there is not any case to the contrary, but only for the benefit of a survivor, or a benefit to a third person, which here is not material; and a devesting may be without any discontinuance properly so called: and by Allen, *Bredons case* is agreed in *Clanrickards case*, Hub. for good law, for else it would be a forfeiture of the tenant for life, if it were a devesting. Adjornatur.

44. ELLIS *against* ELLISON. *Ante.*

Error. 8 Co. 162 b. ac. 2 Cr. 538, pl. 5, acc. So 2 Cr. 632. They will not amend judgment of Inferior Court, that is, quod demandant teneat for recuperet, so it is held error. The same term judgment in trespass was amended, in omitting quod defendens repararet menia 18 Ed. 3, 23, pl. 6.

Twisden conceived they could not amend it in another term, *Beechers ca.* 59, 1 Cr. *Nelson* against *Skeer*, Hut 41. *Shirly* against *Underhil*, 1 Cr. 580, though in the C. B. it may; and the course in Secondary Brooms time altered, by reason of the multitude of cases, which increased, and were not at large to be entred, which was the reason of *Keyes* against *Ireland*. Windham and Foster agreed the case to be hard, but being an auncient landmark is not to be removed, but this is ayded by 16 & 17 Car. 2, cap. 8.

[230] 45. THE KING *against* READ. *Ante.*

Perjury.

The judgment of the Court delivered by Foster was, that he be fined 100l. and imprisoned till paid, and that he go round each Court at Westminster with a paper about his head, testifying his fault, and then to stand in the pillory in the pallace-yard in the same manner for two hours.

46. TOWES *against* LEWIS. *Ante.*

Bayl.

If H. comes in by habeas corpus only to account, he shall not put in special bail; but if they do, it is erroneous.

47. GRANGER *against* HEMBOROUGH. Sinderf. 77, pl. 10. *Ante.*

Covenant. Entr. Congeable Br. 2.

Jones for the defendant, conceived the difference to be betwixt condition to perform particular things, and when, of covenants in general; which by Twisden is not material: and by Windham, this is but an excuse after a particular affirmance, that he had actually performed; Mallet, contrà, that the plea is good; and by Foster, the plea though not fully pursuant to the former, is not contrary to it, nor dissonant from it, because no rent was due, and so he hath paid all that was due, but by Twisden, he could not have pleaded such an ouster after payment of rents pleaded, because payments is intended actual, and so of performance of covenants, 1 Inst. 204, or 304. And it is not sufficient to shew an offer or performance in law. Adjornatur.

48. JOHNSON *against* BRIDGES.

Condition.

In debt upon a bond for performance of covenants, the condition was in the disjunctive, that H. should make a conveyance when he came of 21 years of age, or in default thereof that the defendant should pay 50l. The defendant pleaded no notice of any conveyance before the death of H. on which the plaintiff demurred, as not material, the defendant having election to pay or convey; which the Court denyed: and that as this condition is, if he do not one, he must do the other at his peril. Adjornatur.

[231] 49. THE KING *against* BODISH. *February* 7.

Perjury.

Stroud sen. on 1 Cr. 180, moved to quash an indictment of perjury for the King, the verdict being for the defendant; 1. Because it was taken on depositions out of the Chancery, *The King* against *Apsley*, H. 23 Car. 1, and *Hunters case* 14 Car. ruled that they ought to say (being by commissioners out of the Chancery) under the Great Seal. But by Allen for the defendant, that's needless, because its said that the commissioners had authority lawful, which is sufficient. But by Windham and Mallet, he ought to specifie the authority: but by Twisden 1 Cr. *Stone* against *Numan* is general. 2. The venire facias is but of twelve, but four and twenty being retorned on it, its good enough per Curiam; and if there be a full jury, the names are not particular in the postea in the retorn, contrà if there be a tales. 3. He excepted that there being a change of government pendant the suit; and no mention made of it, its ill, sed non allocatur. Adjornatur.

50. THE KING *against* ALCOCKE.

Treason.

He was indicted for compassing and imagining the death of the King, and declared it by saying the King was a bastard, the Queen was a whore, and he is gone to carry the whore his mother out of the land, and I hope he will come short home; but I will kill him if I can when he comes back, wherever I meet with him. But it appearing to be a malitious prosecution, the jury acquitted him, and taking the oath of allegiance, he was discharged.

51. THE KING *against* MUCKLOW. *Ante* 225, pl. 38.

Certiorari.

If any of the persons indicted put in security, the indictment must be removed for all, because its only to secure costs, by Twisden & Curiam; and Sir Humfrey Mildmay was fined for not returning such certiorari, and the hands of the justices need not be set to it, no more than the sheriffs, by retorn of the under-sheriffs, and habeas corpus, though not to be allowed if under 5l. yet it must be retorned that it is under 5l.

[232] 52. WINTERBORN *against* KENDALL. *Ante.*

Amendment.

Allen prayed the record here being right in Court, and amended below, and only (sw. i.e. sworn) omitted in the memorandum upon the retorn of the postea, that it needed no amendment, but was well enough; which the Court agreed.

53.

Apportionment.

In an action of debt upon several obligations, having but one count and several issues, some found for the plaintiff, and some for the defendant; and several damages, but intire costs. Jones prayed that the judgment may be reverst only as to part, as *Miles* against *Jacob*, Hub. 6. But Allen for the plaintiff said, that case had often been denied to be law, and that neither as to the person, nor as to the things, a judgment cannot be reverst in part no more than a fine, as *Odyhams case;* to which the Court also enclined; sed adjornatur.

54.

Condition. In Condition Br. 47. 3 Cr. 864, pl. 42. Goldsb. 142, pl. 55.

H. covenants to pay 500l. on Dec. 12, or to secure it on request in action brought for non-payment at the day. The defendant said there was no demand: whereunto the plaintiff said, that he did demand security. To which the defendant demurred generally; and now sheweth, 1. That no demand was of the money at the day, and the obligor hath election to pay or secure, which the Court denied as this case is. 2. The action was brought by A. administrator of B. de bonis non per C. &c. and averreth that H. had not paid to B. nor to A. (not saying he had not paid to C.). Sed non allocatur, because the count is quas ei injustè detinet, which per Curiam cannot be if it were paid to C. Also this lieth on the part of H. to plead in discharge of himself.

[233] 55. POLIXPHEN *against* BRANFORD. *February* 8.

Visne.

Twisden doubted whether visne after a nonsuit before, may be laid in any county at the plaintiffs election, by consent to examine witnesses that were officers in the Admiralty here, because they may be in person at either place: but per Curiam its well enough, when it appears they cannot reasonably be present, the principal issue being whether H. sued there or not. *Post.*

56. THE KING *against* FIELD. *Ante.*

Treason.

Allen moved in arrest of judgment, 1. Because the indictment is not pursuant to the law, the words not being said to tend to bring people in dislike of the Kings person, which should be; and not only to say, that he intended to bring the people

in dislike, &c. 2. The words are said against the Government, which is generally intended of the realm, not ecclesiastick. Glyn the Kings Serjeant, conceived the statute to refer to the intent, and not that the words should be such as should actually incite. 2. The Government of England is all one, and all from one fountain, though in several parts. Windham quered if it had been said, the Government by justices of peace, or in the Kings Bench, had been inconvenient. Keeling the Kings Serjeant agreed, if he had said such a bishops Court had been inconvenient, that had not been within this law; but the indictment mentions no distinction, but is of Government in general. Twisden, The Government in this Act had a particular reference to that which had been before abolished by an ordinance of the Lords and Commons, which was episcopacy: but to say the civil law is better than the common law, that the Chancery or B. R. is an unnecessary Court, is not within this Act; which Foster and Mallet denied. Windham conceived ea intentione to refer to all the indictment, and that the ecclesiastick is the prime part of the Government of England, and was the chief intent of the Act to re-establish; though he did not conceive every particular subordinate jurisdiction to be within it: but all agreed this to be within the Act. And so Foster pronounced judgment, that he be disabled to bear any office, and be fined 500l. and imprisonment till payment.

[234] 57. DR. WITHRINGTONS CASE. *Ante.* Siderf. 71, pl. 9.

Mandamus.

Chief Justice Foster delivered the opinion of the Court to be, that the retorn is to be taken for true, and hath alledged sufficient cause of expulsion; and that the doctor cannot have restitution.

58. THE EARL OF BEDFORD *against* AUSTIN.

Escape.

In action on escape, the defendant confessed that H. was in his custody by latitat ret. mercurij crast. animarum, but said that a supersedeas came to him (varying from it) reciting a writ retornable die Veneris crast. animarum; for which variance the plaintiff demurred, as not the same action; which the Court agreed. Judgment for the plaintiff.

59. HARRISON *against* KNIGHT.

Arbitrement. So issue sur debruiser del parke found for the plaintiff in trespass, is good, though the plaintiff did not travers absque hoc, that the defendant offered pledges to his feme, as he pleaded. 30 Ed. 3, pl. 35.

In debt for non-performance of an award; after oyer the defendant sets forth the whole award, and pleads performance. The plaintiff saith he paid not 10l. according to it; the defendant rejoyns he did not pay; and the jury find he did not pay. And by Allen for the plaintiff, though the verdict be impertinent, yet without relation it, there is sufficient title for the plaintiff, 9 H. 6, 37, 36. 6 H. 7, 11. But by to Wyndham this is an error after judgment, and therefore is considerable. Judgment for the plaintiff, nisi, 235, pl. 62.

60. BROWN *against* BROWN.

Covenant. 3 Cr. 864, pl. 43. 2 Cr. 233, pl. 2.

In an action of covenant upon conveyance of a fee-ferm rent by the father to the son, and his wife covenanting, he had good right. The plaintiff said he had no good right. The defendant saith that the covenant was ulterius that the son should enjoy it notwithstanding any act done by the father, and that he did no act, which by Allen for the plaintiff is ill. Jones for the defendant, This later covenant doth restrain the

former, and is pleaded to be in the same indenture, all the parts whereof shall be taken together, as Nokes 4 Co. 81, and the particular shall qualifie the general, the covenant being, that the covenantor tantummodo warrantizaret, &c. which Wyndham agreed: but by Allen they ought to have set forth the inden-**[235]**-ture: but by Twisden and Wyndham that is confess'd by the demurrer. The plaintiff desired leave to discontinue, being after demurrer joyned. *Post*, 239, pl. 75.

61. BROWN *against* MARTYN. *Post.* Detinue Br. 2.

Maintenance.

In indebitatus for 20l. delivered by the plaintiff to the defendant. The defendant pleads the plaintiff was accused before J. S. for coyning, and L. was to prosecute, and this was only delivered to the defendant as a pledge to save him harmless if L. did not prosecute. Upon which the plaintiff demurred, because it amounts but to the general issue (of non assumpsit) being delivered as a pledge; but he cannot plead non detinet. Adjornatur.

62. HARRISON *against* KNIGHT. *Ante* 234, pl. 59.

Issue.

The case 9 H. 6. is a case hardly to be sampled; and this is no confession expressed, but only by mis-joyning of the issue. But by Allen, The verdict is idle, and there is a breach expresly confessed in the bar; but the judgment is given by the jury, &c. But by Twisden, The Court will give such judgment as the C. B. would have given upon the whole record. Adjornatur.

63. JONES *against* EDWARDS.

Wales.

Error of a judgment in Wales in dower, the demand being against one, and the deforcement said to be by another, who only was summoned, and not the tenant to the præcipe, who was Margaret, the other being Jane. Judgment reverst.

64. GIBSON *against* GILES.

Rents.

In debt for rent, the plaintiff counted on demise of a rectory for 21 years, yielding 100l. yearly rent, if the lessor or his deputy should so long officiate. The plaintiff avers he did officiate, according to the covenant, &c. And the defendant said that he did not by himself, nor his sufficient deputy. The plaintiff replyed he did officiate by himself and his deputy: on which the defendant demurred, because double, and not pursuant to the indenture, *Pithie* against *Jacob*, which is averred to be done by the plainiff himself only; and he must have shewed who did officiate in his absence by **[236]** particular name. But by Twisden this is needless, and its well reddend' singula singulis; and a great mischief by Windham would ensue, if every deputy or assistant should be named, being not a single act, but of continuance, (as issue upon payment to H. is good, when payment is to H. or his assignees): ordered that both parties amend, and go to a good issue.

65. WHITEACRE *against* DACRES. *February* 10.

Ejectment. Stiles 164, pl. 439.

Per Curiam ejectment lyeth de uno stabulo, or wherever the thing is so certain, that the sheriff may do execution.

66.

Judgment.

Nota, per Curiam, when the judgment is given for security to stay a trial, execution can never be on it if the party dye before issue tryed, as *Digbyes case.*

67. POLYXPHEN *against* BRANFORD. *Ante.*

Admiralty. 1 Brownl. 4, pl. 21.

In an action upon the statute for prosecuting in the Admiralty, contrary to the statute. The defendant offered to plead not guilty, which is not receivable till visne settled; the evidence was of seizing a ship in Devon, where by Maynard the action ought to be laid; sed Curia contrà: and that prosecution in the Admiralty can be tried no where else; and non prosecutus suit is no good plea, but a departure.

68. THE KING AND CLERK *against* THE CHURCHWARDENS OF C.

Poor.

Keeling moved to quash an order of sessions, on 43 Eliz. 2, which enables the churchwardens, together with the overseers to tax for the poor, with the consent of the two next justices, this being not made in the same, but in another year, and directed only to the churchwardens. Wild pro Rege, This very case, he said, was one Peckhams at the Assize at Maidstone, where the intestate having laid out moneys as overseer, he was re-embursed by order of the General Session, which by Hale Chief Baron was good within the statute: and by Windham, I know at Salisbury the justices of peace, by very good opinion, having the original care of these things, this being casus omissus (that the overseer is obstinate, and will not **[237]** disburse any thing) the justices may compell them, and make a tax for the poor of themselves in the same, or another year, and so here, Dalt. 40, p. 116. But by Stroud, That tax was made in the same year. Twisden, It is doubtful whether any provision were for the poor before the statute 43 Eliz. they increasing on the dissolution of abby lands. But by Foster, he disbursing without consent of his partners, and no care being taken monthly for to take accompts, this order is null. Windham contrà, that the order being good of it self, the Court will not quash it for matter dehors suggested. But by Twisden, The order not being to the churchwardens and overseers, it must be quasht, and so it was per Curiam.

69. HOARD *against* CHARLES.

Tryals.

Upon an issue out of the Chancery, tryed in B. R. if excessive damages be, or the jury say other things (then expressed) were included in the verdict, the new tryal must be granted by the Chancery, per Curiam.

70. SMITH *against* NOSEWORTHY.

Error.

On 1 Cr. 481, *South* against ——— and 561 per Curiam, so H. 23 Car. *Jeoffryes* against *Scot*, if a writ of error be brought by the bail, tam in redditione judicij, against the principal, as against the bail, quam in adjudicatione executionis ad damnum of the bail; and this being the same point, Jones for the principal as amicus Curiæ, moved that the error might be quasht, and so it was, per Curiam.

71. HUNT *against* HARELWOOD.

Varyance. Dalt. 40, p. 116. Moor 298, pl. 444. 2 Cr. 247, pl. 5. 2 Cr. 629, pl. 2. Noy 88. Yelvert. 5. 1 Bulstr. 171. Stiles 341, pl. 727.

In action upon the case on promise to pay several sums aforesaid, and the plaintiff said the defendant had not paid the several sums, being in toto 75l. which was miscast; and judgment being given, error was assigned in this; Hub. 89, Bail. but by Wallup, the action being not founded on it, and the issue having reference to the several sums, Dy. 55, pl. 8, not to the sum, H. 3 Jac. *Faner* against *Snelling*, assigning breach by not payment of the rent at several days in toto 70l. which was miscast, yet ruled good only dammages being recoverable; Tr. 9 Jac. *Armitrage* against *Trice* which shall be according to the truth of the case, *Busby* against *Haverton*, M. 1657. *Wood* against *Louth*, in action upon **[238]** the case for work done for building an iron-mill; and divers particulars amounting to so much; the defendant pleaded payment M. 3 Car. Rot. 507, *Cook* against *Jeoffryes*, in the same point in toto, being so much which was miscast; yet on debate in arrest of judgment ruled good; the case of *Cook and Jeoffryes* was reverst for this error, because the action was founded on it; and miscasting was moved, which is stronger then if it had been less, 2 Cr. 569, and *Risby* against *Hales* 2 Car. and though this miscasting might lead the jury, yet here is apparent reason for the jury to give more then the sum, because of his special dammage. Twisden conceived the very difference to be when more, and when less is alledged to be miscast, which was the reason of the judgment betwixt *Wood* against *Louth*. Adjornatur.

72. SEIGNIOR CLARE.

Nota. Joynder.

If several tenants clame under one person by one tytle, and the plaintiff hath but one against them, they all may be joynd in one action: but not so where he hath several.

73. BOOTH *against* BEARD. *Ante. February* 11.

Amendment.

Original in a term after imparlance, by Wild, by the course of C. B. is well enough after judgment; and it shall be intended that the party appeared de novo; which by Twisden is against law upon nil dicit, or non sum informatus; contrà in judgment by confession, which may be the same term: but in the other cases he must have time to plead. And this is but to shoar up a judgment, which appearing on the record certified (in *Tanner* against *Bachelor*) upon diminution alledged after judgment removed in want of an original; and Roll was of this opinion: and the Court conceived it to be against law, and would not rule it one way or other till further advisement. Adjornatur.

[239] 74. WINDYBANKE *against* BEAR.

Office.

In assise for the office of clerk of the Privy Signet of England, first the assize was arraigned, then oyer of the count, then of the writ and retorn, after which, as in *Pagets case*, special imparlance to except against the writ was prayed, with copies of the writ, &c. which the Court granted; then the recognitors were called, and adjorned: but the better way should be to have given special rule, without any entry on record: also the Court refused to enter the count before the writ be allowed, especially being of an office, as by Foster, was in *Jehu Webs case*, and it should first be read in Latin by the Secondary.

75. BROWN *against* BROWN. *Ante* 234, *pl.* 60.

Non est factum.

Allen for the plaintiff, Had there been such a covenant quod tantummodo, &c. the defendant might have pleaded non est factum, but cannot plead it without shewing the indenture, having not demanded oyer of the indenture when produced by the plaintiff. Adjornatur.

76. PHILIPS *against* WEST.

Slander.

You set on folks to murder your husband, and you rob him of all his linen, that he had not a shirt to bury him in: he being then dead, the last words were agreed not material; but of the former it was doubted. *Post.*

77. THE KING *against* BREWSTER.

Perjury.

In indictment of perjury, Williams moved in arrest of judgment, the presentment being in English it is presented. 2. It is said, that he received in satisfaction 3 Martij 1648, and saith not, in the year of our Lord. 3. It is said that the mony (payment whereof was the point of the perjury) was paid prædict. Johanni, whereas his name is William, 9 Car. juratores pro domino præsent. omitting Rege, only the tenor of the record being removed out of London, may be amended here; and so in the case at Bar, by Twisden, which the Court agreed. Adjornatur.

[240] 78. THE KING *against* ROBERTS. *February* 12.

Carpenter moved to quash an order of the sessions made for a collection on a brief for a fire, to bring the officers to account of what they gathered, &c. which being by letters patents, the justices have no conusance. Twisden, The not confirming it is as good as if it were quasht, and confirm it; the Court agreed they could not.

79. COXE *against* DENTON.

Peace.

The justices must certifie some colour of their jurisdiction, else his Court will not confirm their orders, and all wages are not within the statute; and this being for wares sold, and work done, it was quasht.

80. TRIBUT *against* REYNOLDS. *Ante.*

Baron & feme. 3 Cr. 848, pl. 1. Stiles, 255, pl. 579.

Barnard moved for judgment in assumpsit to pay to the wife, if the husband would assign lease, &c. 1. No person certain to whom being named, it shall be intended to be to him with whom the communication was, *Coulman* against *Blumden;* which by Twisden, is intended only when the promise is pursuant and created by law, but not when it is collateral or express. 2. It was not shewed how long the assignee enjoyed it; but its said he enjoyed it the whole term afore mentioned, which is certain enough. 3. This promise might have been to the benefit of the wife, and either might have had the action, as in consideration of a marriage: and here after verdict, the husband and she being but one person, she may well enough have the action. Twisden doubted whether, as this case is, the wife may have the action; but he agreed the case of marriage. Windham conceived no difference after verdict, but that the promise in both cases shall be intended to be made to the party with whom communication was. Adjornatur.

[241] 81. PHILIPS *against* WEST. *Ante.*

Slander. 2 Cr. 823, pl. 24.

Baldwin moved in arrest of judgment, because there is no inducement that the husband came to an untimely death, *Skelly* against *Pierce*, 1658, B. R. You would have been the death of J. S. And Moor Rep. Thou hast procured one to kill J. S. not actionable, Cr. *Harper* against *Beaumont*. Windham. This doth not shew any act done, but only an intent. But by Foster the common parlance is understood of actual doing, which Twisden agreed. *Laurence* against *Woodyard*, Yelvert. Thou didst violently on the high-way take away my purse. The rule of intent to do an act illegal, is not always actionable. Adjornatur.

82. NEVIL *against* CAGE & UXOR.

Baron & feme.

The husband in custodia in a writ, where he and his wife are named, must appear for himself and wife, but is not forced to put in special bail for her if she be not arrested: but the sheriff may, upon the arresting him, take an obligation for good bail, which by Hern Secondary, is the constant practice of the Court; but he must find special bail for himself.

83. RUMSEY *against* BOUCHER.

Slander.

Of a servant maid, She is a common drunkard, and will go to the alehouse with any common fellow, and sit four and twenty hours, and swear damn her and sink her, &c. By which she lost her service; not shewing she lost any wages, or that her service was profitable. After verdict, and this cause moved in arrest of judgment, it was conceived well enough, having a temporal loss, though the words be ecclesiastical, per Curiam.

84. THE KING *against* BRAUGHTON.

Fees.

Powis moved to quash indictment of extortion against the keeper of the gate-house; 1. Because it appears not he was then keeper. 2. That the party is not said prisoner ad tunc, or at any time certain, and so might be before the Act of Indempnity: but the Court refused to quash it till trial of the fact, because great complaints had been made of him before.

[242] 85. THE KING *against* EVANS.

Usury.

The defendant was indicted for purchasing land of a free-school at 20l. per annum, which were worth 60l. which by Williams is no offence; which the Court agreed. Adjornatur.

86.

Slander.

She is a whore, and E. D.'s whore, not actionable without a temporal loss.

87.

Ejectment.

Nota, That upon a judgment against his own ejector in default of confessing lease, entry and ouster according to rule of Court, without a special rule, no costs

shall be paid by H. the tenant in possession, that made the default, &c. contrà upon trial had against H. because the plaintiff hath the benefit of the suit, viz. judgment against his own ejector, whereby he may recover the possession.

[243] 14 CAR. II. B. R. DIE MERCURII 9 APRILIS, ANNO 1662.

1. CLERKE *against* THE CHURCHWARDENS OF C.

Poor. Its said the churchwardens ought to provide in present exigency, and shall be reimbursed by a rate. Stiles 246, pl. 562.

On motion for a new amendment of an order made for to reimburse Clerke overseer of the poor in St. Giles's Cripple-gate, but the former being quasht, the majority of justices in Hicks's-Hall (viz. 17), refuse to grant any new one, because not in their power; but mainly because the order was grounded only on an accompt stated by the oath of the party, and never allowed by the two next justices: yet it was urged that such default maketh not void the accompt, but hath a particular penalty annexed. 2. That the two next justices refused to allow it, in which case the two next must be sought to first, before H. can go to the sessions; contra in things to be done by two justices, &c. That the inconvenience would be great, if not allowed here at the sessions, the poor being but ill provided for at best, and now would fare worse. 3. That it was impossible to render an accompt other wayes then on oath, by reason of the sudden and necessary occasions of expence. 4. That it was more for the benefit than disadvantage of the parish, for one that is a baker, &c. to distribute bread of his own, at the parish charge, then to buy it. 5. That there was a tender made in due time by C.

2. BETWIXT THE PARISHES OF ELING AND THISTLEWORTH. *Friday, April* 11.

Poor. 14 Car. 2, c. 12.

Resolved by the major part of thirteen justices in Hicks's-Hall Sessions, that H. being a labouring man, and having an abode at T. goeth for work, viz. to make brick, with his family to E. and there dieth, (both T. and E. also being in the same county of Middlesex) his family shall be kept by T. although his imployment last longer then that season, as well as if he had only removed to a harvest, or such like work.

[244] DE TERMINO PASCHÆ.

Foster, Chief Justice; Mallet, Twisden, Windham.

3. THE KING *against* BARKSTEAD. *Wednesday, April* 16. Siderf. 72, pl. 1.

Treason. In action upon the stat. if the party fail, the King cannot sue till apprise by information or indictment; contrà in attachment upon prohibition, or any offence, contrà Coron. & dignit. 7 Ed. 3, 26 b. pl. 12.

Barkstead, Okey, and Miles Corbet being brought by habeas corpus to the Bar, Mr. Attorney Palmer moved upon the Act of Attainder 25 April, 12 Car. 2, cap. 30, and the confirmation thereof in 13 Car. 2, removed into the Chancery, and transmitted hither by mittimus (which he desired to be read) and that they might have execution thereon without information, indictment, or other trial. The prisoners only desired counsel, which the Court refused, until matter of law shewed by them. Twisden, There is only, that they are not the same persons, or the Kings pardon pleadable, the Act making all the rest void. 2. Windham conceived the Court should waive the advantage of the prisoners holding up their hands (because the Attorney General was ready to take issue that they were the same persons, and to prove it presently) and so

it was offered with a modo & forma, which the Court refused, but took it absolutely; and the oath of the jury was only to try the issue, &c. to which no challenge is allowable, but for special cause: to prove which issue, the evidence was of their sitting in the Court of Justice, and signing the warrant of execution of the late King, as against the prisoners in the Old Baily before: and they being found the same persons, Corbet excepted, that here was no indictment or information, as in *Sir W. R.'s case:* but per Curiam they being attainted by Parliament, they are need-**[245]**-less, 1 H. 7. Stafford was so proceeded against; and these proceedings are not new. Also by Corbet, This Act to this purpose is but a judgment, on which the year and day being past, there ought to be a dat Curiæ intelligi: but by Twisden, A scire facias extends not to attainders by Act of Parliament, as Hut. 21, *Sir W. Raleighs case* not being grounded on Westm. 2 cap. 45, and must be of an offence, (whereas here is none but that of which they are convict) wherefore Foster and the Court awarded execution against them; and soon after all three were executed at Tyburn.

4. BROWN *against* BURDET. *Thursday, April* 17. Siderf. 74, pl. 4.

Audit. querela.

In audita querela by the course of the Court, the plaintiff enters into recognisance to discharge himself, if the suit go against him, by Twisden: but by Hern Secondary, That is only when execution is superseded, or the party taken out of prison; but if the money be on the first judgment paid to the party, there is no remedy for it; but if to the sheriff, the Court upon the audita querela may order it to remain there till the suit determined: if the plaintiff hath judgment in audita querela, he shall only be discharged of execution, but shall have no restitution; wherefore (because the plaintiff could not have been taken in execution on the first judgment, but only upon the judgment in the audita querela) the Court ordered the money to be brought into Court, and remain till an end made.

5. MATTHEWS *against* RAYMOND. *Ante.* Debt Br. 43.

Amendment. 46 Ed. 3, 29, & 47 Ed. 3, 13 b. In Debt Br. 43. Moor 47, pl. 142.

Raymond moved against a repleader in an action of covenant to pay money on articles. The defendant pleaded payment after the day of 5l. in satisfaction of 50l. mentioned in the articles; issue thereon found for the defendant, who pleaded it, which he conceived sufficient. But Jones for the plaintiff contrà, The action of covenant was for not payment of money at a day; after which the defendant pleads this satisfaction, which by way of accord might have been pleaded in satisfaction of the debt and damages, but not in satisfaction of the debt, but only in mitigation of the damages. Allen for the defendant, This action is in nature of debt, a præcipe, & quod adhuc detinet, so that an acceptation after will bar the action of covenant, which Wind-**[246]**-ham agreed: but by Twisden, The pleading is not sufficient in discharge of the 50l. But there being a full issue on an affirmative and negative, it is well enough, as it had been by Allen, if it had been pleaded in satisfaction of the breach of covenant; and here it doth tantamount, being in satisfaction of the thing covenanted to be done; and *Nichols case*, the Court agreed; but if any negative and affirmative be found against him that pleads it, it is good, but not so when it is found for him. *Vid. Lightmans case*, Hut. & 2 Cr. Judgment for the defendant, nisi.

6. JORDON *against* CLERK.

Assumpsit.

Jones moved in arrest of judgment in action upon the case, upon indebitatus assumpsit of the testator, against the executor, upon promise to pay in consideratione præmissorum, the plaintiff intending to sue him as executor; which by Jones is insufficient, which Twisden agreed: and that the case of *Howard* against *Ducket* in

this Court, was on the same point ruled void, being upon promise if H. would forbear to sue D. as executor. 2. The consideration is void without assets, or being not made as executor, stayd quousque first moved on the other seide.

7. Sir Hugh Middletons Case.

Ejectment.

Nota, pro Rege, that judgment against ones own ejector cannot be entred till the postea returned and endorsed, that the nonsuit was for want of confessing lease, entry, and ouster, which the Secondaries agreed.

8. Goodier *against* Clerk. *Ante.*

Leases.

Finch solicitor, for the plaintiff, that claimed under the lease for 100 years, the case he cyted to be C. leased to begin on the death of W. C. and Martha, on their death without issue male: they dye having issue, which dyeth without issue, yet this is a good lease; it is admitted to be so in point of creation, that it tends to a perpetuity is no reason of moment, for the law shall never construe words of limitation to make a contingent, which may commence in point of estate: so if H. had granted a rent to commence when J. S. dyeth without issue male, it shall begin when the issue of J. S. fails, as well as if the words had been so expressed; and yet the objection of the perpetuity would have been the **[247]** same: and however imprudent provision this be, its not material, if it be good but yet this lease is dockable, as Manwood held in the Eschequer, lessee for years in futuro, or on contingent, cannot falsifie; also this issue goeth to all; but it might have been otherwise, if it had been on the death of J. S. without children, which would not have extended to grand-children: also the words are not on the death of issue male begotten, but also to be gotten, which refers to all generations; and this is a proper provision for the daughters to begin, when the male line fails, for which end this lease interposeth betwixt every branch, and the main inheritance which is valuable in the preferment of the daughter, and shall go to her administrator, though she cannot sell it, nor perhaps may never enjoy it. 7 Car. *Keble* against *Hall*, lease to begin within 20 years, or on the surrender of former lease, here for the uncertainty the lessee hath election. Jones for the defendant, put the case that H. on the marriage of his son, makes a lease for 100 years to begin when the male-line of the son fail, and on that deed of settlement, there was a trust for portions to be paid to daughters, its considerable, whither this lease be good in point of creation, or not; being not on the life of any person, but upon such a remote contingent; but this he admitted now. But the main question is, upon the words of the habendum, which he conceived capable of both constructions; but according to the most common intention of the words, must refer to a dying without issue at the time of the death of the lessor, as according to common parlans, Pl. Com. 233, though not according to legal forms, as *in formedon, &c.* If H. makes a will and the executor thereof dyeth intestate, here (as in our case) H. may be said in law to dye intestate, 26 H. 8, 7, but not so in common vulgar speech, Pl. Com. 279, for which reason this was ruled within the equity of the statute. Also the intention of the deed, doth manifestly shew that it should commence at the death of the lessor; being in trust for provision for daughters then unmarried; and there is a proviso, that if the males fail within a year after the death of the lessor, then there were payments to be made to them both, which must else be destroyed: and this is the only reason to avoid perpetuity, which shall be taken, rather then any other, in equal construction, which was the reason of *Blunket and Holmes case* to avoid inconveniencies. Finch, The case of executors refusing hath no resemblance in propiety; but by Windham, in point of pleading he is said to dye intestate. Twisden, The sole point here is, what the devisor meant, **[248]** and lessee to begin 5000 years hence within the words of the statute (of future interest) may falsifie, if any future interest may; which Berclay held could not. Windham said, that Rolls was of opinion, that this settlement was intended to

continue only till issue-male had by the son, at which time the estate was said setled, and no clog of provision for daughters intended to continue: there was an opinion certified in a case referred out of the Chancery to counsel in this point, 13 Car. 1, *Bret. & Pildrim* against *Cole.* Adjornatur.

9. BARBER *against* WINTER.

Infant.

If an infant be sued, he shall be in custodia, and shall not be delivered by appearance per guardianum without special bail, which the Court said he must find, though he cannot secure them, because as to this purpose there is no difference betwixt appearance by guardian and attorney.

10. BROWN *against* MARTEN. In Detinue Br. 2.

Trover. Action upon the case, Br. 111.

In indebitatus, the defendant pleads delivery of a pledge, and it was said in a trover and conversion, such a plea is not good. And Twisden doubted here; but being a special demurrer, for that cause the Court conceived it to amount but to the general issue. Judgment for the plaintiff, nisi.

11. FEN *against* DRIVER.

Trespass. Stiles 182, pl. 416.

In trespass, Bugging moved in arrest of judgment, being quod 10 equos ceperunt, abduxerunt, & fugaverunt, by which he lost one hundred loads of hay, not saying ad valentiam, nor pretij, which the Court conceived ill, being quod ceperunt, abduxerunt, & fugaverunt; contrà if it had been quod fugaverunt only. Adjornatur.

[249] 12. FRANKLAND *against* SAVILL. *Friday, April* 18.

Proof.

Examination of witness cannot be by consent of the parties before any Judge that is not of that Court, out of which the cause went to the Assizes, by Twisden and Foster; because the depositions are not taken before him, as Judge of Assize, but as Judge of this Court; contrà by Windham: but per Curiam, Though one consent to have a letter read, yet the jury in pain of attaint, are not bound to find it; therefore it was agreed, that a bill should be exhibited in Chancery, and answered, and commissioners, by consent, go out thence into the country to examine such witness in the country, whereby the depositions may come in hither judicially.

13. FRIER *against* HEN.

Utlary. Assurances Br. 1. Dyer 310, pl. 78, such remainder is in obeyance.

In evidence to a jury, it was observed, that conveyance to A. for 99 years, if he so long live, is forfeitable by utlary, and so scarce so good as for life, remainder to the feoffees, and their heirs, during the life of tenant for life, yet both do prevent the cutting off the contingent remainder to the first, second, or third sons in tail; which yet Jones for the defendant against *Cholmeleys case,* prayed to be found especially, but the Court denied it, most conveyances being this way. 2. One may forfeit, during his life, and yet the remainder not destroyed, as *Jacobs case,* contrà to Sir John Lydalls. 3. Non-claim upon a fine levied under usurp'd powers, confirm'd by the Act of Judicial Proceedings, shall bar, (of estates sold or disposed by such powers for any delinquency against them) but only such as are parties to the fine, and their trustees;

not such which could not enter by reason of such powers, and such as might then have entred before, shall not have new five years now, per Curiam, but directed it to be found specially.

[250] 14. BRAYDLE *against* HENBRIE.

Assumpsit.

In action upon a promise against an executor to pay if the plaintiff would give day per paululum tempus, to sue him for debt of the testator. Baldwin moved in arrest of judgment, that this is insufficient, as well as per breve parvum, or aliquid tempus: stayd per Curiam usque.

15. BOWCHIER *against* COSTER.

Apprentice. March, 3, pl. 6.

In action of covenant, Scrogs moved in arrest of judgment, shewing the custom of London to turn over an apprentice from one to another; and that such to whom such apprentice is turned, may have an action of covenant upon special issues on the several breaches assigned, and verdict for the plaintiff. 1. That the breach is quod abstraxit se a servitio so many nights, and during that time, did not serve him, which per Curiam being found against him, is good enough. 2. That he did not serve according to his covenants, whereas no covenant was made with the plaintiff, yet if this second covenant had been omitted, it had been good enough, and the conclusion, & sic non tenuit conventum made with the plaintiff, is as well as could be. Judgment for the plaintiff.

16. ROBINS *against* COXE & WARWICK. *Ante.* In Dett. Br. 94.

Rents. Cestuy que use on lease made could have no rent unless reserved by deed, yet the lease was good 5 H. 7, 5 b. pl. 11, by Brian.

Powis for the defendant, moved the Court that the parties were agreed, and had compounded, that no advantage should be taken of arrears, and that the plaintiff might have judgment, and the tenant would pay his rent in futuro to the grantee.

17. THE KING *against* TRINITY-HOUSE. *Ante. Saturday, April* 19.

Franchis. March, 16, pl. 38.

Baldwin pro Rege in an information in nature of a quo warranto, for digging of ballast and lastage: the defendants pleaded their incorporation and grant of that office, betwixt London Bridge and the high sea, by the King, which is insufficient, they being a corporation only capable to sue and be sued, and therefore cannot take lands of the purchase of a common person, nor of the King 2 H. 7, 13, by Keble, 21 Ed. 4, they being but a corporation to the parti-[251]-cular purpose, and they cannot here be to other, because no rent is reserved. 2. It is not said to be an auncient office, and no usitatum by such as enjoyed that office can be pleaded; so Dy. 76, *Isams case;* and to say that the King and Queen of England, time out of mind, have had the grant of such office, is but an implication, and impossible to be true, Queen Elizabeth being the first grantor of it: but the prescription should have been annexed to the office, &c. that Queen Elizabeth, and all her predecessors, Kings and Queens, &c. 3. This priviledge to digg in the river, ought to be alledged to be ratione officj, and as appendant to the office (admitting the office to be sufficiently pleaded) for this cannot be parcel of, nor an incident inseparable to the office; and therefore can be only appendant, 1 H. 7, 29, and must be so pleaded, and not that they have used to digg generally. 4. Admitting it be appendant, nothing passeth out of the King by this grant (of the office lastage and ballastage) without saying cum pertinentijs, being a thing of considerable profit 8 H. 7, 4. Dr. & St. 35. 5. The information is, that the defendants, without warrant, have used to digg in any place of the river betwixt the bridge and

the sea: the defendants say, that by virtue of this grant they might digg in aliquo convenienti loco, which (not shewing in what place) is insufficient, sed non allocatur, the King having demur'd thereon, this is a disclaimer in all the rest. Also it is said, that all grantees of the King and this office have used, &c. which is not good, no prescript being to be layd in lessee at will 7 Jac. *Sir Thomas Grimes* against *Peacock*, B. R. no more then every tenant may prescribe for common, because no interruption ought to be. Allen for the defendant, By the very constitution of a corporation by the King, they are made capable of this grant, and they have appeared as a corporation; also the grant of this office is only described by the usitatum, the liberty and office being the same thing, and therefore is not necessary to be said appurtenant to the office, it being doubtful, whither it be an office or not: also none can ascertain which are convenient places, by reason of the accidental rising, and full of the sand; also the form of this grant is not as to the corporation in their own right, but only interpret the right in the Kings grant by the usage, but the record being, that they should be a corporation by such a name, and that they might sue &c. the Court conceived it well enough; and though the office be only to survey the ballast, and order the wharfs and manner of the landing and drying it, and by the Attorny-General may be without digging the ballast, which is a profit, a prejudice in anothers soil; yet Twisden **[252]** and Windham, conceive this an incident inseparable to the grant of lastage and ballast, as Spilman Glos. verbo Lastage. Howel pro Rege, conceived this office only of supervisorship. Foster ad idem. *Post.* Adjornatur.

18. WINDEBANK *against* BEAR. Siderf. 37, pl. 3.

Office. Vidan 17.

After demanding the tenant (which must be the day of the retorn of the writ) then the assize must be arraigned, then the count is to be read, by Twisden, but by Windham the plaint is only made generally of his freehold, then the tenant demands oier of the plaint, writ and retorn, then day may be given, and then the Court may be made specially: and if it be of a rent, the title must be in the plaint or count which is all one, and the reading of such count in Latine, is that which entitles the Court to jurisdiction, and if no sufficient entry be made of such plaint, so read all, is discontinued, yet when the writ is retorned the Court, (without any entries) may adjorn the assize from time to time, without calling the recognitors till issue joyned, and may enter all as of the first term, though no count be then made. *Post.*

19.

Baron & feme.

In action upon the case upon promise made to the plaintiff, to make a feme worth 500l. if the plaintiff would marry her. Newdigate moved in arrest of judgment, that the action ought to be brought by both or by her to whose benefit it is, which the Court denyed; and that the promise is only for the benefit of the plaintiff as the case of *Sprat* against *Agar*. Judgment for the plaintiff, nisi.

20. *Monday April* 21.

Indictment.

Nota by Twisden, No indictments, but such as are removed out of London are here amendable, and they are so, because they by charter retorn only tenorem recordi.

[253] 21. FOURD *against* WESTON. In Demise, Br. 8. Siderf. 73, pl. 2.

Devise. Stiles 201, pl. 657. 2 Cr. 115, pl. 5. Goldsb. 33, pl. 7.

After a devise made to H. to say as in *Kites case* Dy. 310 b. I will settle my land on another, or to say, that he hath made no will, as *Jeoffryes case*, or to say, that J. S.

shall be my heir that is not so at common law, is no revocation; but if he were heir it may be, or not be, (as in 20 Car. per Curiam was resolved) but if H. take notice of his will, but that J. S. is his heir and shall have it, is good revocation, by Twisden & Curiam, and in the case at Bar, the devisor said without reference to his will, that his heir at law should have his estate; which Foster conceived a revocation, being spoken to a person that knew of the will; which Twisden denyed, without deliberate taking notice of the will. Verdict for the defendant that the will was revoked, if any.

WEST *against* PHILIPS. *Ante.*

Slander.

Wild conceived the words (You set on folks to murder J. S.) actionable, fine and imprisonment being due without averring J. S. to be dead, 1 Cr. 140, pl. 147, of *Leukner* against *Crutch*, for the words are scandalous, as that my Lady Cockain offered money to give her poyson to kill the child in her body. Twisden, If it be criminal to charge H. with fact done, as that he is a barretor, though only fine and imprisonment be due, yet it is actionable; and this is pregnant in it self, that the husband was murdered; *Cronye* against *Prat*, 1653, B. R. There was a man murdered in your house, and you conceald the murdered; which by Twisden counsel, supposed a fact done; also the case at Bar is the husband tunc defunct. which supposeth him dead, and by Foster no good sense can be put on these words, and you set on rogues to rob me, hath been adjudged actionable, and the words implye that he caused the husband to be murdered. Judgment for the plaintiff.

In Disms. Br. 11.

Tythes. March, 50, pl. 87. *Infra* 238, pl. 300.

Nota, that tryal whither land of which tythes are sued for in Spiritual Court is barren and not arable, must be at common law, and prohibition awarded accordingly.

[254] 24. PALMER *against* HAMS.

Fees. Pl. Com. 415 b.

In assumpsit to pay the goaler money due for fees. Allen after verdict for the plaintiff moved in arrest of judgment, that it was not averred that the money due and promised was for fees, sed non allocatur, but judgment for the plaintiff, the record being upon view for fees, also his bare fee about 6s. 8d. or 13s. 4d. of each prisoner, which is not taken away by statute.

25. THE KING *against* TYMBERLY. *Ante. Tuesday, April* 22.

Conspiracy. So conspiracy lyeth for procuring H. to be indicted of common trespass 3 Ed. 3, 19, pl. 34.

Barwelt moved in arrest of judgment, for that matter of the indictment, it being to deprive the plaintiff of his credit, and to extort several sums of money from him; but said not that they charged or conspired to charge the plaintiff before any that had jurisdiction; and as *Poulters case*, by the common law, no conspiracy lay till after acquittal; but doth now lye for a conspiracy to indict; but it must be such as may draw the party in peril, and this is the description in the Statute of Conspirators, 33 Ed. 1, 3 Inst. and the reason of that severe punishment against them. 2. This is not matter of slander 1 Cr. *Salter* against *Brown*, nor would be actionable, unless for matter that were determinable by the Ordinary, 2 Inst. 206. Windham, The crime is the conspiracy, which whither it be only to defame, or disgrace men, or had it been to charge him with heresie, it had been punishable by common law, though no prosecution be had thereon. And by Twisden, This is no indictment for having a bastard,

which is seldom, but is a conspiracy for lucre and gain, to discharge and disgrace one with a bastard, which is well actionable: Mallet ad idem, Corporal punishment being due: and by Foster, The very act of conspiring is so odious, for the ill consequences, that it cannot have good intent. Judgment pro Rege.

[255] 26. TOWS *against* LEWIS. *Ante.*

Account. *Williams* against *Lowe.* Noy 28, pl. 113, Green and Dickinson that it is in discretion of the Court to do either at first or last.

In account, if H. be removed out of London, or Inferiour Court, albeit special bail be below, yet here he puts in bail only to be in custodia, but after judgment quod computet, a capias goeth forth, and when he is taken, he must put in special bail. 2. Mainpernors to answer the condemnation; but he shall not (as was before supposed) put in special bail on the first appearance to answer the condemnation, by Twisden & Curiam.

27. SHEPHERD *against* WAKEMAN.

Slander. 12 Co. 35. Hub. 62, pl. 13, it may be so to the party. 337 pl. 444. Simile.

In action upon the case for writing a letter to her, as sweetheart, whereby she lost her marriage with J. S. The letter bore date in the middle of that term, when the action is brought; which, per Curiam, if it be before the bail filed (which may be of any retorn of the term, but is usually of the last) is well enough, but contrà if after. 2. The defendant claimed the woman as his wife, and therefore though it is found by verdict, that the defendant falsly and malitiously affirmed a precontract, yet the defendant making title, it is not actionable; *Mildmayes case, Banister* against *Banister, Sir Gilbert Gerrards case;* else by Twisden, none can ever make his title, if when it is found, that he made it falsely he should be sued. Judgment stayd, quousque. *Post.*

28. THE KING *against* ———.

Trades 38, pl. 54.

Information on 5 Eliz. 4, for using the art and mystery mercatoris, Anglicè a mercer, which by Lindly is ill, the trade of a merchant being not within the statute; and it hath been doubted whether a mercer or draper be within the statute, and then the Anglicè will not help it: but by Twisden, Information in B. R. on this statute being in derogation of the common law, may be quasht on suggestion; but others removed out of Inferior Courts, cannot be so, without demurrer. Adjornatur.

[256] 29. NEVE *against* NELSON. *Ante.*

Priviledge.

That all the clerks of the C. B. trahi non debent into suit, else where is negative pregnant, *Levingston* against *Crumpton*, clerk in Chancery, and *Foster* against *Barrington*, by Twisden in B. R. and this plea ought, as hath been resolved, to be amended, if pleaded; though if one bring in the book of the Eschequer, it is sufficient without averment, which the Court agreed, and awarded respond' ouster.

30. SPENCER *against* MONKE.

Error. Stiles 174, pl. 401. 8 Co. 143, *Dr. Drurye's ca.* & Error Br. 150.

In error on a scire facias upon a judgment against J. S. the principal cannot assign error against the bail, though it be as well against himself, as in execution against the bail, per Curiam: also the judgment against the principal was, that it

was awarded that the plaintiff do recover, which was moved by Baldwin to be error; and so held per Curiam.

31. THE KING *against* RANDALL.

Nusance. Stiles 356, pl. 760. But process may be stayed without, 122, pl. 144.

Graves moved to quash an indictment of nusance for building of a barn in & super altam & Regiam viam, not saying whither leading: and as *Claydons case*, 1 Cr. the barn cannot be upon the whole way, but his chief exception was, that here is no offence, being quod per quandam structuram incroachiavit, which per Curiam is well enough: but by Twisden, The not shewing whither the way tends is material: but by Foster, First take issue on the nusance, or have a certificate that its removed, else no exceptions to the indictment are allowable: else by Twisden, the justices must certifie that its no incroachment, till when the Court would hear nothing.

[257] 32. HUNT *against* HAZLEWOOD.

H. 2 Car. 2, Rot. 849, 850.

Amendment. 2 Cr. 569, pl. 8.

In assumpsit laid several wayes for several sums of money, the toto se attingunt was more, but the jury in one found less then the particulars; which by Wild, Recorder, for the defendant, is well enough: but the other action being in toto se attingunt more than the particulars, and the jury find the sum computed, this is ill; which difference, by Twisden, was agreed by Roll upon perusal of several cases in Jones and Barclays time: but Allen for the plaintiff, cited *Syms* against *Gregory*, where a repugnant trespass as 20 H. 6, with continuando beyond the test of the writ, and the jury gave damages for all, it is intended that they only give damages for that which they lawfully may, and so were the resolutions in *Parmiter* against *Cresser*, trover pro duodens fili, damages were affirmed well given, though it be nonsense: but by Twisden, No jury can believe trespass can continue after the writ brought; but this doubt ariseth on their belief of a sum which is miscast, and so the difference is evident; and three or four cases have been thus adjudged, which the Court agreed, and gave judgment for the first, and adjorned the last.

33. FEN *against* DRIVER. *Ante.*

Trespass.

The trespass being for taking away 10 equos, by which he lost one hundred loads of hay (not saying of what value the hay or horses were) but concluding generally ad valentiam 100l. which was found by writ of enquiry of damages; the Court conceived it to be ill, the action being not brought for the taking away the horses, but for the loss of the hay: but they agreed, that after verdict this had been helped. Adjornatur.

[258] 34. DEVEREUX *against* UNDERHILL. *Wednesday, April* 23.

Amendment. Stiles 8, pl. 17. 2 Cr. 239, pl. 4.

In trespass of assault, battery, and wounding, the roll of jurata, which begins ponitur in respectu, quousque, &c. this is right; but the distringas was returnable at a day after the Assizes, which as 1 Cr. 138, by Newdigate for the plaintiff, is well enough, and at most but a misprision of the clerk, P. 2 Car. 1 Cr. 32, *Smith* against *Wade*, which the Court now, after verdict, may amend in a quo warranto, 1 Cr. 146, which is out of the statute, this case was held amendable: and by Twisden, The jurata is the chief warrant, 1 Cr. 175, though not the sole warrant of the Judges, who have power by West. 2, and by all the presidents and the practice of the Court, the distringas, which is only si justiciarij prius venerint, but is no Nisi Prius of it self, i

amendable after verdict, as well as the jurata shall be amended by the distringas that is before, à fortiori, the distringas that cometh in after by the jurata before, which the Court agreed. Judgment for the plaintiff.

35. THE KING *against* THE MAYOR OF HEREFORD. In Escape Br. 32.

Retorn.

On Rast. Entries 580. Not guilty may be pleaded to the sheriffs retorn of a rescous, by Moreton for the defendant, which the Court denied; but agreed, that in action upon the case for the rescous one may travers, &c. 2. If one confess contempt or perjury, he shall have judgment presently, without further examination on articles. *Post.*

36. WHITCHURCH *against* PAGET. Siderf. 74, pl. 5.

Entred M. 13 Car. 2, Rot. 222.

Office. Stiles 208, pl. 471.

In an action upon the case for taking the profits of the under-clerk of the Treasury, whose admittance was usually by the master of the office, and fees ancient in a table under the Judges hands, 18d. every præcipe, and not removeable at the masters pleasure, nor at the Judges. 2. Petitions to this Court are seldom signed by the party himself, as they are to Higher Courts, per Curiam. The defendant relied on, that this is no office though the fees be certain, **[259]** but only an imployment at the masters pleasure, and all the admission is only the masters permission of him to work, without rolls or grants. 3. A note obtained by the Lord Finch, master of that office formerly, of the officers subscription, that they were but servants, which by Allen for the plaintiff, is no more then some parishioners subscription to pay tythe in kind which will not bane others; which the Court agreed, and refused to give it in evidence, especially part being cut off. 4. Though this be no office, 29 H. 6, the Duke of Norfolk in *Reynolds case*, 10 Co. yet its such an imployment which is allowable by the Court, and to be placed on men of ability, whose defalt shall not prejudice the master, nor can he remove them without cause; they must first serve a clerk, then are admitted by the Chief Justice by allowance of the prothonotaries, which must be after they have served their time, unless cause be to the contrary; and though the office is not forfeited by defalt of the clerk, yet the superior may be fined for it. 5. Money given to an inferiour clerk to resign, is not within the statute, by Twisden, not being bought of the master; and these offices are particularly excepted in the statute. 6. It was moved for the defendant, that the taking of the profits, being by colour of an ordinance disabling the plaintiff, being a delinquent, was pardoned by the Act of Oblivion, 12 Car. 2. But by Allen, The Act relates only to publick differences, or such private injuries as were done under colour of, and relating to them; and it doth not appear that the plaintiff was a delinquent: but per Curiam, This being but an ordinance, Jan. 43, notice thereof must be proved; and by Twisden, The Act extends only to indempnifie such as received rents of delinquents, and paid them over to the State, 25 Dec. 1643. The Court conceived it an office, and that the master could not turn any out of it, and directed only as to damages, which by verdict were given to 600l.

[260] 37. LAWRENCE *against* WARBECK. *Thursday, April* 24.

Court baron.

Upon affidavit that the debt was above 40s, and divided into several actions in court baron, the Court awarded a prohibition and an attachment, unless cause be shewed.

38.

Visne.

The visne cannot be altered after plea pleaded, but only by consent on motion in Court, and then the parties pleaded de novo, per Curiam.

39. BROWN *against* BARNET. *Ante.*

Audit. querela.

By Windham, By judgment in audita querela brought before the former execution done, H. shall be restored to whatever he lost by execution, which the Court agreed, being founded on a release, F. N. B. Adjornatur.

40. WESTON *against* HORTALL.

Prescription. Avowry, F. 66.

In action upon the case, the plaintiff counted that he was seised of mills, and that the defendant and occupiers of such ground (not saying by what reason) ought to repair a wear, by not doing whereof the plaintiff lost the benefit of his mills; which by Jones, in arrest of judgment, is ill; but especially because the prescript is laid only in occupiers, 5 Co. 99, which may be tenants only at will. Adjornatur.

41. THE KING *against* ———.

Indictment.

H. by pretence of concealment of an offence in leather by a tanner, contrà legem penalem receiveth money, as also not to prosecute, being an informer, for which he was indicted; which Winnington prayed might be quasht, no offence being alledged: and not concluding contra formam stat. Twisden conceived it a strange indictment, but being after verdict, adjornatur.

[261] 42. GLASCOCK *against* MORGAN. In Debt Br. 49.

Judgment. Error, Br. 117.

After Curia advisare vult, by Allen, the judgment might be entred of the same term the verdict is given, though the party be dead, as in *Waldron and Wards case;* which Foster agreed to have been done, as well in this Court as in C. B. and by Hern prothonotary, as the common course; but otherwayes where the party by his voluntary act defers his judgment, there it shall be entred only of that term when its prayed; or if the defendant stay it by injunction, if rules be given to move in arrest of judgment on the postea, the plaintiff may enter his judgment, as of the term when the verdict is given; so on special verdicts which are continued by act of the Court: wherefore Wild for the defendant prayed that the elegit, being executed, might be returned and filed, that so no capias might be after award, which the Court granted. *Post.*

43. WARNER *against* BROTHERTON.

Entred Hill. 12 Car. 2, Rot. 708.

Executors. 2 Cr. 15, pl. 20. Stiles 385, pl. 836.

In action of debt against one as executor upon a judgment against the testator; she pleaded that such a day (which was) that administration was committed to her, which on demurrer after imparlance, was by the plaintiffs counsel conceived to be ill. It hath been objected, because in substance it is no more then ne unque

executor, which is not in bar, 7 H. 6, 36, per Goddard, & 37 H. 6, 24, per Davers, and therefore cannot conclude in abatement, and the matter, not the conclusion, denominates the plea; yet by him this is but a misnomer of the person, as *Robinsons case*, 5 Co. 32, & 35 H. 6, 21 b. the word executor being parcel of the name, and traversable, 35 H. 6, 55, which showeth it so to be: and this plea differs from unque executor, confessing her self chargeable with the debt, but not in that manner, 21 H. 6, 19. But admitting the pleas to be alike, yet the conclusion doth restrain the election to one way. 36 H. 6, 18, per Littleton, 3 Ed. 3, 46. 37 H. 6, 24. And supposing this a plea of misnomer, it cannot be pleaded by attorney, being contrary to his warrant, F. N. B. 27 a. 2 H. 6, 11. 6 H. 7, 14. 32 H. 6, 30. Nontenure after the view may be pleaded, but not after imparlance, 19 H. 6, 1 & 2. Yelvert. 15 Jac. 112. 32 H. 6, 27 & 28. 35 H. 6, 36. H. 2 Car. *Ratcliff* against *Bucke*, Ow-**[262]**-en; & Latches Rep. But this plea demanded judgment de billa, and began not actio non, which by Twisden is but in abatement; which Windham agreed; and so cannot be pleaded after venit and defendit vim & injuriam, which is general imparlance. But per Curiam, The attorneys authorities are now general by the parties name, without any addition of executor; but in the old book the warrants of attorney were filed together with the pleas, which is not now used. Adjornatur.

44. CALLOP *against* METHAM.

Error. Of lessee in B. R. is aided, 35, pl. 157.

Venire facias upon issue in Inferiour Court, being of 24, is error per Curiam, so judgment of debt, and damages, and costs de bonis test, si, & si non, de bonis propriis against executors, upon plene administravit found against him is erroneous; contrà of ne unque executor upon assets of 20l. found, the debt being 22l. whereas only damages should be against the executor, si, &c.

45. THE KING *against* BREWSTER. *Friday, April* 25.

Perjury.

Jones shewed cause against judgment upon indictment of perjury on 5 Eliz. because it doth not appear how the oath made was material to the point in issue; saying only quod defendens, being testis productus in assumpsit, to pay all such sums of money as the plaintiff should expend, in consideration he would bring an action, issue non assumpsit; the oath was, that the plaintiff received mony paid by the defendants servant in discharge of all actions; but by Twisden, though this be not direct to the issue, yet it is material to the end of the action, which is to recover damages: and by Twisden this payment being before the action brought, may be pleaded in bar; but however it is material per Curiam, 263, pl. 47.

[263] 46. HENLY *against* COTTINGTON.

Pope.

In evidence to a jury at Bar in ejectment, the defendant claimed by 3 Jac. cap. 5, § 17, because the lessor of the plaintiff, (viz. his son) was gone beyond sea with a popish priest without licence, but it appeared that he went several times, some whereof were pardoned by the Act of Oblivion, and once after he had licence which cost 6l, 6s. 8d. But Twisden conceived the interest, vested by this crime in the next of kin taken away by the Act of Oblivion, which was of as high nature as the other statute: also the King hath not an interest, but as 13 Eliz. 3 of fugitives hath a perception of profits, which upon return is gone. Windham, doubted; also he conceived that any other cause is not meant of any what ever, but only of causes like the first, to prevent his education. The Court inclined to a special verdict; but by consent of parties a juror was withdrawn.

47. THE KING *against* BREWSTER. *Ante*, 262, pl. 45.

Amendment.

A second exception to the indictment was, that to the assignment of one breach in the paying, &c. the year of our Lord was omitted, which by Curiam is amendable being out of London. But 1661, being in, it is well enough. Judgment pro Rege.

48. THE KING *against* PEACHE. In Error Br. 186.

Trades. Stiles 228, pl. 518.

Defendant was indicted for using the trade of woolen-draper, the caption whereof was before Justices of Assize, who by Windham have no power to take any which the Court agreed on, *Naylor* against *Ash*, 5 Eliz. 4, § 32, but if they had said of oyer and terminer, it is well enough, being within the words, any other justices, as well as on informations, for the forfeiture on any such law, as indictments; for by Twisden the justices take things promiscuously, but the clerks must certifie by that power whereby they take it; or else generally naming all their powers; and it was quasht per Curiam, and a fine ordered on the clerk of Assize of 40s.

[264] 49. YOUNG *against* COLLET.

Aud. quer.

The Court refused to bail one in aud. quer. as well when the party is in execution, as where he is not taken, unless he shew some deed of release, &c. And here the defendant prayed a supersedeas in audita querela to prevent his being taken upon pretence that the assault and imprisonment, on which the judgment is grounded, was by virtue of the Act of Oblivion, and commissions from commissioners of excise, which the Court would not grant, but conceived it a supersedeas of it self, the party not being in execution; (which by Hern, Secondary, is not usual by the course of the Court without deed): but the Court take the bail to prosecute the audita querela cum effectu, which must be. *Post.*

50. RIMPE *against* HARRISON.

Arbitrament.

In debt upon a bond to stand to an award; defendant pleaded performance, plaintiff replyed non-payment of money, as *Parker* against *Taylor* 1 Cr. 93. Defendant rejoyned, that he hath not paid, which by Twisden, is a confession of a breach; 9 H. 6, 37, and so judgment ought to have been for the plaintiff: but by Powis for the defendant, that is intended on demurrer on the pleading; but here is no issue joyned, and so the verdict assessing dammages, is void; though had dammages been releast, the plaintiff might have had judgment, or else the party might have had a writ of enquiry of dammages: but Twisden doubted, that now this verdict shall tantamount. Adjornatur.

51. THE KING *against* TIMBERLY. *Ante.*

Conspiracy.

Judgment given that he stand in the pillory in Cheapside from 10 to 12, with a paper writ on it, for false conspiracy, and fined 50l.

[265] 52. TEMPLE *against* FOTHERLY.

Records.

Nota, per Curiam, if a record be cut off, the file torn or imbeziled, the Court on examination of the original, and remembrance in the office of custos brevium, and attornies, may renew it.

53. THE KING *against* THE MAYOR OF HEREFORD. *Ante. Saturday, April* 26.

Restitution.

Restitution cannot be by the Court, before they are possest of the record by retorn of the writ of error by the clerks; but per Curiam, they may do it when H. on a contempt comes in and confesses the injury. *Ante.*

54. COLLINGWOOD *against* PACE. *Ante.* In Denizen Br. 7.

Alien. 1 Cr. 151.

In the Exchequer Chamber, all the Judges (but the Chief Baron) being present, in ejectment, Archer Serjeant for the plaintiff, for the discent against the escheat, postnati 25, this is quæstio juris, as *Ratcliffs case*, & pref. to the 2 Rep. which is in our law certain; 1. As considered without the act that the brothers, English born of alien parents, shall inherit each other; the objection that there are elder daughters hinders not the younger, Dr. & St. 13, Denises 7, Discent 57, but otherwayes of an attaint which is not out of the consideration of the law, as the other is, Entr. Fitzh. 7. Stanford 95. 27 Ed. 3, 77. 21 H. 7, 31, per Fineux; nor shall the heir of him that is an alien hinder, 17 Ed. 4, 1. 20 H. 6, 43. Stanford 58, because he cannot make his pedigree, Dyer 274, which he must do to take any estate; but the single point is, whether the brothers may inherit each other, Pl. Com. 303. Pl. Com. 455, which he conceived they should, the eldest brother being as much obliged by nature, and the law of God, to comfort his younger as the father the son, 27 numb. 8, 9. *Ratcliffs case*, Pl. Com. 445. How far blood is necessary is considerable, it must be intire, 1 Inst. 7, and of lawful marriage, but is not necessary to be as well by father as mother, but any one will suffice to convey the discent betwixt brethren in case of purchase by either of them, 13 H. 7, 7 b. Stanford 195. 1 Inst. 84, so is 2 Cr. 601, *Bacon & Bacons case*, & Denizen Br. 21. Abr. Ass. 39 b. The verdict doth not find of what woman he had issue, 1 Inst. 198. Rast. Entr. 252 b. **[266]** therefore it shall be presumed she was English, for iniquum jure non est præsumendum, but its found the issue is of Scotish parents; yet by reason of the constant and usual amity betwixt the nations in King James's time, therefore postnati 9, such born in one, as well as the other realm, are declared to be inheritable since Queen Elizabeth's time before the union: and the objection 1 Inst. 8 is answered in 2 Cr. *Godfrey* against *Dixon*, there is here natural blood, whereby one conveys his pedigree, which is sufficient without inheritable blood, which is only to make title, 2 Cr. 685, every man hath a personal and an auncestrel blood, 49 Ed. 3, 9. Pl. Com. 447, and the natural personal blood is the foundation of the legal, F. N. B. 195. 8 H. 6, 2. Entr. 435, and so the father need not be here mentioned, Co. Entries 328. F. N. B. Pref. the jus duplicatum is only meant of the natural, not of the inheritable blood, Pl. Com. 357, that they have the same father and mother, which doth disable only when one makes title from them. 8 Co. 72. 9 Co. 139. Dyer 357, 332. 5 H. 7, 33. Hub. 259, but especially Hub. 332, *Mackwilliams case*, 1 Cr. 524, *Edwards* against *Rogers*, are full to this point, 1 Cr. 543, also *Hobbies case* was adjudged, that the attainder of the father hinders not the brothers, as was also adjudged in *Barons case*, in temps Eliz. in *Hobbies case*, after error brought, and six adjornments, there was a non prosec. entred by the attorney upon another title, as *Altonwoods case* started for the Queen, which hath been reputed a hard judgment, Tr. 37 Eliz. Rot. 199, as to the naturalization, 1 Inst. 129, being of an alien in amity, its more on policy to enable him to traffick, then to take off any disability, 5 Co. 52. Dyer 283. 7 Ed. 4, 30. 10 H. 4, 26, for such persons may purchase and maintain an assize, and his lands shall discend till an inquisition found, 1 Cr. 9, so far the law takes notice of his blood to be true, and not corrupt or disabled, Tr. 9 Jac. B. R. An alien may have action for slander, 7 Jac. cap. 2. Naturalizations are acts of grace, and so to be taken liberally, being but a restitution to those capacities which are restrained for reasons of State, 3 Inst. 241, that they shall, to all purposes, be made natural liege people, are operative words to this purpose, and may do any thing that two brothers born in England might, Pl. Com. 130. 3 Inst. 242, and the contrary

would be of ill consequence, and against the publick faith of the nation. *The Duke of Lenox's case*, he was naturalized, and the Lord Aubeny likewise; and though their auncester was antenatus, yet they enjoy to this day upon this point, as was said by Sir John Davis in the argument of *Godfry* against *Dixon;* which case, **[267]** though the father were a denizen, doth not alter it from this. 7 Co. 7. 1 Inst. 8, 129. 22 H. 6, 38. Denizen Br. 9. They are like two grafts on a wild stock, which concockt the wild sap into their own nature; or like branches of a candlestick.

(2.) Finch for the defendant, The difference betwixt alien and attainder is denied, 22 H. 6, 38, yet he agreed the case only, that the sons of aliens cannot inherit each other: he agreed, that the children of an English woman are as lawful issue, as if the father were so. And here it cannot be presumed she was English, because its found that the issue was alien born: and as to the Act of Naturalization, nothing therein puts them in better case, then if they were subjects born, this being but an imitation of nature; wherefore bastard & mulier, or brothers of the half blood, cannot inherit by such Act: and the words of the Act are in reference and similitude, and can have no other construction, then that they shall be like English sons, born of alien parents; the intent of the statute being not to create any new course of discent, but to take away his personal defects; and the clause of resorting to any auncester, concludes as any born in England might do, and so are meerly redundant. In ancient times the method to introduce aliens was by letters of denization, which were after confirm'd in Parliament, as 8 H. 4, numb. 99, Davis, 2 H. 6, numb. 31, Jaques and the Dutches of Bedford, 1 H. 5, numb. 17, Rice ap Thomas, 2 H. 5, divers others were naturalized without any denization, 3 H. 6, 55, and this term is not mentioned in any old book, nor before *Calvins case*, yet was the benefit then as great as now, 24 Eliz. *Hye* against *Hill*, 3 Cr. 3. 1 R. 3, 4. 22 H. 6, 38. Issue of English parents born beyond sea, after licence expired, shall inherit the capacity of an alien; but being born of an English man, is not alike with this at the Bar, yet is the Act in the same form; these Acts must be taken strictly, 50 Ed. 3, Petitions, numb. 204, being against the liberty of the subject, strangers being spies, 1 Rich. 3, cap. 9 (doubted whether repealed by 1 H. 4). Hut. 132, yet always expounded against the alien, *Harmon* against *Jacob*, 1650, & Tr. 55, in an indictment against Petit a French taylor, 18 H. 6, Roll of Parliament, numb. 29, because they are presumed to have animam revertendi, P. 3 Car. *Gret* against *Wood* in Exchequer, the son of an alien of the first discent, born in England, shall pay double custom. We do allow aliens to traffick, and gain personal estates, and dispose them by their wills, but they have no favour when they purchase **[268]** lands; and this is different from an act of restitution; which last hath some merit, the other none. Naturalizations in France, by reason of the great fines the King there taketh, which are the tenth part of his estate, is much favour'd, but not so in any other nation, 10 Car. All the antenati in Scotland are naturalized in Ireland, which doth not extend to England; yet natural birth in either nation giveth capacity in the other. The arguments taken from nature make nothing for the plaintiff, because there are elder brothers; but all inheritance betwixt all persons is grounded on true and legal consanguinity, natural without legal being not jus consanguinitatis, but call'd so, having no legal root; and where the brothers could never inherit the father, they shall never inherit each other; for if there be defect in the root, Bract. 64, there can be no capacity in the branches, Rom. 11. The disability ex culpa supposeth natural blood, but the root is corrupt by attainder: so if baron & feme have issue, and then are divorced causa præcontractus, the issue cannot inherit each other, none can distinguish the whole from the half blood, or compute the degrees of cosinage, but by recourse to the common stock, Stanford 195. 1 Inst. 8. *Courtneys case* doth admit no collateral discent could have been without the Act of Parliament, 1 Inst. 244. 1 Inst. 2 b. A denizen cannot be inherited collaterally by a brother, Denizen, Br. 9. The laws of other nations guide this way: in France an alien cannot devise; and such as are born there, may devise, but cannot inherit as if they were naturalized. We are to treat strangers as they treat us, Mag. Chart. 13. Bract. 427. Dower F. 179. Stanf. Prerog. 139. 1 Inst. 129 in *Hobbies's case*, there was always an apparent possibility for the children to inherit their father. If the second brother be attainted, Stanf. 195. Dr. & St. 16, the youngest need not mention him in conveyance from the eldest, yet is barr'd by such disability against

Ratcliffs case, 1 Inst. 187. The fathers blood is causa sine qua non, but the mothers is the inheritable blood, and bastards are not of the blood of the mother. Dyer 374, 296. Adjornatur.

[269] 55. SHEPHEARD *against* WAKEMAN H. 13 CAR. ROT. 473. *Ante. Monday, April* 28.

Slander. 3 Cr. 325, pl. 17.

The latitat appeared to be retorned after the cause of action, which is well enough; but on original, the teste must be before the cause of action: and per Curiam, the teste of the latitat is not material; but the putting in common bail, is the beginning of the suit. The second objection was, that the letter was not actionable, being that she was before God wife to the defendant, which was found for the plaintiff, (but for other words for the defendant;) yet by Jones for the plaintiff, when there is no probable tytle or cause there to affirm he hath tytle, the action will lye, by Windham, this would let in great inconvenience, should it not be actionable; and more then making a title to land, for this is imposing an impediment to the marriage. Twisden contrà; I see no difference betwixt this and slander of title, which must be layd precisely, that it was spoken without colour falsely, as *Caves case* against *Golding* J. S. hath no title to a rectory, but I have more title than he, adjudged actionable: but yet here it is only a general claim of his own interest, so it was not said in that case, that there was any purchaser. Foster doubted, this letter being private: but by Windham, then the directions by the Judge at the tryal should have been for the defendant; but now it shall be presumed maliciously after verdict, though the name of God be used; but by Twisden falsly, &c. as in *Guilbert* against *Gerrard*, signifies nothing, if the matter appears, as here it doth; and that the law doth not make such construction on it: which Foster agreed, because the letter imports the contrary, and the party can never prove his own private contract. 3. It was excepted, that no place was mentioned for the letter, but only Civitas Exon in the margent; which, by Jones for the plaintiff, is well enough, no other place being mentioned, and the city being a county of it self. Adjornatur.

[270] 56. THE KING *against* TRINITY-HOUSE. *Ante.*

Patents.

Keeling pro Rege, that the patent is not pleaded well, being quod Queen Elizabeth dedit ratificavit & confirmavit, not shewing what particular way they claim; M. 10 Car. 1, *Pain* against *Pilton* B. R. for he can elect but one way, that a certain issue may be taken. 2. The defendant have not made title to digg in the Kings soil, but only as an use of such persons as had that office, not saying as spectand. & pertinent. nor that their office is an auncient office, which is necessary, Dy. 70, for incidents are universally necessarily inherent, Lit. sect. 131, and as fealty to a tenure, or rent to a reversion, 34 H. 6, 49, a court baron to a mannor, quo warranto, Br. 4, and it may be said, eo warranto, without any special prescript appendant, is such as by construction of law follows the grant, 4 Co. *Terringhams case*, as common or an advowson to a freehold, which only can be said appendant: offices or other things are to be said appurtenant, and are supposed to begin by special grant, 1 Inst. 121. 1 H. 7, 28, though they be claimed by prescript; (but sometimes these words are used promiscuously;) and by considering the nature of this office, its apparent, that this digging cannot be incident, the principal thing necessary here is only supervising, else might any digg as well in Greenwich-Parke, as in the river, and this were to give another person interest in the Kings soil by implication of law: also by grant of such office, at this day, digging passeth not, 27 H. 8, cap. 18, being said to be a new thing, and so cannot pass as incident; and if he that hath this office is not bound to provide ballast, then it cannot be incident: by lastage is only meant lading, as Cowell interprets, into which they enquire, but are not thereby to provide all lading for ships, but only to see it be

well laid on convenient wharfs, well dryed, &c. which appears also by 27 H. 8, cap. 18, and the patent pleaded, doth shew this, being of all ships veniend. exeund. of the river Thames, and they cannot provide ballast for ships that come from beyond sea; and its also with whatsoever ballast its laded, they are to judge of it; and 10 Car. it was certified by Noy on petition of Trinity House, that by virtue of that patent they could not dig gravel; all which shew it not incident, and as appurtenant, 11 Co. 9, they have not laid good prescript, 8 Co. 122. 6 Co. 60, because their foundation is not to an ancient office, and the use of the Kings and Queens is but an implication, which **[271]** is not sufficient; and they do not annex this privilege to the office as pertinent, 1 Inst. 121. 1 H. 7, 29. 4 Co. 36, being an interest in another soil, P. 14 Car. 1, *Lord Say* against *Young*, Hill. 13 Car. 1 Rot. 464. That the plaintiff had used to have common for all his tenants, which after verdict was ruled ill, because it was not said for him and his tenants, as pertinent to the house whereof he and all those, &c. were seised.

Newdigate for the defendant, That this usage is sufficient to shew it an ancient office, 1 Cr. 555, 279. *Young* against *Stowell*, 4 Inst. 10, and the fees of the Judges pass by their patents without special words, 44 Ed. 3, 2. 10 Co. 14, and so an advowson before prærog. Regis, 4 Inst. 75, passed by grant of a mannor cum pertinentiis, and this being but a liberty, 9 Ed. 4, 6. 11 Co. *Lyfords case*, need not be mentioned in the grant, being incident to it, 12 Co. 14. Dyer 71. 1 H. 7, 8. Minshal verbo ballastage, 21 R. 2, cap. 18, Stat. Calice. Ballastage is the materials, lastage the ordering thereof, as 27 H. 8, cap. 18. This case is like the case of the lead mines in Derbyshire, he that hath interest in the Peak may dig in any mans ground in the Folly. And the King may grant such an office, as a subject cannot, Dyer 259. 30 Ass. 4, and that the persons to whom such grant is made, 2 Ca. 665, debent & solent dig, which is a sufficient prescription, Curia Claudenda, F. N. B. to shew that its ancient, this quo warranto supposeth it a liberty, and no interest in alieno solo: and therefore the defendants are only to excuse themselves of a contempt, Hub. 40. 3 Cr. 419. Yelvert, 148, *Woodman* against *Aylin*, and this only demurred on without issue, and therefore all informally pleaded is well enough. The Court disallowed the certificate of Noy, though as it was by Twisden, it cometh not to this case, because that was only that others, as well as Trinity House, might by grant of the King have liberty to dig ballast. Also Windham doubted, whether this usage do not make this liberty parcel of the office. Twisden agreed, especially here by way of excuse; contrà if he were to claim and make a title to it: he remembred a case of *Watlin* against *King*, where it was alledged that time out of mind the sum had used to come in, yet because the plaintiff had not said his house was an ancient house, they were fain to have a new trial. Windham, If it be an original grant by several words, it can inure but as a grant, but otherwise if it were an after grant. Another exception was, that the information in the nature of a quo warranto, was for digging à ponte London, and the plea was **[272]** infra pontem Londinensem, & altum mare. Also by Windham, This being an information, and not an original quo warranto, as *Bacons case*, is not final. *Post.* Adjornatur.

57. The King *against* Armiger.

Fees.

Nota, per Curiam, The sheriff may suggest that the party will not pay his charges of retorn of habeas corpus ad faciend' & recipiend', which is at the suit of the party; but contrà in habeas corpus ad faciendum & subjiciendum, which is at the suit of the King, he must retorn at his peril. *Post.*

58. Callop *against* Brandlin.

Attorny.

A reteyner in B. R. by an attorny of the C. B. parol, though the attorney in C. B. as *Childs case*, have no warrant, is good, and the party is put to his action upon the case against the attorny in C. B. but the Court will not undo the judgment, F. N. B.

Audita Quer. especially being a judgment had about five years since; but had there been any practice appearing in the party, the Court would have considered on it; but execution being done by cap. ad sat. and judgment on an action upon escape had, the Court would not examine it, but ordered the attorny of C. B. to attend.

59. THE KING *against* LAWRENCE. *Ante.*

Error.

He retorned a writ of error, that there was no such record; which by Twisden he cannot do, but ought to retorn the record, and if there be any real defect in it, it must here at the retorn be shewed to make void the record; which Windham denied, as this case is, because no such plaint as is specified in the writ is pending at the time; contrà if names in the record be mistaken only: but per Curiam, he must retorn the writ whether the party will pay him his demands or not, and the Court will on the retorn allow them. Twisden conceived, that when a writ of error is brought, though the officer will not retorn it, yet the Court may award restitution, which the Court agreed, but awarded not restitution till other writs were retorned.

[273] 60. MOTLEY *against* SLANY.

Slander.

He hath forged a bond, and that is not the first by a hundred, upon colloquium with J. S. spake of the plaintiff on *Fitzherbert* against *Bishops case*, not saying that the colloquium was of the plaintiff, was moved by Baldwin, in arrest of judgment. But per Curiam, though to forge a writing be not actionable, yet to forge a deed, or any release, &c. it is, and no colloquium is necessary, more then is alledged. 2. It was that he spake hæc ficta falsa verba, not saying quod ficte & falso dixit, which per Curiam is well enough. Judgment for the plaintiff. *Post.*

61.

Appearance.

Entry of appearance, as of the first retorn, when the term was adjourned to another, is a discontinuance, per Curiam; but doubted whether help'd by act of continuation of judicial proceedings. Detinue Br. 19, per Hawke, 11 H. 4, 46 b. Heir may have deceit, Fitzh. 44 (seu 43.) *Post.*

62. BAILY *against* BERTLEY.

Trover. It lyeth by executors, 106, pl. 170, Arundel. 3 Cr. 377, pl. 28. March, 202, pl. 242. The baylor cannot take it without leave of baylee. Goldsb. 89, pl. 19.

Bigland moved in arrest of judgment, that action for detaining money due for a cow sold by the testator, to whom it was delivered to redeliver on demand, lyeth not against an executor; to which the Court agreed, stayed quousque, being but in nature of trespass. *Post.*

63. CHUTE *against* HALL. *Tuesday, April* 29.

Visne.

In action upon the case on a rescous, the visne cannot be changed on the common affidavit, being grounded on a process made out of this Court, though the plaintiff have election to lay it here, or where the rescous was, per Curiam.

[274] 64. WHITCHURCH *against* PAGET. *Ante.*

Office.

Maynard moved in arrest of judgment, because the plaintiff declares of two offices by several names, which cannot be understood but as distinct, and both being pro scriptione omnium exemplificationum, which can be incident but to one. 2. He is not an officer sufficiently entitled to an action, 8 Ed. 4, 5, because he is not said to be juratus, but only admissus debito modo, which not being by patent, is ill. 3. Its not said for what time, whether at will or for life; and cannot be understood to be for life, because he is not said seised, but possessionatus & interessatus; and if it be but at will, he may be turned out at will. 4. He sheweth no particular fees, and so may bring a new action for the same, or some of the same fees. Allen for the defendant, As to the last exception, it's certain enough, being in toto 500l. especially this being only an action upon the case for a disturbance, which is a sufficient answer to the second and third exceptions: and as to the first, there was several persons have power to write all, not exclusive of any other: also by Jones for the plaintiff, to particularize the fees, would be infinite, therefore is the value sufficient: all which exceptions the Court overruled. Judgment for the plaintiff.

65.

Audit. querela.

The Act of Oblivion coming after verdict, and before judgment, is good ground of audita querela; but will not discharge the verdict on suggestion, because that Act having provisoes, must be pleaded. Per Curiam.

66. FOSTER *against* FOSTER. *Ante.* Siderf. 82, pl. 9.

Assurance. Moor 102 & 381. 3 Leonard 16, pl. 39. 1 Anderson 113, pl. 157. Entr. Congeable, Br. 140. March, 50, pl. 78.

Jones for the defendant, To make good the first conveyance, and that the use thereby was changed, the words of the indenture were, articles of agreement, whereby the mother did bargain, sell, grant, demise, and set over; which was found to be as well for natural affection, as for 20l. whereby he conceived that there is a sufficient consideration to raise a use, by way of covenant, to stand seised, had it been expresly as well for one as the other consideration, (as *Manxells case*, and the Statute of Enrollments) it had been undoubtedly good: he agreed the opinion in *Bedells case*, though some cases contradict it, as Dyer 146, *Beaumonds case;* so *Osborn* against *Church*, 2 Cr. 127. And as an averment is allowable that mony was paid where none is men-**[275]**-tioned to be paid, so may affection; but in the case at Bar, there is that which doth admit of this averment, as well as of the other of money, being for divers other good considerations, *Ward* against *Walthew*, Hill. 3 Jac. Rot. 1161. 2 Cr. 173, (on which he relied) is express in this point. 2. The main question is, whether the words and intention of this deed will bear this construction. 1. There are sufficient words to raise a use at the common law, any words which declared the will of the owner of the land, Dyer 235, how he would dispose the profits, were sufficient, Dyer 96. And since by the statute, 2 Cr. 400 pl. 9, though there be a greater ceremony requisite, yet as to the words, there is no authority to change the common law. If one covenant to stand seised, as *Bedells case*, and Dyer 96, for good consideration, though he use no apt words, nor although the words do properly import a conveyance at common law, as *Foxes case*, yet it may pass by bargain and sale, or by way of use, and betwixt the words in *Foxes case* and this at Bar, there is no difference, though there be in the consideration which will not alter the case, but is rather here stronger: *Foxes case* might have enured otherwise then by way of use, but here no other. 3. That the intention of the parties was, that it should thus enure is evident, in that there is nothing shews the intent to the contrary; for though the articles are by way of covenant, which refer to a future conveyance, yet upon consideration of the whole deed, it appears the

deed terminates in it self, when the operative words of demise and grant are executed presently; and it's no ways repugnant, but suitable to all conveyances to reserve a particular estate, because this is good in covenants to stand seised, and is an evidence of the intent to pass it by way of use: there is a remedy for 20l. to be paid to the assignees of Margery by action of debt or covenant, on the indenture, and therefore that's no objection. The agreement that Margery shall have Matthews barn in full of her third part, doth not appear to be part of the consideration of the deed, but a collateral covenant; but if it were part of the consideration, yet this barn passeth to Margery by the deed, for she was entitled to dower, and the defendant the eldest son that was to render it, and so this must be intended an assignment of it, and so both estates mutually executed: the authorities cited of weight, are 2 Cr. 127, in which case there are words of bargain and sale, and the enrollment after did declare the intent of the parties; but this case went off on another point, because here it might enure as a confirmation, if it enures as a bargain and sale. **[276]** 2. The case of *Pitfield* against *Pierce* hath been looked on as a hard judgment, but distinguisht from our case, because the words imported an estate at common law, and no intent appeared to pass it to the contrary, though it could enure no other way. But here the father granted to the son after his death, and so mentioned nothing of the freehold to be in himself, which is done in the case at Bar, Hub. 301. In that case there could be no proper covenant to stand seised, being future, and never taking effect in his life, 21 H. 7, 18, which could not be good, nothing being presently executed; but Dyer 235, where there is a present use limited to the father, H. 20 Jac. C. B. *Buckland* against *Symons*, covenant that the son, after the death of the father, shall have the land, is void; contrà where the father expresly reserveth an estate to himself. Twisden in *Wats* against *Dixies case*, the case of *Pitfield and Pierce* in special verdict, was affirmed for good law by all the Court. Windham, In ancient time, as in *Vinians case*, there was such an opinion as Jones conceived, but now it hath been setled, that if no intent appear but one on the deed, it shall rather be void, then enure to any other: and the difference mentioned by Jones of the reservation, was never mentioned; but the point relyed on were the words give and grant; and it was granted, that if the covenant had been to stand seised after his death, it had been well enough in *Pitfields case*, March, 50, pl. 78. And Justice Jones conceived, that the father intended never to make himself tenant for life punishable of waste by his son, but that there were other agreements which may be presumed in this case; and the intent appears here by her after feoffment to be to pass it by bargain and sale. Twisden, In the case of *Saunders and Saunders* in C. B. the jury found that livery and seisin was indorsed on the deed, but did not find it actually made: and therefore per Curiam, it was ruled to enure as a covenant to stand seised, which he conceived a hard judgment. *Post.*

67.

Bail.

One cannot declare by the by (to make common or special bail liable) unless it be before the end of the same term.

68.

Amerciament.

The Court doubted whether they could mitigate fine in any term after it is assest, yet they meet only once in two terms to mitigate; the clerks conceive they could not.

[277] 69. ——— *against* BROOM AN ATTORNEY OF LONDON, AND OF B. R.

Visne.

Nota, per Curiam, A counsellor or clerk may by his priviledge change venue into Middlesex, but not elsewhere.

70. CRANMER *against* ANDREWS. *Ante. Wednesday, April* 30. In Default, Br. 52.

Baron & feme.

Baron in execution on an action brought against him and his wife, is not bound to appear for her, unless she be arrested; but he shall not be discharged till he put in bail for himself and her.

71. THE KING *against* WILLIAMSON. *Ante.*

Records.

The roll in Court is the warrant for the Nisi Prius, this being but a transcript of the other; yet a trial by Nisi Prius may be had without entring the plea roll, but the plea roll cannot be altered by the Nisi Prius; yet the continuances of each roll may be entred at any time afterwards, to avoid discontinuance, per Curiam.

72. THE KING *against* THE INHABITANTS OF YARENTON.

Ways.

In information for not repairing a way in B. from A. to D. in the parish of C. the defendant pleaded quod prædict. via in the parish of C. is in the parish of B. and that the inhabitants of B. ought to repair. Whereupon Sir T. F. demurred; and the Court conceived the plea repugnant, and ordered the inhabitants of Yarenton to repair by consent; and if the others ought to repair part, they shall refund so much as shall be after found due on the trial; else the Court would have given judgment.

[278] 73. LUSTON *against* JOHNSON.

Ejectment. So where there are several of the same name, or divers goods together, the sheriff must take notice of the light for the party, &c. March, 97, pl. 168. Pl. Com. 13, cont. *Manxels c.* Stiles 238, pl. 546. Godbolt, 188, pl. 135. Yelv. 228, pl.

H. in ejectment, count on the moiety of two acres of land, which per Curiam is well enough; and trespass lyeth against the sheriff, if he do not execute on the right places, the last case in Yelvert. 228 pl.

74. LORD BUCKHURST, WENTWORTH, AND BELLASIS.

Coron.

If one be killed in a vill, and the coroner make no enquest, the vill must be amerced, by Twisden; for probably, the coroner had no notice of it; and if there were an enquest, it must be retorned by the certiorari, per Curiam. *Post,* 280, pl. 81.

75. LORD HOWARD *against* CRAWLY.

Recital.

On *Duckets case,* in consideration the plaintiff would forbear to sue the defendant, as executor, is ill, being only a recital: so, by Allen for the plaintiff, to plead an entry ut filiæ & heredes, as the defendant doth; which per Curiam, is well enough, as if it were a discent made to J. S. ut filio & heredi: but because a discent was made, without saying the auncestre died seised, judgment for the plaintiff nisi, being on demurrer on plea.

76. *Ante.*

Error. March, 46, pl. 72.

Error of a judgment in C. B. in ejectione firmæ assigned, on 1 Cr. 91, 594, in not certifying pledges (on diminution alledged) in writ of error for that cause; which by Powis, the original being lost, is helpt by the statute: but per Curiam, omission of pledges, or of one, is error, though after a verdict: and the defendant after, in nullo est erratum pleaded, may pray diminution; which, as *Samsons case*, cannot be granted but on motion, and then only to affirm the judgment; yet when the record is come in, it may be made use of to avoid the judgment. *Post.*

[279] 77. HART *against* HUNBLE.

Common.

In action upon the case for disturbance of common in West-fen, averring it was not within any vill or hamlet; the defendant demurred, and for cause shewed, that there is no place; which, per Curiam, is well enough. And Allen cyted a case affirmed on error in the Exchequer, where such an action was laid in Church-field in Essex, without such averment, and a visne de corpore comitatus, and ruled good: and by Windham, against *The Lord Cravens case*, any place shall be intended a vill, unless the contrary appear, judgment for the plaintiff, nisi. *Post.*

78. ARUNDEL EXECUTOR OF ——— *against* TREVIN. Siderf. 81, pl. 8.

Tr. 13 Car. 2, Rot. 1442.

Issue. Non cepit is good plea. 33 H. 6, 12 b. pl. 2, by Littleton, & 35 H. 6, 47, by Laken. 1 H. 6, 7 b. pl. 30. Briefe 4. H. cannot, and that the avowant hath not gaged deliverance or is hucusque seised, because no dammages are recoverable, for the not delivery where the taking is not tortious 21 Ed. 3, 20, pl. 8. Gage Del. Br. 6.

In replevin, the defendant pleaded not guilty of taking within the six years; which by Allen, is ill, and should have been not cepit, or not guilty generally, because as *Sir George Stroud* against *Bacon* the defendant, had deteyned the cattle during that time; and the dammages are as well for deteyning, as the taking, though the one be not a continuance of the other. But by Windham, If he that took, keeps the beasts in his possession, every day is a new taking, as trespass continuando, in which case the count is, as well on the continuance, as on the trespass: but by Allen, The deteiner, as well as the taking, must be justified, being distinct points; and this action doth suppose the property to remain, (Co. 140, F. N. B.) but trespass alters it. Also if the beasts return to me, and after estray into the lands of J. S. who took them before, yet J. S. is chargeable with the deteyner; and this declaration is distinct, being of a taking in the life of the testator, and deteyning in the time of the executors. Twisden, A replevin can never be barr'd by the Statute of Limitation, if this plea be not good. Windham, Non cepit is the proper plea in replevin: yet Allen conceived this ill, because if the taking were before, and deteyning within six years, if non cepit be pleaded, I cannot reply that he did take, &c. But by Windham, Every day is a several taking, and though the first were pardoned, yet the others may remain, and be made as the first taking, and so after amends tendred on involuntary trespass, if the cattle be deteined, replevin lyeth, and shall complain of an unjust ta-**[280]**-king, though that taking was good. But per Curiam, This is a strange plea, non est culpabilis of the taking, &c. Adjornatur.

79. THE KING *against* ARMIGERS.

Fees.

Upon a habeas corpus to remove any person, the sheriff must return the writ, and the Court will allow his charges here.

80. JAY *against* RYDER. *Thursday, May* 1. Siderf. 75, pl. 6.

Proof.

In evidence to a jury, challenge was made of the Bishop of Salisbury, because the lease he was to testifie, was only by grant and demise, which implying a general warranty, he could be no evidence; and though there were a special covenant against him, and his successors, yet by Maynard for the defendant, the lease being void, that is no derogation: contrà if it were but voidable: but per Curiam, this lease is good in point of creation, though fruitless whilst another is in being; and he was admitted. 2. The father testified a deed in pursuance and affirmance of a lease made to his son by himself, which the Court allowed, his interest being passed away 3. It was doubted, whither lease by prebend, confirmed by dean and chapter and bishop, who is patron of lands lying in another diocess, whereof D. is Ordinary, be good without confirmation of D. But after ruled good. *Post.*

81. LORD BUCKHURST, WENTWORTH, AND BELLASIS. *Ante* 278, pl. 74. *Friday, May* 2.

Coron.

Nota, per Curiam, The coroner is to return his inquisition at the next goal delivery, and because he did not, the Court discharged him, and set a 100l. upon his head, they having found it murder, and kept the inquisition in his pocket; whereby the grand jury having found it only manslaughter, and the parties confessing it, were here bailed. *Post.*

[281] 82.

Prohibition.

Nota, When the cause is doubtful, the Court usually in grant of prohibitions made the first rule, that parties should shew cause why a prohibition should not go: the next rule is, that a prohibition go, unless cause be shewed; and then the rule is made absolute to have a prohibition.

83.

Proof.

The answer of a feoffee in trust in the Chancery was refused, per Curiam, to be given in evidence, the party being living, and none of the parties to the suit, which was betwixt the heir and the cestuy que trust. 2. One suffers a recovery, and 4 years after maketh his will, and therein recites that the recovery was in trust to perform his last will, which by Twisden, is well enough, and might have been done by parol, which makes the use changed ab initio. So by Wild, a void deed may serve to direct use of a subsequent recovery. 3. Men usually recite date of a deed to be on, or about the true time, though they have the indenture before them, to prevent mistake.

84. ROBINSON *against* HARDY.

Baron & feme. 2 Readings 321, § 5.

In action upon the case against Baron, on promise by indebitatus to pay debt due by feme dum sola on *Holdage* against *Chase*, special verdict in action upon account

against baron sole, upon debt so due, and special verdict, rule that the feme ought to be joyned in the action; it was so ruled here on demurrer. Adjornatur.

85. HODGES *against* HODGES. Error Br. 90. *Ante.*

Error.

Powis conceived want of pledges ayded by the Statute of Jeoffails, 1 Cr. 91, in C. B. where it is indorsed on the original; but it would be otherways here in B. R. where they proceed by bill: but because diminution was not prayed, the Court conceived it cannot be assigned for error. *Post.*

[282] 86. REEVE *against* BROWN. *Ante.* Error Br. 13.

Variance.

Certiorari to remove a record coram R. F. & sociis suis, which is certified by R. F. and one other; which by Windham is well enough: which Foster and Mallet agreed, contrà by Twisden.

87. KNIGHT *against* DANCER. *Ante. Saturday, May* 3.

Presentation.

Special verdict found, that Dr. Griffith was incumbent of the rectory, and that the Earl of Shrewsbury was seised of the advowson of it, and presented Mr. Griffith, lessor of the plaintiff, being then recusant convict, and that the presentee was instituted and inducted, and was in actual possession, and then found the Act for Ministers, 12 Car. 2. Jones for the plaintiff that was sequestred, and another in orders put in by usurper, and this action may be brought notwithstanding the Act of Minsters that commissions several persons to determine differences, and that all verdicts shall be conclusive, this action being by bill in Trinity after the Parliament began, and so not within the intent of the Act, Br. Parliament 86, being not commenced before the first day of the Parliament, to which all their Acts relate. 2. That the presentation is void in it self, 3 Jac. cap. 5, he agreed; but yet when the Ordinary doth admit, institute, and induct thereon, it will be good to some purposes; as against all strangers that claim not under the rightful patron; so at common law, if the King present, mistaking his title, that is void; but the Ordinary inducting thereon, its as an original collation. 6 Co. 29, *Greens case*, Hub. 302, in *Sir H. Gawdyes case*, its direct in this point, that such person may sue for tythes; and if the patron will admit himself out of possession, he must name such clerk in the quare impedit, which shews that he is incumbent. 3. The statute shall not be taken beyond the words, being penal, as the Statute of Symony makes void all the Acts of Presentation, Institution, &c. this statute, only the presentation: and the intent of this statute is rather to intrust the patron with supervisorship then interest, and so leave it to him, whether he will turn out the incumbent or not. 4. None is confirmed by the Act of Ministers, but such as are in such livings as are void against all men, as well as against the patrons.

[283] 2. Powis for the defendant agreed, that if the church be not void, he is not confirmed: the words of 3 Jac. are, 3 Co. 59 b. That such presentation is void; and the induction thereon is also void against the true patron, 6 Co. 50, *Boswells case*, and it shall not amount to a collation, but a meer provisional care of the bishop to supply the cure, else will it be contrary to the express words used in institution and induction. 2. The bishop intends not to transfer any right from himself, but is a minister, 1 Inst. 52 a. and only an instrument, as cestuy in reversion, making livery by letter of attorney from tenant for life, which hinders not his entry afterwards, 14 H. 8, 3. 1 Cr. 99, *Stephens* against *Potter*, for institution without a presentation is meerly void; contrà if the bishop collate by special words, 11 H. 4, 7. Also the Act of Ministers, 5 & 9, doth take in this case, the lease of ejectment being seal'd the 20 of April before the Act. Twisden, Collation within six months will never grow to a

plenarty, no more then one that enters on the King, can be a disseisor by the Kings granting over. Also by Windham, The opinion in Hub. 302, is against *Greens case*, this being a plenarty against no man, though the incumbent may, during his being so, sue for tythes. *Post.* Adjornatur.

88. GRANGER *against* HEMBOROUGH. *Ante.* Entr. Congeable, Br. 2.

Covenant.

The Court conceived it a departure, and gave judgment for the plaintiff, nisi better cause were shewed.

89. NEVILL *against* HAMERTON.

[See *Robinson* v. *Duleep Singh*, 1879, 11 Ch. D. 832.]

Common. 2 Brant. 170 b. pl. 431.

In an action of trespass, the defendant justified for common: and the plaintiff replyed, that he hath a house adjoyning to the place in which the defendant justifies for common, and that by West. 2, cap. 46, he took two acres to enlarge his curtelage, 32 Ass. 5, not saying it was an ancient house. 2. It doth appear that here is more then is necessary for enlarging of a curtelage taken, being two of three acres, 7 H. 4, 38, which by Jones is ill, in trespass for breaking his close, which Windham agreed: but this Court cannot judge that this taking two of three acres is unreasonable, for all circumstances considered, as the condition of the inhabitant, &c. and by Foster and Twisden, this plea being demurred to is frivolous, and he ought to shew that the house is ancient, though the party makes no prescription, but on-**[284]**-ly a priviledge, which is given by the statute to houses in general. And by Allen for the plaintiff, There needed no averment that he left sufficient common, which Windham agreed. And Twisden conceived the statute entended to advance habitation, houses being then few, and so an ancient house not requisite; contrà by Windham; for necessary supposeth it should be averred ancient, and not a necessity of his own making. *Post.* Adjornatur.

90. HUTCHINSON *against* INNOCENT.

Assets. 2 Cr. 3, pl. 10. 2 Cr. 626, pl. 19.

In action against the executor on a bond made by the testator: the defendant pleaded judgment against her, ultra quod non habet, &c. not shewing what was the ground of the judgment, as bonds of single contracts; for which cause, as pro vero debito, the plaintiff demurred, and judgment per Curiam for the plaintiff, nisi.

91. BOULTER *against* FOURD AND HARRIS. Siderf. 76, pl. 8.

Joynder. March 103, pl. 176. Stiles 5, pl. 9. 2 Cr. 134, pl. 7 c. Stiles 57, pl. 124.

In an action of covenant against two joyntly on covenant made joyntly and severally, if the plaintiff hath judgment against one by default, and be barr'd against the other, *Tilly* against *Woodill* on plea pleaded, he is barr'd as to both by Allen; and so in all actions, where of necessity they must be joyned, as in debt or detinue; contrà in trespass or the like. And though the labour to build the house were several, yet the matter being contained in a deed, is joynt; but when the joynder is only on delictum, as two joyn in service of J. S. if one do not, the plaintiff may recover against him alone. By Foster, As this case is, the one defendant having pleaded covenants performed, and found for him, here it appears the plaintiff hath no cause of action against any, which the Court agreed. Also the defendant prayed costs against the plaintiff, there being here a nil capiat per billam awarded by the statute, which the Court granted. Also in a writ of conspiracy against two, one

confesseth, the other pleads, and its found he did not conspire, which is found for him, both are hereby discharged, which the Court and Bar agreed, and so in this case. Judgment for the defendant.

[285] 92. BAKER *against* BERESFORD. Siderf. 76, pl. 9.

[Commented on, *Curtis* v. *Vernon*, 1790, 3 T. R. 589.]

Assets. Moor 2, pl. 3. 1 Brownl. 103, pl. 443.

In action by B. administrator de bonis non of C. against the administrator of the executor de son tort, the defendant pleads that the executor de son tort of C. had laid out in payment of debts to a greater value then the personal estate of his testator the lessor, which per Curiam doth enable him to retain the lease: and this being pleaded by administrator of an executor, or executor of administrator, that the executor or first administrator had paid, &c. he per Curiam, needed not to shew that the first administrator paid to this purpose and intent; for the property is altered by operation of law, without election made by the party, *Woodward* against *Darcy*, Pl. Com. 185 b. And if election were to be made, yet the administrator of the administrator may make it. 2. Its not said, when the administrator paid, whether before or after administration committed; which, by Windham, is good enough, were it paid as executor de son tort against all but creditors: but none may be supposed for to pay contrary to his express authority. Also by Foster, This retainer is not by payment of his own, but others debt; and in such case executor de son tort may retein so much as he payeth, especially if administration be after committed to him only, which the Court agreed; and that else such a person can never plead fully administred: *Teb* against *Long*, in evidence to a jury, it was held, that when once administration is committed, he is so now ab initio, which is the reason he may retein to himself; also payment pleaded in vita testatoris, without other particular time, is well enough, per Curiam, in action of covenant for rent arrear against the testators under-lessee. Judgment for the defendant on demurrer to the plea in bar.

93. *Ante.*

Surrender.

Nota, In the case of *Jay and Ryder*, as it was told me, Windham said, that contract by trustee to take a new lease is present surrender of the old lease of cestuy que trust, being by his assent; which Foster and Twisden doubted; but all agreed such contract to be good evidence to a jury of a surrender, and it was so found by verdict for the plaintiff.

[286] 94. *Monday, May* 5.

Prohibition. March, 101, pl. 174. 2 Cr. 670, pl. 9.

Wild, Kings Serjeant, moved for a prohibition to the Spiritual Court, because the bishop would have put out a parish clerk, which is a temporal office which the Court agreed, and grant it, nisi.

95. HOWARD *against* GOLDING-PRENTICE.

Pardon.

In evidence to a jury, in action upon the case, against one convicted of perjury and pardoned, to recover dammages only; the former conviction, by Foster and Windham, may, notwithstanding the pardon be given in evidence, being collateral: as in calling one thief, after pardon, his former ill conversation may be given in evidence in mitigation of dammages, which Twisden denyed; for he may falsifie or travers it in this collateral action; but by the rest, though it be not conclusive, yet it is good evidence to induce belief.

96. THE KING *against* PILL, AYRES, &c.

Nusance.

Allen moved to quash an indictment of nusance, for throwing corrupt water ad nocumentum inhabitantium & legiorum transeuntium, which by him is ill; as also because no place unde ducens is layd; which being in a highway, by Windham, is well enough, but it wanting vi & armis, it is ill, per Curiam, as also by Foster and Twisden, because no place is alledged from whence and whither the way leads.

97. TRADAHAM *against* ———.

Prohibition.

After nonsuit on tryal of a suggestion, no new prohibition shall be granted, per Curiam, though such nonsuit were sworn by default of a witness necessarily imployed.

[287] 98. PATESON *against* DANGES. LORD SALISBURIES CASE. *Wednesday, May* 7.

Copyhold. 2 Cr. 511, pl. 22.

In evidence to a jury it was held, that proclamations, whereby the lord claimed forfeiture, ought to be proved viva voce, and not only by the court rolls. 2. Glyn for the plaintiff against Maynard for the defendant, held that forfeiture upon default at three proclamations made to come in, is by common law, which the Court agreed: though *Branch* against *Lee*, 10 Jac. for forfeiture present by the homage, the lord may distrain or seize, but not make proclamation; but by Twisden, He cannot distrain or seize on forfeiture, but by custom. 3. The proclamation was, that J. S. come in and be admitted to the lands discended unto him; which, by Windham, The certainty of the lands being before declared, is sufficient, unless the custom be contrary, and not like a demand of rent, which being generally of so much as is arrear, is ill, which the Court agreed; the custom of the court being to demand it generally, and not to specifie the lands. 4. As *Havergills case*, the Court agreed, that upon entry of feoffor (for rent reserved, and entry till satisfaction) he may upon such interest quousque maintain ejectment, and so the lord upon seisure of a copyhold, till the heir come to be admitted. 5. Allen for the defendant conceived, that though the lord, without custom, might seize quousque, yet he hath no interest to seize for a forfeiture upon such default on proclamation, without custom or personal notice, which the Court denied: but they agreed, *Cocke* against *Lees case*, that one saying he would come if the lord had a court, otherways not, which is no forfeiture; but contrary, the lord on such refusal might seize quousque: and by Windham, Its not like the demand of a fine which groweth due by refusal and contempt, not by default, as here.

[288] 99. SIR JOHN COTTON *against* WISEMAN. Siderf. 77, pl. 1.

Partition. In Custom, Br. 44. Goldsb. 115, pl. 10.

On evidence at Bar in ejectment of certain lands in gavelkind, doubted if only by custom devisable, and may be so disposed by parol, or that they cannot be devisable otherways then as gavelkind, because the custom to devise is not through all Kent, as capite land is not devisable, by Allen for the plaintiff: but by Wild for the defendant, The very issue must admit that the lands are gavelkind; yet *Brooke* against *Lander*, 15 Car. 1, B. R. agreed, 1 Cr. 561, that to be devisable is collateral to the gavelkind, and some gavelkind is not devisable; therefore special prescription & proof must be made thereof, but that it's partible, it is incident to the nature of gavelkind; but that father to the bough, &c. or that the wife should have a moiety, these are collateral, and must be pleaded specially. But by Twisden, This custom to devise is incident to gavelkind; and by the attainder of such tenant, or by any Act

of Parliament, as 2 & 3 Ed. 6, that disgavels it, this power to devise is taken away, which was direct to be found, especially admitting all lands gavelkind is devisable, whether by 2 & 3 Ed. 6, which disgavels these lands, as to the partibility, making them discendible, as at common law, this incident to devise be destroyed. *Post.*

100. SIR HENRY HERBERT *against* PAGET. Siderf. 77, pl. 12.

Action upon the case. Dr. & St. 135, in Baily Br. 42.

In action upon the case for negligent keeping records, whereby judgment against the plaintiff at the suit (begun 1656) of Walker in action for slander, being in the Exchequer, 1659, like to be reversed, a capiatur being entred for a misericordia, and afterward was in the defendants office, being keeper of the records, razed, and made in misericordia, for which per Curiam, an officer, de facto, only is responsible for, as well as de jure, being a misdemeanor: but the clerk of the errors, the Philizers, and clerk of the Nisi Prius, and the prothonotaries, and their clerks, have uncontroulable priviledge to go into the Treasury, and have free sight of any record within six terms, but after pay 6d. for it. 2. An officer without special negligence shewed, is not responsible (as the keeper of the goal) at his peril, especially the attornies having power to alter and mend their own rolls without controll.

[289] 101. VANDEVALDE *against* LLUELLIN. *Friday, May* 9.

Assumpsit.

In action upon the case on assumpsit to pay the value of such goods as were of J. S. and his partners, the defendant pleaded that the goods were not J. S. and his partners, and issue thereon, the verdict found the value for the plaintiff. Finch for the defendant, moved for a repleder, which by Twisden cannot well be, but rather a venire facias de novo. Adjornatur. 291, pl. 108.

102. THE KING *against* DAWSON.

Perjury.

In evidence upon information of perjury, it was observed; that one indicted of perjury, may be a witness in the same point, upon tryal betwixt others, till conviction, as *Sir Ed. Powels case. Post.*

103. DR. PATRICKE.

Mandamus. It is visitable by the Kings commissioners, 25 H. 8, c. 21. Poult. 556. Where the King is founder he shall visit and not the Ordinary. Lit. c. 96.

Keeling moved for mandamus to admit him, being by a majority of the fellows, chosen Master of Queens Colledge; which the Court denyed, though the statutes of the house appoint no particular visitor, to whom appeal might be made. Windham conceived it a mixt corporation both lay and ecclesiastick, and so to appertain to the jurisdiction of the Ordinary of common right: but by Twisden, This is a meer lay corporation: and per Curiam, The writ for Dr. Willington was granted, only because it had been so once done before, but ought not to have been, had it appeared (as now) to be upon differences in colledges. Twisden cited the case of *Lewis and Day. Post,* 294, pl. 220.

[290] 104. THE KING *against* DOUGLAS, &C.

Peace.

Spilman moved for a supplicavit, as the best way to quiet possession, upon articles exhibited; wherein it appeared that several persons had made a disturbance in the church, and pull'd the minister, reading the divine service, (viz. the

common prayer) in the church, and carrying him to the compter; which the Court granted; and further advised to inform against them for a riot; this, by Windham, being little better then the beginning of a new rebellion.

105. SIR CHRISTOPHER GUISE *against* ADAMS, FENNE, &c. TENANTS OF PUREFOY. *Saturday, May* 10.

Fish. The visne is of both countries Dyer 267 b. pl. 14. Rast. Entr. 665 b. § 1. 2 Rolls Abr. 258, tit. Piscary. Entre F. 2. 1 Cr. 492, pl. 571. 46 Ed. 3, 28 b. pl. 21. Da. 57 b. contrà.

In evidence to a jury at Bar, in trespass for a several fishing: upon not-guilty pleaded, if the plaintiff derive a title as high as the abbies, he need not shew any patent, or derivation from the Crown, but the constant enjoyment is sufficient, unless one be sued by the Crown; which, Twisden said, he knew to have been ruled in a former case wherein he was counsel. 2. A several piscary usque ad filum aquæ cannot be counted on. But, by Windham, Such evidence might be given of such a piscary by meets and bounds, Kell. 53 b. pl. 11. Trespass Br. 426.

106. EYRE *against* EYRE. *Ante.*

Tr. 1658, Rot. 2498. Ex. 2418.

Variance.

A writ of error direct to Sir Orlando Bridgman & socijs, of a record, quod coram vobis quia in recordo & processu ac, etiam in redditione judicij quod coram vobis; whereas all the process, till the judgment, was coram Olivero Saint-John, but the judgment before Sir Orlando; and, by Keeling, it was moved to quash the writ of error, because it ought to have been especially of the record and process before one, and of judgment before another: but, by Stroud for the plaintiff, A record in Curia domini Regis, which was in the time of the keepers, was ruled here good, which the Court, Foster absente, agreed, yet doubted here. Adjornatur. 294, pl. 291.

[291] 107. THE KING *against* MUCKLOW, &c.

Force.

Newdigate moved to quash an indictment of forcible entry; 1. Because its said at the sessions of the peace at Leicester, in the feast week of St. Michael, which began on Sunday, and they have no power by 2 H. 5, cap. 4, to hold sessions till after that week. But by Windham, Its ill, because the feast continueth eight days from the Utas, and the sessions cannot be held till after the eight days. 2. Its said juratores sworn to enquire for the King, and for the body of the county, which per Curiam is ill. 3. Its said that they entred not, shewing that quilibet eorum entred, which by Twisden is an old exception, and fatal: but these being taken the last day but one of the term, the Court would not grant restitution; but adjornatur. *Post* 293, pl. 118.

108. LLUELLIN *against* VANDEVALDE. *Ante* 289, pl. 101.

Verdict.

The jury found the issue & ulterius an impertinent thing, which, by Twisden, is well enough; and therefore the Court would make no rule for any repleader.

109. PRICE *against* GIBBONS.

Legacy.

Carpenter prayed a prohibition upon suggestion of a suit in the Prerogative Court, of an administrator of an executor, for legacy left by the first testator, which the

Court denied; because if they give judgment against the administrator, an appeal lyeth.

110.

Nusance.

Indictment for nusance in alta antiqua via vehicularum in Cretingham, leading from A. to C. not saying regia; yet the Court would not quash till a certificate that it be removed. Stiles 108, pl. 226.

111. READ *against* DAWSON. *Ante. Monday, May* 12.

Perjury.

The Court stayed execution upon verdict had against R. upon conviction of perjury, on affidavit by several credible persons, that the plaintiff had sworn truth, until trial had against D. who was after convicted upon that point of convicting R. *Post.*

[292] 112. THE KING *against* ROBERTS.

Poor.

One was indicted for not performing an order of sessions, which licenced J. S. to build a cottage, which being removed out of Dorcetshire hither by certiorari, was quasht per Curiam, no time being when the tenant refused to perform it, nor before what justices.

113. HODGES *against* HODGES. *Ante.* Error, Br. 90.

Bail. Hub. 264, pl. 341, 342. 1 Cr. 594.

Want of pledges in C. B. by Windham, as this case is, cannot be assigned for error, because upon diminution alledged, the prothonotaries certified that there was no original; and also by him pledges might be put in Chancery in writs si fecerit te fecurum, and they are to be indorsed, and so cannot appear to the Court without the original certified; and by the statute, want of original being helpt, want of pledges is so. Twisden, *Hussey* against *Moore*, 2 Cr. 413, is contrary; and so he held 18 Ed. 4, 9. 4 Inst. cap. Justices of Peace, pledges may be found any time, in the Court out of which the writ issueth, 1 Ed. 3, 5, b. pl. 23, hanging the writ: and so the plaintiff must take order, that though there be no original, yet they must be filed. *Post.* Adjornatur.

114. THE KING *against* FINCH.

Poor.

Procedendo awarded upon indictment, removed hither by certiorari, and no prosecution made; the indictment being for not executing the office of overseer of the poor.

115. THE KING *against* GROVE.

Trades.

Procter moved to quash an indictment for using the trade of a mercer, against the statute of 5 Eliz. being an art used at that time without express averment, which, per Curiam, is ill; so of a draper and haberdasher, not saying contrà pacem; therefore both quasht, and the clerk of the peace fined.

[293] 116. ORTON *against* FULLER.

Slander.

Orton saith that I am a perjur'd rogue, but he is perjur'd as well as I; for he and J. S. swore one for another; which, by Wild Recorder, is ill, without averment that

Fuller was perjur'd, which the Court agreed; being moved in arrest of judgment, stay'd quousque. *Post.*

117. WARNER *against* ELLISON.

Slander.

The words of a libel need not be actionable; but if they tend to publick scandal, its sufficient, per Curiam, as by Foster, to send a challenge if the thing be a lye; by Windham, its sufficient if the party be wronged, also publicavit, declaravit, & notam fecit; though it were not said that he knew the matter of it, yet its actionable. Judgment for the plaintiff after verdict.

118. THE KING *against* MUCKLOW. *Ante* 291, pl. 187.

Peace.

Upon 2 H. 5, 4, the sessions held within the week is good, being not made void by the statute. And when its said many did an action in the affirmative, it needed not be said & quilibet eorum; but contrà when its said in the negative, that many did not do such an act, as non comparuit, there he must say nec aliquis eorum, which the Court agreed. And thus is the common course in indictment that they entred, and not to say & quilibet eorum. As to the second exception of the enquest taken for the King, & pro corpore comitatus, which in forcible entry is ill, all the presidents being pro Rege, pro corpore comitatus. Adjornatur.

119. BILL *against* NEAL. *Ante.*

Slander.

The words relate ad proximum antecedens, and here by saying you would be a justice of peace, like the plaintiff, a fool, an ass, and a coxcomb, and a buffle-headed justice, the words are actionable, 14 R. 2, 11, the justice losing his wages thereby, or being in peril thereof. The case of *Brisco*, 2 Cr. is not like this, which reflects on him in his very capacity to be a justice. *Post.* Adjornatur.

[294] 120. DR. PATRIKE AND DR. SPARROWS CASE. *Ante* 289, pl. 103.

Mandamus.

Keeling moved for mandamus to Queens Colledge in Cambridge, which, by Windham, ought not to be granted, whilst cause may be shewed to the contrary. And though it doth not appear to the Court what corporation it is, yet they ought to be tender in these cases: but the Court granted the mandamus, because upon the aliàs or pluries they may shew cause against it. *Post.*

121. EYRE *against* EYRE. *Ante* 290, pl. 106.

Error.

The writ of error is only a commission, and so being of record and process, and judgment before J. B. whereas only the judgment was before O. B. therefore Williams prayed it might be quasht, being not special, which ought to be as well now, as upon the death of any Chief Justice, as all the presidents are. But by Wild for the defendant, it hath been ruled in the Exchequer Chamber good enough, and so is the opinion of the C. B. that its well removed; therefore this Court would not decide it (though they conceived it ill) till conference with the Justices of the C. B.

122. DAVIES *against* THE CORPORATION OF DROITWICH.

Verdict.

Upon verdict against all evidence, the Court will tax costs, and will not suspend it till the new trial.

123. THE KING *against* SAGRENE.

Indictment.

Indictment for taking away of two obligations at B. not saying in comitatu prædict. (the county being in the margent). 2. No time of the taking or carrying away of them, for which reasons Twisden conceived it ill: but Windham and the Court held it well enough. And by Twisden in forcible entry, to say he entred, and held him out, not saying how long, or when it was held, ill. Adjornatur.

[295] 124. THE KING *against* ARMIGER. *Ante.*

Imprisonment.

A declaration cannot be entred against one brought in by habeas corpus, till he be in custodia, or unless a latitat delivered into Court at the time of the retorn.

125. THE KING *against* PEACHIE.

Religion.

He was indicted for not using the Book of Common Prayer, which the Court would not quash, till the parties pleaded to it; though it did not appear in the indictment, that he was such a person as ought to read it.

126. POWERS *against* POWERS. In Error, Br. 55.

Bayl.

Error of action upon trespass of assault without bail, it was mov'd to be good, & not to be within the stat. 13 Car. 2, c. 2, that orders bail in trespass: but, per Curiam, this is a trespass, and therefore within the Act, 21 Jac. doth name trespass generally, but ejectment is not within the Act.

127. WESTON *against* HORT. *Ante.*

Sewers. Owen 114.

In action upon the case for not repairing a weere, after verdict, it was moved, that prescription that the occupiers of Black Acre ought to repair, is ill. *Post.* Adjornatur.

128. THE KING *against* COLE.

Peace. Hitch. 161 b. pl. 447.

Indictment for riot and assault, laid in ecclesia parochialis de H. which is sufficient place of venue, prædict. being added. 2. It was not said, that they riotusly assembled, but only, quod vi & armis, did commit a riot; which, per Curiam, is good enough.

129.

Error. Error Br. 6.

Upon a scire facias on error brought, the defendant ought to non pros. the plaintiff, and not to bring a scire facias quare executionem non, which is in effect only to cause the errors to be assigned. Adjornatur.

[296] 130. NORPIL *against* MAY.

Days.

In action upon the case for disturbing one in the office of water-baily, the Court refuse to hear motion in arrest of judgment; or for setting aside judgment; or to grant prohibitions; or to make reports; or any difficult matters of law on the last day of the term.

131.

Bail.

Nota, By the course of the Court, when the bail is to be changed, the principal must be committed, (whereby the first bail is discharged), and then a new bail may be filed; but by consent the bail, may be sworn as a witness in the same cause.

132.

Variance.

Scire facias teste 23 Jan. Hill. 13 Car. 2. The second is teste 31 Jan. 13 Car. 2, which, the King changing his reign in Hillary term, is ill, by Allen, who, for that cause, prayed judgment might be staid. But this being moved after nul tiel record pleaded, by Windham, is well enough; which the Court agreed. 2. Upon bringing in the record, upon notice of it, judgment must be entred; but notice is not absolutely necessary.

133.

Bail. It is said against law in Ecclesiastical Court to tyth H. pro salute animæ generally without shewing the cause. Fulb. Paratit. 15.

Nota, The attornies do usually avoid the late Act made against general writs of trespass taken out of B. R. and not shewing special causes of action, whereby they ought not to have special bail, unless for above 40l. but by feigning on the latitat, that the bail answer to the trespass counted on; and also to a bill of 100l. (feigned) that shall be brought against them, by color whereof they take what bail they will:

[297] DE TERMINO TRINITATIS, 14 CAR. II. B. R. DIE SATURNIJ, 30 MAIJ, ANNO 1662.

Foster, Chief Justice; Mallet, Twisden, Windham.

1. THE KING *against* DAWSON. *Ante.*

Pardon.

The Kings Attorney moved to restore one Read, formerly convicted at the suit of Dawson, by reason that conviction was disproved in a trial against Dawson, which Foster agreed. But by Twisden, The conviction remains, and till pardon, the Court cannot restore him to his practice, as attorney in the Court, though this be but a grace of the Court, and not taken away by the conviction, but is a consequent of it. But per Curiam, Till pardon, he cannot be admitted as a witness. Windham agreed with Twisden. Advisatur that Read procure pardon.

[298] 2. DR. PATRICKE. *Ante.*

Mandamus.

Keeling moved for an aliàs mandamus to restore; but the writ being retornable but this day, the Court refused it till default made.

3. WINDIBANK *against* BEAR. *Ante.*

Assize.

The tenant excepted to the writ, because it was octabas for octavas &, and wanting & only. And also it was retornable at Westm. coram Rege, which ought to be ubicunque, &c. And this after a special imparlance, the first exception was waived; but Twisden held the last invalid, according as Stiles . But all the presidents are contrary ubicunque, and this is an assize which will not lye out of the county. Windham doubted whether now the Court shall not intend it well enough, being it sits at Westminster. *Post*, 303, pl. 13. Adjornatur.

4. LORD DUNBARRE *against* THE COMMISSIONERS OF SEWERS. Siderf. 78, pl. 2.

Sewers.

Witherington excepted to a retorn by commissioners of sewers; 1. The jury presented, that there is a gettee repairable by the King or the lord of the mannor of Preston, distinct from that which the plaintiff ought to repair at the lower end of the pasture, not saying where this is, or of what quantity it is; all this is in English, which, per Curiam, is all well enough, a gettee being certain, and the form usual. 2. The presentors are impannel'd to see and present only infrà medium ballivæ de H. and it doth not appear that this place is within the bailywick; but the Court would not willingly quash this till the place be repaired, especially here the commissioners being bound to no legal forms in strictness; but something must appear whereby they have no jurisdiction which is issuable. *Ante.* Adjornatur.

[299] 5. HODGES *against* HODGES. *Ante.* In Error, Br. 90.

Bail.

After verdict in ejectione firmæ, and judgment given, Powis moved that where there is original, and no pledges, it's error, 2 Cr. 414, but where there is no original, M. 16 Car. 1, Cr. 594, *Tregose* against ——— and so it cannot appear whether there are any pledges or not, it is none, but aided by the statute. Twisden denied the ground, because pledges may be retorn'd in Chancery, or without the original. But by Powis for the defendant, in C. B. the pledges must be indorsed on the original, though they may be filed any time after the retorn thereof, which Windham agreed; and that this is aided by the stat. lest all the judgments in C. B. be overthrown. And whether pledges be found in Chancery, or before the sheriff in the county, it must appear by the original error, *Young* against *Young*, 4 Car. because an infant found no pledges, coming of age before the trial; and this judgment was affirmed, because the plaintiff in the writ of error had not removed the original, whereby it might appear that there were pledges. Twisden, This is expresly against *Moore and Hussyes case*, 2 Cr. 414. And the writ summoneas si A. fecerit, &c. warrants not this indorsment: and though the statute aids want of original, yet not this benefit and security of the Kings amerciaments, being collateral to the writ it self. But by Twisden in 2 Cr. 414, the original was certified, and the plaintiff not having alledged diminution in the case of Young, whereby the original might be certified, judgment was against him. Foster remembred well the case of *Moore and Hussey*, and this is far different from it, and will be of greater inconvenience. But by the clerks, no diminution is here prayed by the plaintiff in the writ of error, and so this regularly cannot be assigned: but the defendants having prayed it, the Court conceived it well enough by whatever means the record cometh in; but here diminution is only alledged in the venire facias and habeas corpus, and so the original is not certified: wherefore, per Curiam, judgment affirmed, nisi. *Post.*

[300] 6. THE KING *against* POPE. *Saturday, May* 31.

Peace.

Hoskins moved to quash an indictment for not obeying an order of sessions in Dorset; 1. Because it doth not appear that he doth inhabit in the county. 2. The defendant was bound to two overseers, and one dying, and the other becoming indigent, the parish warned him not to pay it to the other, and yet he did it, being bound; and the justices have no power to call Pope, but only the overseers, to accompt. 3. They ordered that another bond should be assigned to Pope in lieu of his own made to the overseers; but it doth appear that the payment was by collusion, and that the money is yet in the hands of Pope, and therefore the indictment was to stand, unless the defendant consent to stand to the award of the Judges of Assize.

7. HUNT *against* LOCKE.

Verdict.

To set aside a verdict given for the plaintiff, it was sworn that the defendants servant had talked with a juror, and that before that, that the jurors were most of opinion for the plaintiff: and, by Twisden, This is sufficient to set aside the verdict: but if the verdict had been for the plaintiff, such offence had been only fineable, which the Court agreed. Adjornatur.

8. THE KING *against* TRINITY-HOUSE. *Ante.*

Franchise.

Howel pro Rege, exception 1. That it is said that they do fodere, extrahere, &c. taking and carrying away, and the plea is only to the digging and taking away; and saith nothing of the application thereof, which cannot be but by asportation and extraction, and hereby that is disclaimed. 2. It is said, as to the taking infrà Pontem Lond. and the high-sea, he justifies, which is impossible; but ought to be, as afterwards is said, quod inter Pontem L. and the high-sea; and here he hath applyed the taking to infrà, whereas the charge is for taking it à ponte ad mare. But, by Windham, inter & infrà are all one: but, by Howell, infrà must be either of one side or other of the sea, and so must exclude the contrary side of the bridge. 3. Its said, eo warranto, without applying it to any place certain; so that the taking is **[301]** every where betwixt the bridge and the sea. 4. Its not said, that the master, wardens, and assistants were denizens according to their incorporation, aliens being excluded; as to the matter in law, whether this be an office, or a liberty only, as an office, its not sufficiently pleaded, 2 Cr. 615. That the Kings and Queens have used to grant it, unless the thing it self be said auncient, or created by certain words; contrà of a messuage or mill. 2. Its not said, that this taking of ballast is parcel of the office, but only that such as had the office have used to take, &c. Whereby being in aliquo convenienti loco, the King may be excluded out of his own inheritance, they being judges of the conveniency, Dy. 326. Lands gained out of the sea, or navigable rivers, is the Kings as auncient as his Crown, Dy. 11, 7, which is the reason that Royal fish belong to him; and no custom can fetch lands farther then the low-water mark, being against reason. And granting power to dig in my own land, cannot exclude my self, Stanf. Prerog. cap. 15. Bract. l. 1, cap. Quæ res dari possunt, this being auncient inheritance, nullum tempus occurit Regi: but its otherways in new purchased lands, L. 50 Ed. 4, 121, the King shall not be bound by any custom, that goeth to the person, or the goods, 35 H. 6, 25, as of London, that pawned goods may be deteined against any owner, 8 Ed. 4, 18. Allen for the defendant, As to the first, the digging and ballasting is all the defendant claims, for he hath no power to take it, and carry it whither he will, but must use it for ballast. 2. Infra pontem must be intended betwixt, and not below the sea; and that H. is infrà quatuor maria. 3. That the corporation is made capable of purchasing, by being enabled to sue, Hub. 211. Grants

F. 130. 4. There is a place of the grant of the letters patents, but the want of place in the plea is not so fatal, as the want of it in the information, which layeth no part of the usurpation to be in London, where the action is brought, and Juxta Lond. is not sufficient; and the plea answers to the usurpation fully. 5. The quo warranto it self doth suppose, the master, wardens, and assistants were subjects, especially no question being here upon the charter. 6. The charter is pleaded as grant and confirmation; which being hic in Curia prolate is well enough, and needed not plead it only one way, especially where the conveyance cannot operate several ways, as by feoffment or bargain and sale. As to the matter in law, he agreed, that in prescription for house to an office, he must say ad officium præd. spectand. but where a thing is claimed, that is of the essence of the thing granted, **[302]** its needless, as in quo warranto for the office of cole-meeter, its sufficient to say the Kings grantee have used to meet coles, &c. So of gaugeor or garbler, which are but imployments, and all alike in the conusance of the Court. That the officers thus to dig ballast, and order it, is evident, in that no such office was ever in being, as to see that ships were well ballasted; and the statute, 27 H. 8, 8, cyted to the contrary, doth take notice that such officer hath this liberty. But admitting it an office of survey, yet the plea is good; for the digging is not claimed as parcel of the office, but by the grant of lastage and ballastage, which is the very thing proper to ballast ships, which as Spilman, Glos. verbo Lastage, who cites 22 R. 2, 8, the Statute of Calice, the grant is by whatsoever name or kinds the lastage was then used, known, reputed, or exercised; and the usage is declaratory, that such as had grant used to dig, and so is not in nature of incident to office, or grounded on any prescription. Twisden was not satisfied with the exception of pleading it with several words: but Windham was satisfied with Allens difference: so Foster; This cannot enure any other way then as a grant, there being no precedent grant made. Twisden, To plead a former patent, and after say dedit & confirmavit, it can enure but as a confirmation; and yet it is naught, being against the King. 2. The visne ought to be alledged in the plea, to entitle the defendant against the King, who else shall have judgment, whither he hath title or no: and by Foster; Ballastage is not so properly the gravel, because it may be of other materials, as cole-ships are often ballasted with coles; and this is not well pleaded as incident or appurtenant, 4 H. 6, 13, because neither are relied on. Adjornatur.

9. ORTON *against* FULLER. *Ante.*

Slander.

H. said I was perjured, but he is perjured as well as I. This is actionable by Barwell, without any averment that I was perjured, which the Court agreed. Judgment for the plaintiff. Nisi.

[303] 10. THE KING *against* BILLING.

Forgery.

Because he had forged an attachment of priviledge as an attorny (and was none) against 100 persons, and had arrested one or two of them, and made them compound: the Court committed him to the marshal, and ordered an indictment of barretry, and another of forgery, to be exhibited against him.

11. BAKER *against* THROWER. *Monday, June* 2.

Priviledge.

In action upon the case for words, after imparlance, the defendant pleaded priviledge; which, per Curiam, priviledge of an attorney in B. R. is not pleadable after imparlance on demurrer made on such plea

12. THE KING *against* BOWDWICH.

Perjury. Yelvert. 22, pl. 34.

Stroud pro Rege, moved to quash an indictment of perjury, because the recital of the interrogatories was in a commission to examine bond betwixt J. S. and A. the sum, and the figure of 9 mistaken for 7 in the date, and the bond was entred into by the father, as was set forth in Chancery. But by Allen, The bill being only for discovery prefer'd against the son, whether it were made by him, or by whom, and so the interrogatories differing from the charge, makes no fault in the indictment, especially after the defendant is found not guilty. Adjornatur.

13. WINDEBANK *against* BEAR. *Ante*, 298, pl. 3.

Assize. Ravishment of ward retorned coram justic. nostris, without saying where, is good, 3 Ed. 3, 2 b. pl. 4. 2 Brant. 23 b. pl. 24.

Jones for the plaintiff, As to the retorn coram Rege apud Westm. the assize being in the same county, is according to the register; and where any writ is retornable at a day certain, and not on the common retorn, it is retornable always at a place certain; and it had been a good exception had it been otherways, which Twisden agreed: and 2 octabus or octavas is alike, and all the records are octabus; the Court conceived both well enough; and audit. for ad audiend. is well enough, per Curiam, some writs being ad audiend. F. N. B. 178 b. some audituri only, respond. ouster awarded per Curiam. And Twisden cited a case brought here by error in **[304]** venire facias, per quos rei veritas melius scire potest, which was ruled error; sciri being by custom made allowable, though no Latin word, and notwithstanding *Calvins case*, or that this lay in Middlesex, which Glyn urged fortitèr to be different from all other places, because the Courts are constantly there, and the C. B. also; but when the Kings Bench is removed it may be otherways. And by Windham, This action is not brought before us as justices in B. R. but as having the power of justices in eyre, F. N. B. 71, 72. Coram nobis in the register intends only justices in eyre, and only ubicunque distinguisheth this Court from it: but presidents being doubted, adjornatur. *Fairfax* against *Fairfax* was returned coram nobis in Superiori Banco apud Westm.

14. THE KING *against* SIR HENRY VANE AND LAMBERT.

Treason. Siderf. 84, pl. 13.

Vane was indicted, that intending to bring the King to death, he had compassed the same by endeavouring to change the Government; and to fulfil such intent, 11 Car. 2, had assembled (30 May, 1659), with others to consult of, and had usurped the Government; as also by regulating the forces of the nation then raised against the King; and that (20 Dec. an. prædict.) had been in the head of 1000 persons armed. The prisoner desired to hear the indictment read in Latin, which the Court refused, 36 Ed. 3, being that the records must be entred in Latin, but discussed in English; and the indictment was read twice in English, which was conceived more then usual. 2. He excepted, that the indictment doth not pursue 25 Ed. 3, 2, no particular acts of levying war having been charged certainly, by reason it wants place, which was mistaken. *Post.*

2. Lambert was indicted for levying war at the same time; he pleaded, that the Commons had excepted him only as to pain, not extending to life, which the Lords refused, and for expedient, the proclamation was made for persons to come in, which the Lords now have comprised him in, which was a full consent of the two Houses to save his life: and pursuant to this, the letter by the King to the Commons, to whom he left it to make provision; and thus the consent of the three estates concurred in his pardon, nothing that is essential to a law, but is in this particular. Sir Jeffery Palmer, Kings Attorny, conceived this is a petition of the two Houses to the King,

and his grant of their desires: but this being not under seal, cannot be pleaded, but is an inducement to the Kings pardon; which the Court agreed. *Post.*

[305] 15. THE KING *against* ZACHARY CROFTON. Siderf. 78, pl. 1.

Habeas corpus.

He was committed for matters of high treason, 23 March 1660, which being long, though the Kings Counsel had no notice till the delivery of the habeas corpus, the Court conceived it ought to be filed, though delivered but one Court day before; though they conceived the three days by 17 Car. 1, to be exclusive of the day of delivery of it, and ordered the retorn to be filed to morrow, and he bailed, unless cause be shewed to the contrary. *Post*, 305, pl. 17.

16. DEVOE *against* DR. CORIDON. *Tuesday, June* 3. In Detinue, Br. 2.

Trover.

In trover for jewels, it was said by Twisden, there is no plea in trover, but a release or not guilty, every special plea in justification being but tantamount: but the defendant being in the Kings service command, after the declaration delivered, the Court gave an imparlance nisi, but upon motion the next day of the Kings solicitor, ordered the trial.

17. THE KING *against* CROFTON. *Ante* 305, pl. 15.

Bail. 1 Cr. 219, pl. 10. 1 Leonard 70, pl. 94.

Sir Jeoffry Palmer conceived him not bailable, but (by the solicitor) only at discretion of the Court, not ex debito justiciæ, and so the filing of the writ would be to no purpose: and by Wild, the Kings Serjeant, the particular treason is not necessary to be specified. And by Keeling, the Kings Serjeant, the whole House of Commons, 3 Car. conceived this general retorn good, and the King needed not discover the particulars, which may be inconvenient, and he offered to indict him this term. Newdigate for the prisoner, conceived the Court not possest of the cause till filed, and both are the Kings prisons, and no inconvenience in either; and the Court cannot debate the cause till filed; Windham agreed with Newdigate, that whatever the retorn be, if it appear to the Court that there is a default of prosecution, there is no cause but the retorn ought to be filed, else the party may lye for ever in prison, and this delay was the reason of the habeas corpus. The attorney cited *Russels case*, where three months was conceived a very reasonable time, and in dangerous times, as now, imprisonment may be for punishment **[306]** for prevention as well as for custody. Twisden agreed with Windham, that this Court cannot remand him till after the writ filed, after the committitur is entred the remittitur, or else that traditur in ballium: and by Windham, had the retorn been, that he had endeavoured to kill the King, the foulest treason, yet that is no argument against the filing it: and by Twisden, this Court cannot take notice of the cause till it be filed; Foster ad idem; and being filed, it was read again, and Newdigate prayed, in respect of the delay, that he may be bailed, which the Court refused, the Kings Counsel assenting, that they would indict him this term; though *Cornwallis case* was only by length of time, that he was bail'd, and by consent of the Kings Counsel, entred a rule quod remittitur, and brought hither the last day of the term, and if no indictment be then found, to be baild, and so he was.

18. WINDEBANK *against* BEAR. *Ante.*

Assize. 1 Brown. 151, pl. 517.

Against 19 Jac. *Min* against *Maidwell*, an assize retorned coram nobis ubicunque; on the contrary was cited the pleading of it in Rast. Entr. 60, is an assize retorned coram nobis apud Westm. And by Allen, The ubicunque relates only to the retorn,

and not to the stile of the Court. Stroud for the defendant, cited also Yelvert. 60, *Brigs* against *Thomson* and had not the C. B. been sitting at the same time, here a retorn apud. Westm. had been good enough. Windham, upon perusal of all the presidents of eyre, never read of any retorn coram Rege in itin. but before the justices in eyre by particular name, 4 Inst. And the register denyeth not, but an assize may be here, but not when the C. B. is in the same county: but F. N. B. is contrary, and so is the constant practice. And this is beyond the authority of *Calvins case*, which was but an amicable suit, Artic. Super Chart. proves that assizes were aunciently tryable here. 2. Octabas he conceived by corruption from octavæ, the eight days after the Utas, being the feast; but by custom and usage its well enough either way, stat. de die in Banco: 3. Audit is better Latin, and more frequent: Twisden, ad idem in omnibus, The distinguishing caracter of the Court is coram nobis only, Brief. F. 105. Pl. Com. 73. Audituri is the properest word; Mallet ad idem; so Foster respond. ouster: whereupon he pleaded nul tort, and issue joyned. Adjornatur.

[307] 19. THE KING *against* LORD BUCKHURST, &c. *Ante.*

Pardon.

They now pleaded the Kings pardon, having before confessed the indictment of manslaughter which the Court allowed; but the coroners enquest being retorned murder, they pleaded by direction of the Court, auterfoits convict.

20. HART *against* HUMBLE. *Ante.*

Common.

In action upon the case for disturbing of common in West. Fem. averring it to be lieu conus out of hamlet or parish; on demurrer to the count, for uncertainty of place, the Court conceive it well enough. Judgment for the plaintiff, nisi.

21. BILL *against* NEAL. *Ante.*

Judgment.

Lindly moved for judgment, the words being affirmative of the plaintiff, as proximum antecedens; and especially, because its thereby insinuated, that the plaintiff was unfit for a justice, which is an office of trust, credit, and profit, 1 Cr. 270, *Cawdry* against *Higley:* the Court conceived (the opinion of the Court to be against the book) 17 Car. 1, *Sanderson* against *Rud*, that A. was an ignorant man, and not fit for the place, (viz. steward of Court;) had these words been spoken of a lawyer, or physitian, they had been actionable, per Curiam, but not so here, H. 22 Car. Rot. 725, *Hammon* against *Kingsby*, He was a debauch't man, and not fit to be a justice of peace; which had been actionable, had the words been in the present tense; but the Court, by Twisden, delivered no opinion as to that; and though the statute requireth discretion, yet to call one indiscreet justice, is not actionable. Allen for the defendant, Here is no crime charged or applied to the condition of the person, 2 Cr. 90. As the words relate to the plaintiff, the Court were of opinion with him; but not so now, upon consideration of the words themselves, the case of *Holly and Bristow* is stronger then this, that he was a rascally villain, &c. and though justices have wages, its no profitable office to him; and this is no crime in him, but he is such as God hath made him. Twisden ad idem: Mallet contrà; Foster conceived the words not actionable, but would have the defendant bound to good behaviour, which the Court agreed, and ordered it accordingly. Judgment for the defendant.

[308] 22. LUSTON *against* JOHNSON. *Wednesday, June* 4. In Error Br. 55.

Error. 13 Car. 2, c. 2. 16 & 17 Car. 2, cap. 8.

Error without bail is a supersedeas in ejectment, as hath been ruled in C. B. notwithstanding the new Act, 13 Car. 3, cap. 2, being not within the general word trespass, which this Court agreed. 2. Though execution be sued forth, if error be brought before it be executed, it is a supersedeas, by Twisden, though the sheriff is in no contempt, if he have no notice; which Maynard, for the defendant, denyed: but, by Windham, So long as the money is in the Courts power, they have of late time restored the money; but contrà if the money were delivered to the party himself by the Court against Twisden.

23. THE KING AND EDWARDS *against* THE BAILIFS OF ALLBOROUGH.

Mandamus.

Stroud Senior excepted to return of a mandamus to restore Edwards capital burgess there, because only one express notice appears made, the rest wanting place, &c. 2. The summons varies in days of appearance. 3. There is no cause shewed of removal, but only absence upon summons, which is needless, by Windham, and is to condemn the party unheard. 4. Twisden excepted that being incorporate by 4 Jac. they cannot have a Court, time out of mind, as is alledged before, the bailiffs and capital burgesses rule naught. Adjornatur.

24. SHEPHERD *against* WAKEMAN. Siderf. 79, pl. 5.

Slander. H. 13 & 14 Car. 2, Rot. 473. 2 Brownl. 151, pl. 141. Owen. 30. Hub. 62, pl.

Jones for the plaintiff, that the writing this letter is actionable, the defendant having no title himself, as 4 Co. 18, *Gerrards case*, nor probable cause of speaking such words, 20 Eliz. Sir Fr. Moor 187, pl. 334, *Wildgooses case* according to this difference: and had there been in the case at Bar any express averment, that he knowing himself to have no colour of title, it had been without doubt within *Gerards case*, and here falso & malitiosé doth supply it, and tantamount being found by the jury, *Heard* against *Read*, Pl. Com. 52. Stiles 335, pl. 712, in action upon the case counting, H. being produced as a witness, the defendant said that he had taken a false oath, which being in a Court of Justice, had not been actionable; but the jury having found it falsò & malitiosè, **[309]** it was ruled actionable; and by Allen, None could ever make his own title, if he may not be excused for such words; but this being malitiosè, cometh not under that excuse; and had this not been proved malitious, the Judge ought to direct the evidence for the defendant, for malitious doth imply science. 2. Exception was want of place of writing the letter, which per Curiam, being not the ground of the action, is not material; for whosoever had wrote the letter (it's not traversable) & the delivery and publication is the scandal: but Twisden doubted, because forgery and publication must shew place of both. Windham doubted of the want of averment that the defendant knew he had no title, is not fully supplyed by the falsò & malitiosè. Foster also conceived this was done well, there being no other remedy then to be had upon such pre-contracts, and no publication, and the man the fittingest person to be applyed to. Twisden conceived the words actionable for the ill consequence, and it being private, must be left to God, and not to be divulged unless it be proveable; and scienter is needless in this case, being private betwixt them two; otherways in title made to lands, &c. Allen, It hath commonly been ruled in action upon the case for selling and warranting a horse that was none of his, to say that knowing the horse to be anothers, or quod fraudulenter vendidit, both which ways the Court agreed sufficient, and that the fraudulenter supplyeth the scienter: but the best way is to say, that knowing it was none of his. Adjornatur.

25. BEAVER *against* BINION.

Bail. 2 Cr. 384, pl. 13.

Count in Michaelmas term, and bail in Hillary, a scire facias, by Wild the Kings Serjeant, cannot be brought upon such bail, being not the same term of the declaration entred; but the writ being retornable in Michaelmas, and bail in Hillary, and then the declaration was mended, and made of Hillary, and then a plea and verdict is had, which per Curiam is well enough.

[310] 26. THE KING *against* CHEDLE.

Scire facias.

Williams for the ter-tenants in scire facias ad audiend. Errores of an attainder, conceived, that though the sheriff retorns there are no ter-tenants, yet the ter-tenants may come in and answer by suggestion, and plead; which Allen denied, but conceived he ought to make affidavit of his case, else he cannot come in to plead, by Twisden, contrà by Windham, it being only a summons, which the Court agreed, if they can make themselves tenants.

27. HODGES *against* HODGES. *Ante.* Error, Br. 90.

Error.

On 3 Cr. 586, *Pawlet* against *Christmas*, not retorning 24, if there be no full jury, is naught; but not so where there is a full jury appears; which Windham agreed; and that the party shall not be put on the inconvenience of a tales. Twisden had been of the same opinion, till 3 Cr. came out, and this is but a mis-retorn, expresly helpt by the statute, which Foster agreed, *Sauchel* against *Stocker*. Adjornatur 99, pl. 161.

28. HARRISON *against* KNIGHT. *Ante.*

Arbitrement.

In debt upon bond, the defendant pleads performance, and sets forth the award: the plaintiff assigns breach in non-payment of money; and the defendant replyes that he did not pay, which is no issue; verdict for the plaintiff, and judgment in C. B. and error brought here after damages and costs assest, the Court reverst the judgment; but had it been upon any such point before, and not to affirm or disaffirm the judgment, they would have awarded a repleder. *Post.*

[311] 29. KNIGHT *against* DAUNCER. *Ante. Thursday, June* 5.

Incumbent. Hub. 165. Yelvert. 7. 3 Cr. 642, pl. 42, *contrà.*

Finch solicitor for the plaintiff, conceived no ground to stay judgment on the Act for Ministers, 12 Car. 2. Or if it should be urged it were no Act, yet the possession of the plaintiff is a good title against the defendant, and the Act, as found, doth only confirm incumbents of lawful patrons, not against such as were incumbents by a prior or better title; and that the plaintiff is such an incumbent, though presented by recusant, is evident, though he agreed the presentation void: so Hub. 302, where the Ordinary will present as pleno jure, whereas he hath only collation, this may by the King be made void, or not, but as to all other persons then the patron, he is a lawful incumbent, and his charge by confirmation of patron and Ordinary, would have bound the successor; and this is out of the great piety, justice, and moderation to the Church, and indulgence of induction to serve a cure; and as presentations void by law, so of void by statute, and good against all other persons: the strongest case of symony makes a plenarty against all persons, but the

King, and he may sue for tythes notwithstanding Hub. 168, which is no law, because he is not a symoniack till conviction, P. 16 Jac. *Segar* against *Cole*, adjudged in B. R. that symony was not pleadable to suit in the Spiritual Court for tythes, Hut. *Heylins case* accordant by suggestion before conviction. 2. The stat. 3 Jac. is nugatory in that clause that disable recusants to present, being made excommunicate before ; nor are the universities entitled as full patrons, but to supply the defects of the incumbent, and so it tends not to make the incumbency wholly void, 10 Co. *Chancellor of Oxons case* is in this point, and its at the rightful patrons election to make it void, or not. 3. The clause of disabling in 3 Jac. is not found 3 Jac. 4, is a general law that giveth the penalty to the King ; but cap. 5 is particular, and must be all found, as in *The Chancellor of Oxons case.* And he that ought to be named in a quare impedit, is such a rightful incumbent as cannot now be removed.

2. Allen for the defendant, that the plaintiff hath no title, the institution and induction, as well as the presentation, being void by 3 Jac. cap. 5, it being an act of disability in the presentor, whereby the foundation of the Ordinary is destroyed ; and the meaning was not only to make the pre-**[312]**-sentation alone, but all building thereon void. 3. The statute giveth the nomination, presentation, and collation to the universities, which would be fruitless if the incumbent should be yet full till removal : and the statute was meant, as well to make the incumbent, as well as the patron or donor incapable. Huberds single opinion in *Gawdies case* is against all reason, that this induction should amount to a collation, because this he doth as Ordinary ; the other of institution is but a ministerial act, founded on the presentation, as to the interest and institution made upon presentation of one that had no title, should not hinder the Ordinaries collation ; where the Ordinary hath a right of collation it maketh plenerty, but where he doth it only as having curam animarum, it giveth no right, but a provisionary possession, whereby he may have right to tythes or profits, but hath no freehold or interest in law whereby to maintain ejectment, or to have quare impedit brought against him, *Stephens* against *Potter*, and that such an incumbent is capable of a confirmation, 11 H. 4, 9 is mistaken by Hub. that being upon a collation made pleno jure, in which case induction is made by another. 2. The Act for Confirmation of Ministers is private, and found by the jury to be an Act of Parliament, and the Court are not bound to take notice of it ex officio ; and this Act doth give a title in law to the defendant, and the naming of the incumbent is prudence, as of any that claims title ; but he that hath right is not thereby concluded or put to a quare imped. And supposing the plaintiff had a good title, and the defendant none, yet that clause of the Act that inables incumbents in possession to hold till 20 Dec. 12 Car. 2, takes away the plaintiffs title, for the lease is made 25 Apr. and the action is brought in Michaelmas term, which is before the right accrued. Finch said this Act doth not take away the jurisdiction of this Court. Windham conceived that the naming him giveth him no right, but may be of any disturber whatever ; and the lease and ejectment being made 23 April, and the action not brought till Michaelmas term upon foundation before the Act 25 April, is ill only for damages, because the plaintiff had a good title before. And by Twisden, Since 25 Dec. the title is made, as at first, good, which the Court agreed ; and also that a parishioner may plead symony in bar of debt for tythes, 1 Inst. 344. The reason why collation puts not out of possession is, because its only a provisionable care commenda semestris, and doth not enable to sue for tythes. Adjornatur.

[313] 30. KNOT EXECUTOR OF THOMSON.

Ordinary.

Allen prayed a mandamus to the Arch-deacon of Canterbury, to command them to allow proof of a will after administration committed, which the Court denied, and the party may appeal, though no sentence but only an interlocutory award be made. But, by Windham, The next of kin may have a mandamus, if the Ordinary refuse to grant administration.

31. HODGES *against* HODGES. *Ante.*

Tr. 13 Car. 2, Rot. 460. Error Br. 90.

Error.

Wild Recorder excepted that the venire facias was teste out of term 23 Febr. and so void, not helpt by statute, which the Court agreed. Judgment affirmed, nisi.

32. LORD DUNBAR *against* THE COMMISSIONERS OF SEWERS. *Ante.*

Sewers.

On 19 Jac. *Hall, &c.* against *Mason* in the Dutchy-Chamber, on a commission of sewers, they ought to shew how much a wear is inhansed; so here, the quantity of a gettee ought to be ascertain'd. 2. That the commission of sewers being in English, Tr. 5 Jac. 12 Co. 31, without an Anglice, is void, P. 9 & 14 Car. 1, B. R. which Witherington, for the plaintiff, heard, but could not find, were both adjudged accordingly: but, per Curiam, This is certain enough, being after verdict, and the plaintiff ought to repair it first, especially, by Twisden, the presentment being admitted, and not shewed in the plea to it.

33. LOCKIER *against* SMITH. Siderf. 79, pl. 3.

Extinguishment.

The obligor takes administration to the obligee, and makes his executor, and dyeth: this by Stroud for the plaintiff, as *Sir J. Needhams case*, 8 Co. 131, is no discharge of the debt. Wild for the plaintiff, that the debt is discharged, in regard the obligee is not aver'd to be indebted to any, for else he agreed it shall be assets, but now it appears to be as a gift of the obligee, at least its a personal thing, and by suspension is extinct; which the Court denies, unless it had been suspended by the act of the obligee; and though the obligee owe nothing, yet the administrator shall **[314]** not have them, though executor, or administrator of executor should have had debts of the first intestate, and not the administrator of the first intestate; contrary of executor of administrator of an administrator. In debt upon an obligation by an administrator de bonis non, against executor of administrator of the first intestate, averring the administrator and the obligor were the same person. Judgment for the plaintiff, nisi.

34. HAMMERTON *against* NEVILL. *Ante.* Siderf. 79, pl. 4.

Approvement. See 22 H. 6, 10, contrà per Bing.

In trespass, the defendant justifies in three acres for common. The plaintiff replyes that two of them for enlargement of curtelage be inclosed; which, by Jones, must be for husbandry or necessity, not for all purposes; also it ought to be said, that the enlargement was for habitation. 2. This priviledge remains only so long as the land remains common, not when its reduced to its ancient nature of pasture. Allen for the plaintiff, It's not of necessity by Westm. 2 to say its an ancient house, but if it were, the defendant ought to shew that it was erected de novo; the want of the quantity of the curtelage to his habitation, to which he thus took in two acres, is not material by Allen: but this Twisden doubted, unless the demurrer confess it was necessary. And, by Windham, The house ought to be said ancient, else the necessity is of his own making, and all circumstances ought here to be expressed in the replication. Foster and Mallet conceived it ought to be ancient, and for habitation also, and not only for pleasure or convenience, which the rest agreed, as a hop-ground or park is not within the statute; contrà of a sheep-cote. Judgment for the defendant upon demurrer on the replication.

35. WESTERN *against* HARTNALL. *Ante.*

Hill. 13 & 14 Car. Rot. 1554.

Prescription.

Stroud jun. for the plaintiff, that the prescription quod occupatores have used to repair it, well enough in action upon the case for not repairing a wear, being an easment in alieno solo, Hub. 118, & Rast. Entr. 110. H. 37 Eliz. Owen 71, *Goodway* against *Michael*, the like in avowry, Fitzh. 66. This prescription is but an inducement to the action, *Wingate* against *Gibs*, Paschæ 14 Car. Custom 3 Cr. 445, this prescription is help'd by the Statute of Jeofails. **[315]** Windham, The usual pleading of such as have close adjoyning is quod omnes occupatores, because it lyeth not in his knowledge, which the Court agreed. Jones cited *Roberts case*, 5 Co. to the contrary, when any charge is laid on another that hath the fee, without any benefit to him, the wear was alledged to be cross the river, prope terram, call'd Heath-field, the occupiers whereof, time out of mind, &c. which the Court agreed well enough, 1 Cr. 419, though not in the soil of him that is to repair. Judgment for the plaintiff, nisi.

36. ROGERS AND HIS WIFE *against* COCKE.

Slander. 3 Cr. 643, pl. 44.

That H. is a bawd, and a pocky bawd, and I will root thy whores out of thy house. Twisden conceived them not actionable; Curia contrà. Judgment for the plaintiff.

37. THE KING *against* SIR HENRY VANE. *Ante. Friday, June* 6.

Treason.

He was indicted for sitting, with others, to consult the Kings destruction, and to get the Government to themselves, 30 May, 1659. The Attorny General, Palmer, began with evidence from the treaty at the Isle of Wight, 1648, after with the Acts made against kingly Government, and management of votes of the Councel of State for the Navy, until 1653. And after in 1659, sitting in the Committee of State, and managing the land forces, issuing warrants for them: and in the Committee of the Councel for Government, he contrived the alteration of Government, and raised the opinion that the people had made trustees, and that these were unalterable; all which, with procuring arms for his own regiment, amounting to a levying war actually. Sir Henry urged, that no person in being then claimed the kingly Government, but all things were done in the name of the common wealth, and so matter of law might thereon arise; which the Court conceived would not, being not material, notwithstanding. 3 Inst. 7 by Sir H. is meant of a King in possession; but, by Maynard, the Kings Serjant, which Windham agreed, there must be a King regnant, there being no interregnum in law: but by Sir H. they may be said Kings that have the authority. Finch conceived this the old priest, Watsons doctrine, who thought to oppose King James, being not actually in possession, was no treason; and this was of their own doing, who only usurped the name of a Parliament: and had it been so, yet that's no sanctuary **[316]** for treason, but this Court may trye them; which the Court agreed. 2. Sir H. urged also, that the Parliament in being 13 Aug. 1642 was not dissolved by the Kings death; the Act 13 Car. 2, cap. 1, § 3, of Preservation of the King's Person, mentioning only that its thereby dissolved, and the equality of the three estates in soveranity is that which makes it political, as Fortescue: and for this end, Deut. 17, Kings were constituted. Finch Solicitor, The King cannot give away that prerogative of calling and dissolving Parliaments, 4 Car. *Thursbay* against ——— and they are undoubtedly determined by his death: as commission of sewers, appointed by 13 Eliz. 9, not to end in 10 years: he doubted not, but Parliaments may commit treason, if an unjust thing of them may be presumed contrary to their allegiance and customs of Parliament: the contrary doctrine followeth from a venomous principle of coordination, which is against the oath of allegiance; for if

men in Parliament will speak desperate things, its not to be priviledged by Parliament: and the Kings being out of possession, is but an aggravation of the treason. Windham, I see no colour, why by being continued longer then usual, they should have more power then another Parliament, which is but the Kings Counsel: and though its not to be dissolved, but by another Act, yet by the Kings death it is determined in fact, as marriage enacted not to be divorced till another Act, yet it is done by death; and betwixt King and Parliament is a like conjunction. And had an army in the life of King Charles the First, forced and packt any of the Parliament, it had been a suspension of a Parliament till it might resort again to its freedom, as is the law of all nations. Twisden, ad idem, It had been without question, had not the Act been made that it should not be dissolved; which word is not extendable to a discontinuance; so it saith, no act done or to be done shall dissolve it, his death is no such act: Mallet & Foster ad idem, It was only to treat nobiscum, which is meant in the Kings political and personal capacity, and so determined by his death, whereby those capacities were sever'd, which to do, or suppose, by any other, is the greatest treason, the law making no such distinction; but eo instante, that one dyeth, the other is King. Either House may commit treason, though the Parliament, viz. King, Lords, and Commons cannot. Twisden rebuked the abominable distinction of the Kings capacity; and, per Curiam, The endeavouring to keep the King out, though he be not in possession, is treason; and counsel, by Twisden, is not to be allowed in things that tend to subvert fundamentals, as *Stories case.* Dy. *Post.*

[317] 38. WILLIOT *against* DENNIS. *Saturday, June* 7.

Trover.

In trover for several goods, inter alia pro 400 virgat. texti de serico & pilis confecti, which, by Jones, is uncertain, no species being shewed of it by any Anglicè stuffs; but, by Twisden, Hill. 1659, trover for hydes held good enough, Pool and *Cotley*, so of stockings; and so he conceived here. Windham ad idem; Possibly there is no proper English word for it, and this description of the matter, being a new stuff, is sufficient; which Foster and Mallet agreed. Judgment for the plaintiff.

39. GAYTON *against* RAYDON.

Jurisdiction.

The Chauncellor of Oxon demand conusance of the action, being debt betwixt the beadles of the university, by special warrant to attornies, and brought into Court by rule, which being put in form of plea, the Court granted, nisi.

40. ARMIDEL EXECUTOR OF ——— *against* TREVILL. *Ante.*

Replevin.

Allen for the plaintiff, that not guilty of the taking is no proper plea in replevin, the caption and deteyner are several, and the one may be lawful the other not; therefore to say not guilty de captione within six years, is most improper: but, by Baldwin, This is only informal, but doth amount no non cepit, which is the proper plea in replevin: non culp. in debt on 2 Ed. 6 may be naught on demurrer, which the Court agreed; but is good after verdict. Windham agreed the plea good, and amounted to non cepit, so Foster and Twisden: but, by Bear for the plaintiff, 12 Ed. 4, 5, Replevin F. 21, the deteiner, as well as that caption, is to be answered; and in recaption the injustè is applyed to the detinet, therefore it must be answered; and though non cepit generally be a good plea, yet this special non cepit within six years, is ill, and negative pregnant, which the Court agreed on demurrer. 2. Baldwin for the defendant, Replevin lyeth not by executors of a caption in the life of the testator, 6 H. 7, 8, 9, but they ought to have had trespass on detinue, especially the property being alledged in the testator, Regist. 94. Allen for the plaintiff, that at common

law this [318] replevin lyeth, the property continuing to the executor, though they might have had detinue; but this action as trover, or quare impedit, or ravishment of ward, are undoubtedly within the equity of the statute, which the Court agreed, in omnibus replevin, is founded on the present property, not on that at the time of the caption. Judgment for the plaintiff.

41. HUTCHINSON *against* CLAYTON.

Attorney.

Want of warrant of attorney after verdict, is expresly helpt by 18 Eliz. per Curiam, except Twisden, which doubted it.

42. MARCHANT *against* SHORT.

Courts. 2 Cr. 567, pl. 3.

One must plead recovery in Inferiour Court especially, and not only quod cum recupasset, as in the Superiour Courts in Westminster. 2. Error cannot be brought in one Inferiour Court on judgment in another, per Curiam, but was held erronious.

43. BORMAN *against* HAMMON.

Bail. Godbolt, 267, pl. 369.

In scire facias on recognizance of bail in a writ of error to prosecute with effect; the defendant pleads that he did prosecute with effect; whereby the judgment was reversed quod paratus est verific. and doth not conclude prout patet per record. for which cause it was on demurrer ruled ill.

44. TARLING *against* DEALTON. *Ante.* In Detinue Br. 2.

Executors.

In trover brought by executor, the defendant pleaded that the testator dyed intestate, and that administration was committed to A. who sold the goods to the defendant: to which the plaintiff demurred, as amounting but to the general issue, and so was the opinion of the Court; and so Twisden, it was here ruled in the case of money said to be delivered as a pledge. Judgment for the plaintiff.

[319] 45. THE KING *against* LAMBERT. *Ante. Munday, June* 9.

Treason. 11 H. 7, c. 1.

The evidence against him was taking a commission from the Parliament in 1659, and opposing General Monk and Sir George Booth, (which though not one word had been said of the Kingly interest) was per totam Curiam, held treason: and though the actual war was made in another county, yet the very conspiracy and acceptance of the commission was held treason in Middlesex, as was delivered in evidence to the jury, that after found him guilty.

46. WADE *against* SHAW. *Tuesday, June* 10.

Variance. Stiles 183, pl. 419.

Venire facias awarded retornable coram nobis, which should have been coram Rege, was in the case of *Friend* against *Baker*, per Curiam, amended after error brought in the Exchequer Chamber; so the quæ quidem being less by miscasting the sum.

47. FOSTER *against* FOSTER. *Ante.*

Assurances. Pl. Com. 152.

Windham was for the plaintiff the younger son, and conceived that here is no use raised by demise, grant, bargain and sale, and set over, which indenture was found in hæc verba; and that it was as well for affection as money; and that Margery that sold is yet living: although this cannot rise at common law, yet is it not necessary it should rise as a use, but the intent must guide: and the jury shall not conclude the Court when the indenture is found in hæc verba, which is the ground on which the Court must build. And in this conveyance is no intent to pass it otherways then at common law; and this is the best construction, not to strain the words beyond the literal words; although anciently this raising uses was more favoured; but in consideration of affection, will not raise a use now, Dyer 302. 40 Eliz. *Sherfield* against *Fen;* it was agreed against the opinion of Plowden, that no use will rise by grant, gift, conveying or assuring for marriage, affection, &c. 1 Inst. 49 a. and especially here being another consideration mentioned, and the words demise and grant are proper words of common law; and **[320]** though another consideration may be averred, yet the express is that which guides the jury and Judges to the intent, as *Harpers case*, and the general words, other good cause, do signifie little; and *Pitfields case* is unanswerable, no difference being betwixt a demise after my death, and a reservation to me during life: and in all the reports, the words of the conveyance are considered, and this can have no other exposition; dedi & concessi importing a present grant, and so nothing in futuro could have made this good: but the intent was neither to convey it at common law, nor by use in this case, being only articles of agreement, referring to a future conveyance: this intent appears by the frame of the conveyance, and no remedy by distress, &c. will lye for this rent, but only debt on the agreement: also the feme did not intend to have a bare estate for life, but might, as auncestors use to do, be unsubjected to wast, and that she was to have Matthews barn, is not material, it not appearing that it was Williams her husbands, or that she was dowable of it, and she was to have it, which refers to a future act: and the meaning appears in the after feoffment to the younger son, lessor of the plaintiff, which is a good conveyance.

2. Twisden ad idem: that no use riseth to Matthew, though the consideration be well and fully found by the jury, yet it appears to be made especially for 20l. Dy. 140, both stand well enough together. *German* against *Johnson*, Rot. 163, B. R. 1649. Demise paying debts and legacies, and his estate was found worth but 5l. and his debts were 40l. whereby it was adjudged a feesimple passed; general words in a deed may be used as best for my advantage, but with due consideration of circumstances, as dedi, concessi, is a confirmation: so grant of a reversion, as *Foxes case*, for money, may be used as a bargain and sale; and *Sharingtons case* Dy. 96, Pl. Com. 391. The covenant is not that which raiseth the use, but the intent: and *Manxels case*, when divers considerations are expressed, it may be used either way, and so is *Bedells case:* and to judge when these general words may, or may not raise a use, the intent of the parties is considerable, which if to be executed at common law, shall never be raised as a use; so was *Teb and Poplewells case* against the opinion of *Popham and Vinians case*, Dy. And here Matthew conveyed nothing but what discended from the father, and it doth not appear that this barn is so: wherefore the words are gene-**[321]**-ral in a deed, and there is a good consideration, and it stands in equality to be passed at common law, or by use there: if only want of ceremony be to pass it one way, it may pass another; and dedi & concessi in consideration of marriage to my son will raise a use, C. B. Hill. 1655, Rot. 1578, *Sanders* against *Savill*, as well as covenant to stand seised, as *Sharingtons case:* so *Wats* against *Dixe*, Stiles . . . Bargain and sale in consideration of affection, and that she had disbursed money, and provided necessaries for him, this passed by bargain and sale though the consideration were past. But it was said by Rolls, that if it had not passed by bargain and sale, it would have passed by covenant to stand seised, being both the same way; so 2 Cr. *Osborns case*, and if cestuy que use joyns with feoffees in a lease, its the lease of the

feoffees; but if the deed cannot operate that way, as is expressed, if all circumstances be executed, it shall not be helpt, so *Pitfield* against *Pierce*, Rot. 430. March Rep. 13 Car. 1, by making it as a covenant to stand seised; so *Bulkly* against *Simmons*, Hub. and take this (she reserving) as a reservation or condition, or exception, 38 H. 6, 38, it is repugnant to the deed, had it been executed as a feoffment: and so this conveyance being void in the fabrick, shall not be supported; as covenant to stand seised; and in *Callards case* had the declaration been made by deed it had been void. 3. Mallet ad idem. 4. Foster said the opinion of Walmsey was agreed by all the Judges to be law, that bargain and sale to his son passed nothing, *Ward* against *Lambert* 37 Eliz. and agreed with the rest for the plaintiff. Judgment for the plaintiff.

48. STEPHENS *against* BRETHERIDGE. In Discontinuance Br. 38.

Siderf. 83, pl. 10.

Windham, The case is, Sir Francis Worsly seised in fee in consideration of marriage, covenants to stand seised to himself for life, remainder to Hester, whom he intend to marry, for life, remainder to the heirs-males which he shall beget on her, remainder to Sir Francis son by another venter before in tayle, reversion in fee to the father; then the father, and Hester his wife, levy a fine to the use of a daughter marryed to the defendant, then they dye without issue male: and judgment ought to be for the plaintiff, viz. Sir Francis the son. That this fine is no discontinuance, this estate being a remainder in the heirs males it is not executed, Lit. 578, but a distinct estate from the tenancy for life, severed by the interposition of the femes **[322]** estate for life, and though the limitation be to the heirs of the same persons, that had estate for life, yet they are not present tenants in tail, by reason such a constitution would overthrow the whole frame of the conveyance, to make the wife joyntenant with the husband, or to drown her estate for life, which cannot be here, no moieties being here executed, they being baron & feme, Lit. 525. Confirmation to baron & feme (she being before tenant for life) makes them not joyntenants for their lives, but she is as before, and he hath an estat for her life; so upon a confirmation to him and his heirs, her estate for life remains distinct; feme tenant for life, the reversion granted to husband and wife and their heirs drowns not her estate for the whole, or for a moiety; and so in the case in question, had the reversion, after their estates for life, been granted to them both, it would have drowned for no part, because it passeth a reversion only in the degree of a reversion, being by one and the same conveyance; and this is not like *King and Edwards case;* lands given to husband and wife and his heirs, is present estate tail in possession executed in the husband, conjoyn'd with the freehold in the wife, in that case was a feoffment, which is stronger than this case, which is by fine. And *Peck* against *Charnel*, 3 Cr. 827, cometh nearer to this case; but there the whole estate was in the husband, but the present freehold was in the right of his wife, therefore their joyning in a fine is no discontinuance; and the principal case of *Bredon*, 1 Co. 76, was never denied for law; and here is no displacing of any estate neither, but each granteth what they may: but the construction of *Bredons case* hath been denied in *Baker* against *Huckings*, 1 Cr. 405, pl. 480, this conveyance meddles not with the possession, as a feoffment doth. And here is a distinct remainder grantable over, and each passeth what he may, and so the lessor of the plaintiff hath a good title.

(2.) Twisden held that here each use ariseth by this consideration, being a covenant in consideration of a marriage to be had, he and his heirs would stand seised, this must execute presently, and so doth. 2. He conceived that the husband was no present tenant in tail, but in remainder. And 3. This fine is no discontinuance, as its agreed it would be, were they tenants in tail in possession. 4. This is no displacing of the remainder: as to the first point, he held that a use ariseth, being by way of remainder, *Lord Pagets case*. But 2. The main doubt is, what estate they have, whether a joynt or several estate; but he held it is not executed in her, **[323]** which he grounded on Littleton 225. For if the fee-simple would not drown it, neither would the estate tail, if this, being by several deeds, remain distinct, it is as reasonable to be so, being by one confirmation, 7 Co. 190. 3. This is no discontinuance most

evidently, and was resolved without doubt in *Pecks case*, and *Sir John Davis's case*, 14 Eliz. Hub. 277, pl. 358, *Clanricards case*. 4. That here is no displacing but at the election of him in reversion, 1 Inst. 325, so is the case of fines, *Sir John Davis's case*, who was tenant for life, remainder to his wife, remainder to his issue male, remainder over, he had issue who was attainted, there it was resolved that these estates were distinct in the husband, and not executed, 7 H. 5, 2, and that the fine of baron & feme was no discontinuance: but the question was, whether the fine were at common law, or by statute, the tenant in tail dying before proclamation passed. 2. Whether the warranty did displace; and held that it did not, but at election: and the consequence of these two last points were, that had the fine been at common law, the remainder had discended to the issue attainted, and so the King seised without office: and here the lessor of the plaintiff sealing a lease, hath put himself out of possession.

(4.) Foster ad idem; but that the case of Littleton cometh not to this case, that being only the acceptance of the husband, which could not hurt the wife: and where an estate is limited to A. then to B. if by the same deed any reversion be limited to A. the estate is executed to some purposes, and he conceived to this, and the use as limited was agreed good to the feme, if she marry before the reversion hap, as was agreed in the serjeants case in his call; he agreed him not out of possession, but at election. Judgment for the plaintiff.

49. THORP *against* BAYLY. *Ante. Wednesday, June* 11.

Officer.

In action upon the case for disturbing the office of a water-baily; after verdict for the plaintiff, it was moved in arrest of judgment, that this office anciently was not grantable, time out of mind, by the King and his predecessors. Sed non allocatur.

[324] 50. LORD GORINGS CASE *against* LACY.

Covenants.

Littleton for the plaintiff, prayed that action of covenant, after demurrer joyned in 1656, being long since, might be discontinued, which the Court would have granted, had it never been argued, or had a fatal fault been espied before argument, the Court would give such leave: but here the covenant being for a certain sum of money, and utlary pleaded in bar, because debt also lyeth, and demurrer thereon, and now pleaded in a new action in abatement, the Court refused to grant it.

51. BROMWOOD *against* EASTWICKE. *Ante.* In error, Br. 55.

Execution. 2 Roll. 492. Yelvert. 6, *Tococks case*. 3 Cr. 597, pl. 2. 2 Cr. 73, pl. 2.

Sir Richard Greenvils case, by Twisden, is express, that on fieri facias sued out, and then retorn'd, as *Baud* against *Metholds case*, Dyer 99, that the goods remain pro defectu empt. by error or supersedeas sued out, after that the vendition is not hindered, but if the error were allowed before, then though the sheriff be unpunishable, yet supersedeas, notwithstanding execution done, shall go, quia improvidè. And, per Curiam, if the goods be sold, the money may be brought into Court to be restored to the party, but if not, the goods may be in specie restored.

52. THE KING *against* SIR HENRY VANE, *ante*, AND LAMBERT, *ante*.

Treason. See the form of the writ directed to the justices thereon, in Register 182. 27 H. 8, 24 b. pl. 3.

Sir Henry cited Westm. 2, cap. 31, that he ought to have a bill of exception seal'd by the Court, and the indictment to that end read in Latin, which the Court

denied, as a thing unreasonable, the statute not extending to any indictment, by Glyn the Kings Serjeant, for this is no supersedeas; but that judgment and execution may be had notwithstanding, and so this would be to no purpose, and no goal-delivery would ever be if it should be allowed. But by Sir Henry Vane, the Parliament have declared that execution should be remitted in case judgment passeth; which petition of the Houses, and grant of the King, were read. Windham, Did the prisoner not understand English, it ought to be read in Latin; but no copy of the indictment was ever delivered in Latin or English. Twisden, as the rest, delivered his opinion, that a bill of exception is not within the statute, nor ever heard of; and at common law this bill lyeth in no case. The Chief Justice having given judgment, declared that the pe-**[325]**-tition of the Houses, was not to be allowed by the King, in case the prisoner were obstinate, as he had been in broaching ill documents and fundamentals. 2. Lambert excepted to the indictment, that he was named without addition, which was mistaken. And so the Court gave judgment, and declared him more capable of the benefit of the Houses petition then Sir Henry Vane, by his fair carriage: and Sir Henry Vane soon after was beheaded on Tower-hill, and Lambert sent to Gersey.

53. ROSE *against* KITCHINGMAN.

Error.

Upon verdict for the plaintiff in C. B. they use to enter continuance only for the plaintiff, without giving day for the defendant, which was assigned for error. Adjornatur to search presidents. Yelvert. 97, pl. 32.

54. WINDEBANKE *against* BEAR. *Ante. Thursday, June* 12.

Officer.

The office was alledged to be ancient, and grantable by the King, time out of mind, to four persons, who waited in turn each three months, which were distinctly known, and had particular drawing fees, besides a part in general to be divided, which was worth above 200l. per annum. The defendant shewed that his months were not the months the plaintiff claimed, and so no disseisin, the times being parcel of the office, as a moveable inheritance, but no office being ever granted for certain months, and these months changed by the Kings special command, non allocatur. 2. It was agreed, that rightful receiver paying fees over to a stranger, maketh no disseisin; but if such rightful officer receive in anothers right, he is a disseisor at his election that hath a right, as this clerk, accounting at his second tourn for his first, which was the plaintiffs, was held in evidence to the recognitors of assize. 3. It was doubted whether patentee in reversion, Dyer 197, may enter without office or scire facias. 4. It was agreed that non-attendance of necessary office is forfeiture; and the King need not summon the party, but a recognizance cannot be avoided but by matter of record. *Post.*

[326] 55. LUFTON *against* JOHNSON. *Ante.*

Error. Br. 55. 2 Cr. 73, pl. 2.

If error be brought and shewed to the attorney, Tr. 1659, *Baud* against *Methold*, *Dobbing* against *Druncall*, if execution proceed a supersedeas, quia 2 erronice may go, Dy. 99. 3 Cr. 597, pl. 2. Moor, pl. 569, the fieri facias is the execution and the vend. expon. but proces on it, and if sued out after the roll markt for error, and due notice, all may be undone: but if the attorney nor sheriffs had no notice of the error brought execution done, cannot be undone, per Curiam, contra Twisden: but per Curiam the money may be brought into Court, so long as the cause is not out of their hands. *Post* 327, pl. 61.

56. THE KING *against* RANDAL. *Friday, June* 13.

Pardon.

It was doubted on special verdict, whither tymber cut and sold by vendees of the Kings lands, be pardoned by the Act of Oblivion, or excepted by the words, goods of the King. And Windham conceived that this was profits, and not properly goods. Adjornatur.

57. SHEPHERD *against* WAKEMAN. *Ante.*

Slander. 2 Cr. 4, pl. 4.

Twisden conceived the action lyeth, by reason no colour appears for writing it, which should have been in evidence: and sciens is not here necessary, because the thing lyeth properly in the defendants conusance, as in action for forging of deeds its needless, contrà for publishing, that must aver quod sciens that they were forged. And he conceived the want of place of writing the letter, is ayded by 21 Jac. the visne being at one of the places, and no proper issue arising in other place than where the visne is. Windham agreed the words actionable, but not without a scienter alledged in the defendant: so Foster; no falso & malitiose being found, but only that the defendant was guilty of the writing. *Post.*

[327] 58. BOOTH *against* BEARD. *Ante. Saturday, June* 14.

Error.

An original filed the same term that judgment be entred, its by course of C. B. held to be sufficient to warrant a count before, which was here assigned for error: but by Twisden, The difference is when the record of Hillary term only is certified, and after the original is certified, as of the same term, that's good: but if the imparlance be certified from Michaelmas to Hillary, that cannot be warranted by original of Hillary term; which the Court agreed: judgment reverst, being the original appeared to be entred after imparlance.

59. OLIVER *against* HARDWICK. Error Fitzh. 40.

Ejectment.

If error be brought in ejectment before the last judgment on the writ of enquiry, and no capiatur entred, its error, by Twisden, and hath been so often ruled. Adjornatur.

60. COOPER *against* GIPPING.

Covenants. 2 Cr. 383, pl. 11. That in action of covenant its good, but such pleading in action of debt for rent, is held void.

Pleading of demise, quod testatum existit is ill on demurrer, but good of an indenture of covenants; but both are ayded after verdict in debt for rent on such demise per Curiam.

61. LUFTON *against* JOHNSON. Error Br. 55. *Ante* 326, pl. 55.

Execution.

Windham, If execution be done after notice of error brought, or the roll markt, all all may be undone, especially on cap. ad. sat. if the roll be markt before the writ of execution sued forth, but otherways not, 3 Cr. Tr. 1649, *Baud* against *Methold;* the Court awarded the money to be restored to the party, nisi, the party having notice of the error.

[328] 62. SMITH *against* WILCOXE. Error Br. 90.

Error.

Want of pledges to a writ of previledge was assigned for error, ore tenus, which the Court conceived well enough, and that the defendant may pray diminution if it be false. Sed adjornatur.

63. LITTLEBOY *against* WRIGHT. Sinderf. 85, pl. 14.

Hill. 13 & 14 Car. 2, Rot. 1484.

[See *Darleymain Colliery Company* v. *Mitchell*, 1886, 11 App. Cas. 142.]

Slander. To say of a justice, or officer, he took a bribe, is actionable without averment that the officer, or he is justice. Infrâ.

On the case of *Hornwood* against *Loe*, it was moved by Maynard as error, in action upon the case for words spoken within the jurisdiction of the Court of Marshalsey, by which she lost her marriage; not saying where this loss was, or where he refused her: he agreed, where the dammage is only consequential, as to call a taylor thief, by which he lost his custom at D. This will lye in Inferiour Court; but not so where the dammages is the gist of the action, the cause of the action beginning with the loss. Wild for the defendant in the writ of error; The action is for words, and the conclusion by which she lost marriage is not traversable, and it appears not where the loss was. Windham, If loss of marriage happen seven years after the words spoken, viz. that she is a pocky over-ridden whore, the cause of action begins now, which Twisden agreed; but contrà of a release made before the loss happened: and the case of the taylor cometh not to this. Maynard conceived this special loss traversable; which Windham denyed. Adjornatur.

64. *Monday, June* 16.

Nusance.

An information for a nusance may not be quasht without certificate of removal; but this being for throwing dust and durt into the highway, ad commune nocumentum, not saying that the way was stopt or straitned thereby, the Court stayd process till farther motion, but on indictment would stay nothing.

[329] 65. THE KING *against* BOWDAGE.

Perjury.

Information of perjury in answer in Chancery on interrogatories, which were asked touching bond made by A. which was made as executor. 2. As the case of *Rud and Win*, there is no special dammage, is alledged, which is not necessary, unless the information be on the statute 1 Cr. 180, and *Huntleys case* as commissioners; so this ought to be said sub Magno Sigillo; but per Curiam, its good either way in indictment. Judgment for the King.

66. THE KING *against* EVANS. *Wednesday, June* 18.

Peace.

Wogan moved to quash indictment of riot, being at the Great Sissions of C. and not for the county of C. 2. The jury are not said sworn (ad veritatem dicend.) nor that they were prob. & leg. hom. Quasht.

67. THE KING *against* WOOD.

Trades. P. 1 Ed. 3, 8, pl. 5, gist. To Johan, the wife of Jacket the barber.

In information on 5 Eliz. 4, for using the trade of a barber, not having served seven years: Windham conceived it lay; contrà by Twisden, no more then a gardiner; but by Wild for the plaintiff a gardiner is but a husbandman, but a barber by 32 H. 8, 42, is taken notice of in the statute as a trade. Adjornatur.

68. WHALLY *against* ANDERSON.

Priviledge.

Sir Jeffery Palmer moved for my Lord New-castle, upon a declaration delivered two terms since, when the Parliament was sitting; and the House of Lords ordered his priviledge, being lessor of the tenant in possession, which this Court will not allow in ejectment, unless the lord be tenant in possession, though the Lords may by special order; but however priviledge be allowed, yet the delivery is good as to this Court, who will not take notice of priviledge unless due to the tenant in possession; because else no right should ever be had against priviledged person, and this declaration being delivered to a person not priviledged, is good **[330]** enough, and by Twisden & Curiam, the priviledge is but 20 days after the Parliament.

69. WINDEBANK *against* BEAR. *Ante.* Siderf. 80, pl. 6.

Office.

Wild for the plaintiff moved for judgment in the assize; the recital in the patent to the plaintiff being, that the four persons mentioned were in possession, is sufficient without averring that former persons were dead, and three of the four being said dead, and the plaintiff last of the three next grantees in reversion, and said to be debito modo jurat. & admissus, of necessity the two others are intended supplyed after verdict, *Stonehouse* against 1 Cr. finding him debito modo admissus virtute literarum patentium, per Curiam. Judgment for the plaintiff.

70. HARRISON *against* KNIPE. *Ante.*

Damages. 3 Cr. 497, pl. 17.

Allen for the defendant, There is by this plea non debet and issue, a good confession of the debt and the damages, when assest by the jury, when the Court adjudgeth it, it's quasi an assent, especially in this action of debt wherein the Court ex officio taxt them. But, per Curiam, had the damages taxed by the Court been distinct from those of the jury, nullo habito respectu, it had been well; contrà here when the jury taxt such costs and damages as the Court should. Judgment reverst.

71. PERKIN *against* UNDERWOOD.

Rents. March, 104, pl. 178, an assignment after distress extincts the rent before remedy. Stiles 388, pl. 852. 2 Cr. 126, pl. 13.

In action of debt for rent, defendant pleads tender & uncore prist; the plaintiff having received the money, replyes, that he had not tender, and a verdict for the plaintiff. Allen moved in arrest of judgment, that the writ was abated by the acceptance of the money, which the Court agreed, it not being possible to proceed for damages after the principal money received.

[331] 86. THE KING *against* TRINITY HOUSE. *Ante.* Siderf. 86, pl. 15.

See Mich. 14 H. 4, 7, pl. by Hawke in the case of Glocester fee, he must conclude one way in certain avowry, Br. 45, seu 46, but he may use it any way, 14 H. 4, 37. Avowry Br. 47. 9 H. 6, 22, pl. 18. Double Plee, Br. 9, dedi & confirm. to tenant in possession is a release, seu 48. 2 Cr. 605, pl. 33. 22 H. 6, 10, pl. 13, by Pole, semble.

Windham would not deliver opinion that the grant was void, or that they may not take sand, notwithstanding the second grant; but he conceived the plea insufficient; but yet said, the pleading by give, grant, and confirm being synonimous, is well enough, there being no precedent grant before; so of a deed that might enure as bargain and sale, or feoffment by enrollment, or livery at election, may be used every way. *The King* against *Bridges*, M. 17 Jac. ruled accordingly on exception taken to a quo warranto: but 1. It should have been said an ancient office, Dyer 71. 2. It should have been said that the digging of gravel was used as appertaining to the office, 1 H. 7, 29, and not in gross, for the things claimed must be fixed together in the prescription, else its but an ill usage; and yet he conceived, this judgment being in information, was not final and conclusive, as it had been in a quo warranto, which is a writ original, 2 Ed. 3, 90. 6 Ed. 3, 11. 20 Ed. 3, in which aid and voucher lyeth in the Exchequer, Kel. 141, 139, *The King* against *Sir Edmund Bacon*, for the liberties of Bury, this difference was agreed, and so he conceived here. And 4. The grant of lastage and ballastage doth not necessarily suppose the taking of sand in this place. Twisden held the grant good, and that Trinity House may well digg in this soil, & cum pertinentiis signifieth nothing in most grants, especially in case of the King; but 8 H. 7, 4, the grant of an office alone passeth all things that make up the office, or belong to it time out of mind, *Throgmorton and Tracy*, Pl. Com. 156 b. 1 H. 7, 29. 2. He held the pleading ill, concluding no certain way which must be, though it might have been either way at the parties election, yet he cannot jumble altogether, *Pitman* against *Pain*, Dyer 115, in ejectment the same exception taken; and though this cannot enure no other way, yet its not sufficient. 3. This must be said an ancient office, else the prescription for the King and Queen to grant is not warranted, so *Evesque de Salisbury*, 10 Co. 59. Hub. 44, and *West* against *Crawly* in action upon the case for stopping of lights, on plea that he had a house in A. and lights time out of mind; he was of councel, and could **[332]** never get judgment for the plaintiff on such count after verdict, but was fain to compound it. And 4. It must be said as appertinent: and 5. The right of the case never cometh in question here, being but an information, not a quo warranto. Mallet contrà. Foster agreed with Twisden in omnibus, and that the grant doth not warrant digging in express terms, lastage and ballast, being general terms, which may be satisfied without digging, and therefore the soil of the Thames being the Kings, it must be specially said incident or appertinent, or the grant thereof specially pleaded.

[333] DE TERMINO MICHAELIS, 14 CAR. II. B. R. DIE JOVIS, 23 OCTOB. ANNO 1662.

Foster Chief Justice; Mallet, Twisden, Windham.

1. OLIVER *against* YEAMES. In Debt Br. 100 (seu 99).

Assumpsit. March, 75, pl. 114.

In action upon the case on promise, Allen moved in arrest of judgment, the count was of an agreement for a fine of 60l. to make a lease, and in consideration the plaintiff would pay 60l. to the defendant, by such a day the defendant would deliver up the lease thereon, and quiet possession to the plaintiff, within a week after the day of payment of the money, and assigns breach in not delivering up possession, and doth not aver the 60l. was paid. Twisden, On mutual promises an averment of performance is needless, contrà where one is to be done on the other, which the Court agreed. Judgment staid.

[334] 2. LEWIS *against* THE LORD FITZWILLIAMS.

Execution.

Maynard moved to set aside judgment had in scire facias into London with two nichills, without notice to the defendant, being on judgment had twenty years since, and the debt of A. being bankrupt was assign'd and pleaded by the defendant as his bail to the assignees of the commissioners, which the plaintiff knew. But, per Curiam, Being according to the course of Court, it shall not be vacat; and though error cannot be brought, yet the defendant may have audita querela; but the Court ordered the money taken in execution to be brought into Court, and stay till the audita querela determined, so was the case of *Barcocke* against *Thomson*. *Post.*

3. THE KING *against* BURGESS, &c.

Restitution.

Winnington moved for restitution, the indictment of force being found the last term, and removed hither, and no prosecution till now, which the Court granted. Nisi.

4. BELLAS *against* NICHOLLS. *Ante.*

Error.

The Court awarded an attachment against the Mayor of Banbury, &c. for refusing to allow a writ of error when the plaintiff in Court disowned it, which Allen prayed might be taken off, and time given to make a retorn, there appearing no contempt, though the mayor having taken security of the defendant, (who affirmed he had a consent) to save the mayor harmless, which the Court granted; but the writ must be retorned, how faulty or erroneous soever.

5. LATHWELL *against* FISHER. *Friday, Octob.* 24. Siderf. 78, pl. 1.

Covenant.

In an action of covenant on bottomree, that a ship in the Thames should go a voyage to A. in Spain, et non directe vel indirecte deviaret. To which the defendant pleaded general performance; and Barrel accepted on demurrer, that it was ill, it being a negative covenant, to which the Court inclined; but that if the covenant were intire, and had been only to proceed directly to A. and not to deviate it, had been a sufficient plea. Adjornatur.

[335] 6.

Proof.

Nota, By Maynard the Kings Serjeant in Chancery betwixt Gee and Spencer (which was agreed by all the Bar) that in action upon the case at common law, or bill brought by the son upon marriage, on agreement made by the father, the father may be a witness, though he also might have had the bill or action.

7.

Jurisdiction. By which she lost marriage, not shewing where good.

In action upon the case on promise to pay money for beasts sold, the plaintiff counts in the Marshalsey, that the defendant was indebted infrâ jurisdict. and doth not shew where the sale was, which per Curiam is error. Sed adjornatur.

8. WATS *against* PHILIPS. In Condition Br. 5.

Arbitrement. Condition to pay to heirs or assigns, may be paid to executors of feoffor, but must be only to the heir of the feoffee. 1 Inst. 210. Arbitrement to pay to J. S. an estranger, or his assigns on his death, shall be paid to an administrator. 1 Leonard, 316, pl. 443. Hub. 9, pl. 19. Payment to be to such person as H. shall name by will in writing, shall not be to executors. Tender to executors of feoffee is sufficient on condition to pay to him, his heirs or assigns. So is Dyer 181, pl. 50.

Arbitrement that the defendant shall seal and deliver a demise to the plaintiff or his assigns. The plaintiff assigns breach, that demise was not made to the plaintiff, not mentioning that it was not done to his assigns, which by Winnington is ill, as the case of *Trevor* against *Elmes* out of the Exchequer Chamber, 1658. But by Twisden, The case of Trevor was held well enough, and lease cannot be made to assignee, unless he be particularly named; but its well enough made to him and his assigns, as *Chapman* against *Dalton* in Pl. Com. 286 b. and it is not intended to be to the plaintiff, or whom he shall name. 2. It was to seal and deliver a deed, Anglicè a demise of freehold; which, by Winnington, is not sufficient to pass the estate, 8 Ed. 4, 11, but non allocatur; for it is at least at will, and so long as it continues the rent must be paid, and the intent is here to be observed also. And here the defendant pleaded general performance; and after verdict for the plaintiff, this was moved in arrest of judgment, and the rejoynder was that he did seal and deliver accordingly, which the Court conceived well enough. Judgment for the plaintiff.

[336] 9. BRIAN *against* FITS-HARRIS.

Pope.

In error out of the Marshalsey on judgment on demurrer on the evidence, for not producing the writ or copy of capias out of B. R. upon arrest on promise to pay debt due from the Colledge of Jesuits, if the plaintiff would forbear arrest of Hanmer, (not shewing where, or that he was) one of the colledge, and should never molest any of them, Twisden conceived both error, and that they could not take notice of this in Inferiour Court. Adjornatur.

10.

Slander.

Action upon the case quod crimen suspitionis feloniæ ei imposuit; Stroud jun. moved in arrest of judgment; that the action would not lye; but Curia contrà. Judgment for the plaintiff. Nisi.

11.

Wales.

The Court refuse to award a prohibition to the Court of Marches, all presidents being only to the party himself, but after granted it, quia comitatus Anglic. upon motion of Smith of Glocestershire.

12. *Saturday, Oct. 25th.*

Tryals.

Sir Ralf Bovy moved for tryal at Bar, which was opposed by Wild recorder for the defendant, because the plaintiff had layn still two years, and had not given two terms notice; but by Allen, The defendant is person priviledged, and so they could not proceed sooner; and this differs not from injunction in Chancery, whereby if the defendant be hung up, such notice is needless, it being his own default, to which the Court enclined: but being a special case, day was given to shew cause against the bar tryal.

[337] 13. MANBY *against* SCOT IN EXCHEQUER. In Contract, Br. 19. *Ante.*

Baron & feme. Jurisdiction of avoutry, &c. of priests, is given to the Spiritual Court by 1 H. 7, cap. 4, when the conclusion is on single point, the Court will doubt no more; contrà when super totam materiam. In attaint si payment de rent de tertant at suffrance in gross to bayly de seignior, make him tenant at will, &c. Dyer 173, pl. 15, 10. Find seignior enfeofft son heir apparent ne serra entend by covin; 27 H. 8, 8, pl. 22. Verdict must be such as the issue may bear. Hub. 103, pl. 132. Verdict find feoffment as made, and pray advise if it be disseisin in assize. Attaynt Br. 69. March, 11, pl. 41, on alimony allows she may take goods. March, 80, pl. 129. That abbe was elect by minority on unque abbe prend, is no good evidence, yet found by a special verdict, is good 9 H. 6, 34 by Caund. Bargain of goods is sufficient assumpsit found by special verdict, though it be found there was no other promise 4 Co. 92 b. See of special verdicts must have substance, pag. 256. 2 Cr. 503, pl. 20. In an information, the point must be precisely found usury or perjury, contrà an action. 2 Brant. 147 d. pl. 378. In debt, Br. 112.

Windham for the defendant observed on the special verdict, that there was a reasonable evidence whereby the jury in Guildhall might have found an assumpsit of the husband, as that she offered to cohabit, that the husband allowed her no maintenance, that the wares were necessary, and sold for reasonable prices. But on this special verdict the Judges here can find no assumpsit, nor ground the judgment, had it not been also found that she departed, and that the husband expresly prohibited, which weighed down his opinion for the defendant, as Littletons case in the Chancellor of Oxford, 10 Co. 56, where as much evidence of fraud, as could be, was found; yet not finding the express fraud, the Court will not find it; as trover upon demand, and denyal shall not be concluded by the Court, unless the jury find it a conversion. Most of the arguments at the Bar have been founded on the necessity, which yet is not naturæ, but convenientiæ, for by all laws, in necessity men may lay hold on the next opportunity, as to lay hold on another mans meat; at least, this doth excuse of the crime, and were this necessity allowed extream, the jury could not find it; but the manner and form must be specially pleaded, 3 Inst. 220, Stanford 15, or else the circumstances must be specially found. As to the point in law, as here found in the best sense, the law doth not enable her to contract to bind the husband in no case of sævitia, or otherwise of the husband; its a rule of law, that contract which binds the husband must have licence precedent, or assent subsequent; I allow, if my wife be house-keeper, she may take up necessaries, that being a licence in law; and such contracts shall be qualified according to his estate; but if the husband use to send his wife or servant with ready money, if she payeth it not, but taketh upon trust, the husband or master is not chargeable, 11 H. 6, 30, pl. 16, *Scots case* against *The Abbot of Fountains;* if the caterer or manciple take up any thing ad usum domus, he is bound thereby,(1) so action upon the case, Br. 5. 27 H. 8, 25, *Tathams case*, by assent subsequent she is enabled and capacitated to contract ab initio, 34 Ed. 1, Debt F. 163, **[338]** this difference is shewed plainly, 21 H. 7, 40 b. pl. 64. 14 H. 7, Debt F. 160. 2 R. 2, Br. Contract 40. If a woman buyeth goods, and the husband payeth the money generally (unless there be an assent wrapt up in that) it doth not charge the husband, though it be bread; for by the same reason, she might build houses, &c. which is all to his use, yet is a nullity, F. N. B. 120 G. on view of all the books, 22 H. 6, 20. 13 R. 2, Account, F. 50, concludes the same. The pinch of this case is, the husband allowing no maintenance to the wife, whereby, if she should not be enabled to contract, the law hath inevitably determined her ruine, having left her without means otherwise to subsist: but this reason weighs not; for though she be enabled to take up necessaries, yet the husband may take them again, for the property is still in him, and he may strip her the next day. And the law of England hath ordained a more suitable remedy for her, the Ordinary, whose jurisdiction is proper in these matrimonial causes, as for marriage portion; and its very inconvenient these

(1) Action upon the case Br. 5.

domestick things should be ript up before juries; this meets with the objection before, for he will not only allow her, but fasten it on her, and to excommunicate him, and imprison his body; whereby they have the highest execution of body and soul, which was (what ever opinion of the censures of the church is now) great in former times, and as much remedy as any law can give: and this hath been the proper jurisdiction of an Ordinary, ever since there have been laws distributed by him that had the plenitude of power in his hand, 8 H. 3, upon a significavit of the excommunication, the sheriff should allow her maintenance, which though now out of date, yet the excommunicat capiendo may be awarded, 2 Cr. 364, and 1 Cr. *Drakes case* and *Greens case:* a prohibition hath for this cause been awarded to H. commissioner; and though an infant may contract for things necessary, yet is there no case of a feme covert suited herewith, but only of a moin, but infant meliorari potest conditionem, contrà of feme covert: lease by her with rent is void, so of her feoffment, which cannot be affirmed after his death by acceptance, for she hath no capacity at all, till actuated by him, but is as a moin, and her act alone, without his assent, is a nullity; contrà if her husband joyn with her in feoffment, &c. 2 Cr. 617, *Tracy* against *Dutton*, though the wife made the lease, and marryed but a day before the rent due, yet was the lessee forced to pay his rent again. As to a monk in vacation, he is as a widow, ecclesia est viduata, and yet every monk cannot take up goods in time of vacation, unless made ab-**[339]**-bot after, or be some officer in the house, as by custom and usage they were: the case of relegation is a civil death, and is an anomilar case, and the husband is quasi non in esse; its true, this evidence would very well have grounded an assumpsit, the things being rational to be allowed, but being found specially, this Court cannot determine it so: but this prohibition determins the point otherwise, 11 H. 6, 30, by Martin, is an opinion against all the books without ground, it is only to be intended where the husband made the wife house-keeper; and there is neither assent, or dis-assent exprest, but immediately followeth the case of moin, cellerer, &c. I confess there are no direct books in this point, nor are they necessary to be shewed by me in the negative, but by such as affirm the action doth lye: but cases semblable are Dy. 364, *Poyns case*, where the doubt was not, whither the goods were necessary or not, but whither the payment to the taylor would not make an assent; for if it had been specially found he did pay knowingly, it might amount to an agreement, 5 & 6 Car. 1, *Bill* against *Lake* C. B. where in action upon the case on assumpsit to pay on request for goods necessary taken up by the wife, the husband pleaded the Statute of Limitations, within which the request was, but not the sale of the goods: and the question was only, whether the sale there was cause of action by assumpsit in law, or not till request? The case was compounded, but according to my reports, the Chief Justice Richardson, and the Court did incline, that no cause of action did arise on the contract, but only on the request, which was necessary to be proved to the jury, and the six years to be accounted from the request only; and though an assumpsit did arise, yet the husband may prohibit, especially in London, though not every one, as the King may exempt some from Assizes. And that which guides me in this case, is, the many mischiefs such cases make in Guildhall, and that it's not prudent for the woman to be her own judge in this case; and she will never be trusted, but upon great advantage of gain; and it will not be seemly to rip up these differences of man and wife before juries, whereby an everlasting separation and feud is wrought, which would not be by private examination of the Ordinary; and this is like the seising mens goods, or levying debt before the action brought, which draweth on a violent prosecution, and encourage women to disobedience and extravagance; and so conclude with the advice of Ahasuerus against Queen Vasthi, 1 Esther, 16, 17, 18 verses.

[340] (2.) Brown ad idem, 27 H. 8. 25 Pl. Com. 13, 17. The feme having no mind to contract by word, writing, or record, 34 Ed. 3. Brief F. 923. Husband and wife, and J. S. contract for clothes, in action against them, the wife pleaded she was covert, and good to abate the writ. 2. Not by deed, 1 H. 5, 12, contrà of an infant: release of bond made by infant and J. S. is good as to infant 14 H. 4, 31, contrà as to feme covert, 43 Ed. 3, 10. By record 7 Co. 43. M. 20 Jac. B. R. in error of judgment in C. B. Risly granted an annuity to the wife of Stafford, and desired to compound for it with the husband and wife, and they promised to make such assurances

as R. should think fit; in action against baron and feme for this (however void on demurrer yet) she being dead, she was only named as surplusage, and so judgment was for the plaintiff: and so Hub. 225, she wants will as infant doth judgment, 4 Co. 61, *Ognells case*, she cannot assent or licence any act for which reason the marriage is a countermand of will made by her, 26 H. 6. Attachment F. 4, they shall be distrain'd by his goods, Forfeiture F. 17, and his goods can only be forfeited, 2 Cr. 644, but promises to the wife are good enough, unless the husband avoids them, 39 Ed. 3, 5. 3 H. 6, 23, 37. 12 R. 2. Brief F. 639. Baron sole brings action on obligation made to them both, 3 Cr. 834. *Butler* against *Dell*, Brief F. 939, and no other cases make good promises made to her in trivial things, 2 Cr. 77. 3 Cr. 61. Trin. 6 Jac. Rot. 1717, *Ray* against *Stephens*, action of trover by the husband for money which the feme had lost at cards, and judgment for him; and though she played in his absence, and without assent of her husband, yet he may have action for money won by her: in no case the wife cannot charge the husband, Account Br. 50, is full in this point, Old. Nat. Br. 62, in *Bill* against *Lake*, Hut. 106, it is only videtur Curiæ; so P. 3 Car. 1, *Bowel* against *Langham*, C. B. The wife traded in absence of the husband, as vintner in London, where by the custom of London she may trade as feme sole merchant, but not as feme covert, so 43 Ed. 3, 32 b. pl. 34. 2. The elopement of the wife in April, 1646, maketh this stronger, she came before the action brought; again, the sale was in 1658, and the action in 1659, so without the husbands consent she absented twelve years, contrary to her vow, for which reason the husband is not bound to receive her, or allow her maintenance; contrà if the husband had put her away, frustrà legis auxilium invocat qui in legem committit, 2 Cr. 502, *The Cook of Grays-Inns case*. And though elopement without adultery be not punishable, so not **[341]** adultery without elopement, for hereby she shall not lose dower, as Rot. 1622, *Sir John Stowel* against *Weeks*, Mich. 18 Eliz. C. B. Harpers Rep. 47 Ed. 3, 18. An account against bayliff, who pleaded that the lands were allowed to the wife for maintenance, and she leased, &c. Account F. 32, *Motilams case*, Mich. 14 Jac. C. B. Feme sueth in Spiritual Court for defamation after divorce, causa adulterij of the baron, after which baron released, and held void, the cause of action being after the divorce. 3. This prohibition of the baron makes the case clear for the defendant; for if I forbid any person to trust my known servant, I shall never be charged; so prohibition of one is good enough, though she could charge him, as condition not to alien to this or that person, and hereby the tradesman is satisfied she is a feme covert, and so cannot be misconusant of his condition, Dyer 234. This is one circumstance mainly guiding sale by the wife in market overt, if the buyer knew it not, as 7 Ed. 4, 14, in *Powis case;* contrà of infant who may be known by inspection *Gipson* against *Capel*, Mich. 21 & 22 Eliz. B. R. cited 2 Inst. 713. 10 Co. 43. And I have known many cases of suits by the wife, as of Duncomb, &c. but none this way, 10 Jac. *Sir H. Comptons case*, 1 Brownl. 47, per Curiam, the baron was answerable, but there was no elopement as here: and in the former times when this action began, men sued for legacies, but they cannot do so now. If an infant be clothed by a mercer, the father is not bound for him, and yet the father is bound to maintain him, 43 Eliz. B. R. 3 Cr. *Rippon* against *Norton;* but these are voluntary and charitable acts, and not compellable, 39 Eliz. *Bachelor* against *Macherell*, bond by infant for unnecessary apparel, as with gold and silver for a gentleman of the Earl of Essex, is void. The baron is only bound to provide for the feme during cohabitation, as Pl. Com. 350, and it doth not appear that ever any necessaries were denied, or demanded of the husband: and in *Drakes case*, the husband desired cohabitation, Mich. 10 Jac. C. B. Lady Seymor, libel in Court Christian against the baron, that he beat her, and used her hard, that she dare not live with him, F. N. B. 80, and a prohibition prayed, because she might have the peace of him at common law; but it was denied per Curiam, because the intent and main of the libel was for sustenance; and it's no argument, that because the jurisdiction of the Spiritual Court is too short, that therefore we should enlarge ours; and the wife hath brought this necessity on her self, and its none at all here, for she hath the cloaths, 3 Cr. 367, William; and the mercer that trusted hath **[342]** the only loss; it will be a greater mischief for us to give a judgment without foundation, then on the contrary; for by the same reason she may provide houses, furniture &c. & in omnibus agreed with Windham. *Ante.*

14. HARRIS *against* HAWKINS. B. R.

Toll.

In trespass, for taking a cow, the defendant justifieth that the Bishop of D. had a fair by letters patents, with toll, and that the plaintiff sold certain hides, and the defendant demanded 1d. for toll, which the plaintiff denyed, and thereupon he distrained: the plaintiff replyed that it was ancient demean in which he distrained, which is found against him. Jones moved in arrest of judgment, that the justification was ill, for toll is against common right, and here is no grant nor prescription layd for distreining. Judgment stayd, per Curiam, had not a non pros. been before entend.

15. OLIVER *against* EAMS. *Ante. Monday, October* 27.

Assumpsit. In debt Br. 100, seu 99. Pl. Com. 482.

That promise was to pay at a day certain, and that the defendant upon payment should deliver up the lease and quiet possession within a week after the day: and by Wild for the plaintiff, though that lease be not to be delivered till payment, yet the quiet possession is to be delivered by the day, which Windham agreed; the breach being for not delivering possession, which was to be within a week after the day of payment; but the plaintiff may keep the lease till payment, which Twisden and Foster agreed. Judgment for the plaintiff.

16. MR. SMITH.

Officer.

The oath of the door-keeper and chief cryer, made by patent was, that he should well and truly demean himself, during his being officer, and that he do no falshood, nor suffer any to be done, but thereof inform the Court, and that he increase no fees, but that he do in all things well execute his office, &c.

[343] 17. THE KING *against* BURGES, ALIAS BRIDGES. *Ante.*

Restitution.

Jones moved against restitution upon 31 Eliz. 11, offering a plea, the defendant being first put out, after long possession, which the Court granted, and that according to Lambert, the defendant may indict the prosecutors for the first force; and by Allen, The proper time to offer a plea is, when the prosecutor moveth for restitution, though in another term, it being in discretion of the Court. But, by Twisden, Restitution must be granted, but the Court, ex discretione, may award a re-restitution, because the statute extends not to it: also when a plea is offered, be it at any time, the Court is foreclosed, and cannot award execution, which the Court agreed; and that a plea must be prayed by a peremptory day, and award restitution, nisi.

18. WHITEHOOD *against* TOWEL. Siderf. 88, pl. 4.

Visne.

In action upon the case for a parcel of tallow sold by the plaintiff, laid in Taynton Dean. This by Windham in arrest of judgment, is ill, Hub. 265, and cannot be intended a town, because the dean signifieth the vale of Taunton, 3 Cr. 732, which as the wild of Sussex, or in street, is ill. Curia contrà, This is but the name, as apud White-hall, or apud Lincolns-Inn; contrà if it had been from the Deanry of Taunton, or in the wild of Kent, &c. (contrà by Mallet), but per Curiam, The defendant might plead nul tiel vill. So by Wild, In case of Faukner, action layd at White-hall, in parochia St. Martini in the Fields, the visne being taken of St. Martins, was ruled ill, and the plaintiff could never get judgment; White-hall being there intended a vill:

though Twisden conceived the reason of stay of that judgment there to be because the parish of St. Martin was omitted; and in the case at Bar, though the Judges know it to contein divers vills, yet they must know it judicially: so by Windham, Obligation made at Burdeaux in France, is good, and all shall be intended vill; so in Lydeard, bishop is good, contrà in the Bishoprick of L. So in Easom vale is good, contrà in the vale of Easom, or of forest, 47 Ed. 3. Judgment for the plaintiff, nisi.

[344] 19. HOLE EXECUTOR OF HASKET *against* BRADFORD.

[S. C. T. Raym. 57. See *Phillips* v. *Homfray*, 1883, 24 Ch. D. 445; 11 App. Cas. 466.]

Executors. Siderf. 88, pl. 50.

In an action of debt on 12 Car. 2, c. 17, § 8, for fifths, Stroud moved in arrest of judgment, that the action being given against the incumbent in possession, lyeth not (as brought) against the executors of such person that ought to pay it, as it doth by the executor of the person. Windham, This is an action grounded on a duty, and so is *Chapman* against *Dalton*, Pl. Com. 286 b. the executors are chargeable; contrà where the statute giveth remedy for collateral matter, which the Court agreed: and by Twisden, Where the contract oritur ex delicto, as for not setting out of tythes, action lyeth not against executor of parishoner; nor doth trover lye against executor for conversion by testator by statute; but contrà where it ariseth ex quasi contractu, as *Sir Edward Mittons case*, and as in this case at Bar, which is a remedial law, and the executor is at no prejudice. *Post.* Adjornatur.

20. CRAWFORD *against* MIDDLETON.

Slander. Contrà of such words spoken by attorny to client, Moor 178, pl. 334.

The defendant said he was going to London; and a gentleman met him, and said, I perceive you are going to London with a prisoner, and I will follow with another, namely the plaintiff, son of J. S. for stealing of a mare from Norfolk coasts; which the Court conceived actionable, as well as for false news. Bigland moved in arrest of judgment: but *Megs* against *Griffith*, 3 Cr. 400, is express without any averment of felony committed. Adjornatur.

21. HOLT *against* HARDER.

Estopple.

Recital in bond is an estoppel to say the contrary; but if issue be tried contrary, its good; as non damnificat. pleaded in debt on bond with condition to pay for meat, drink, &c. And the plaintiff replyed quod hospitavit; on which the defendant takes issue quod non hospitavit, and ruled good after verdict.

[345] 22. CRAWFORD *against* DAWSON.

Slander.

Marshall moved in arrest of judgment in action upon the case quod crimen feloniæ imposuit, on M. 2 Car. *King* against *Menick*, Latch, 179, but per Curiam, it's a common case in 1 Cr. 276, pl. 331, *Smith* against *Hutchinson*, &c. 2. It was also for causing him to be imprisoned for three days, which per Curiam, is a consequent damage pursuant to the former. Judgment for the plaintiff. So quod crimen suspicionis feloniæ imposuit.

23. NOBLE *against* NEWARK CORPORATION.

Corporation.

Turner moved in arrest of judgment on a cognovit actionem at the Assizes, in ejectment on a demise of corporation, not saying by deed, 14 H. 7, 17, Mich. 1661, in Exchequer, *Fenwicks case*, judgment arrested for this cause, Curia contrà; they need not say per indent. or scriptum, but it shall be intended after this, as well as after verdict. Adjornatur.

24.

Trades. Moor 421, pl. 581. 2 Cr. 219, pl. 17.

In action on 5 Eliz. 4, for 40s. forfeiture, for exercising trade. Wingfield moved, after verdict, that the trial ought to have been at B. where the cause of action was, which is corporation, having cognisance of such causes by 21 Jac. 4, but per Curiam, the Act being layd at B. in comitatu L. the corporation should have pleaded at the trial, but now it is too late.

25. BUXTON *against* BATEMAN. *Tuesday, October* 28. In Chattels Br. 11.

[See *Churton* v. *Frewen*, 1866, L. R. 2 Eq. 656; *Chapman* v. *Jones*, 1869, L. R. 4 Ex. 280; *Stileman-Gibbard* v. *Wilkinson* [1897], 1 Q. B. 758.]

Church. Siderf. 88, pl. 6.

On 8 H. 7, 12. 3 Inst. 202. 2 Cr. 366, 604. Hub. 69. Poph. 140. In action upon the case for a pue in a church, which the plaintiff claimed by prescription. Allen moved in arrest of judgment, that no ground is laid for the prescription, as that plaintiff did repair, &c. and the difference is where one grounds his title or grant of the Ordinary, or by custom, which after verdict shall be intended good; contrà of such special prescription as this, which Windham agreed, if the pue be in the body of the church; but contrary where it is in an isle which may appertain to a house; and the prescription was to have a seat in quadam cella, which per **[346]** Curiam, is an isle, 1 Inst. 121 b. and doubted whether any ground is necessary. *Post.* Adjornatur.

26. *Ante.*

Visne.

Action upon the case on rescous is out of the common rules of the Court to alter the venue, but it's in the discretion of the Court, *Lady Leicester* against *Sanford*, upon consideration of the circumstances to alter it, as upon an action brought against bankrupt may be laid in the county, or here whence the commission is awarded; and the Court changed it into an indifferent adjoyning county, which not appearing, verdict for the defendant.

27. HERBERT *against* PAGET. *Ante.*

Amendment.

On 4 Car. 1, *Savills case* in C. B. the attorney before a recordatur entred, may enter his own errors for the defendant in action upon the case, for negligent keeping records, wherein, per Curiam, having uncontroulable liberty of coming into the Treasury, there must be some special negligence appear: and thereupon the plaintiff was nonsuited.

28. TALWICH *against* OSBORN.

Record.

In London the Court may force the attorneys to bring in the postea; contrà in the country: but in both cases, notice of it, with the number roll, must be given to the other attorney when it cometh into Court.

29. SCOT *against* SEPHENSON. Siderf. 89, pl. 7.

Assumpsit. 1 Leonard, 173, pl. 241. Yelvert. 16, pl. 26.

In action upon the case upon promise if plaintiff would forbear to sue him, being administrator of J. S. for whom the plaintiff was security, the defendant would pay, &c. Weston in arrest of judgment on Yelvert. 40, *Bosden* against *Thins case*, that this is no cause of action, the intestate being not bound, the administrator is not, Owen 133, *Smith* against *Jones* in Debt Br. 79, the cases the Court agreed for law: but by Windham, the testator being a surety, its a sufficient consideration; and by Twisden, being co-obligor, there might be cause of action against him, and the particulars need not be shewed, *My Lord St. Pauls case*, *Rivers case*, the heir promised on forbearance to pay bond made by the te-**[347]**-stator, wherein it appeared not the heir was bound, yet (which per Curiam was hard) judgment was against the heir, *Jordan* against *Clerke*, and *Rosier* against *Langdale*, Stiles 248, pl. 566. Promise made by the wife in consideration of forbearance against her, to pay debt of her husband, is void; contrà if that the promise be for general forbearance, for that is against all persons; and though there be no cause of action, yet there is sufficient remedy in Chancery, of which our law will take notice. Also here it doth appear the plaintiff had payed the debt, which per Curiam, is good cause of suit. Adjornatur.

30. FARRE *against* ALEXANDER. *Wednesday, October* 29.

Audit. querela. 28 Ed. 3, 99, pl. 31.

In audita querela, H. shall not be baild upon a verbal affirmation, without a deed of release generally, but here the money was levied in execution, and release made to the baily, which was confest by the defendant; but the audita querela was not grounded thereon, but upon the satisfaction, of which, by Windham, this is a sufficient evidence for the plaintiff, which is the substance required, F. N. B. which the Court agreed; but ordered that the audita querela should mention that the defendant per factum suum of release did acknowledge himself satisfied, and that it be new seal'd, that so the audita querela may be grounded on the deed. Adjornatur.

31. HARRIS *against* BESSIE.

Nosme. See Moor 35, pl. 116. Leases are intire, &c.

In debt on obligation, condition to make a will in the presence of such persons as he should appoint. The defendant pleaded that he made the will in presence of W. O. such as he did appoint, videlicet, in the presence of Graciæ, so the issue roll, but the Nisi Prius roll was Grac. And at the trial the will was proved made in the presence of Gracius, which being another person, the defendant moved to have a new trial, pretending surprise, on Hut. 120, *Hicks and Monke, &c.* Hub. 73, *Pope* against *Skinner*. By Twisden it's sufficient if the will be made in the presence of any, though other persons then alledged; contrà if it were to be made in the presence of A. and B. particularly, the issue was, that no such will was made in the presence of such persons as the plaintiff should appoint. And by Jones for the defendant, he could **[348]** not say he made the will in the presence of A. and B. but must say that he made it in the presence of such persons, namely A. and B. which is but an ascertaining the persons for the defendants notice of trial: but per Curiam, this is well enough, and is but the same name; though by Windham, on a justification, such particular days, or things, or persons are traversable. 2. Stroud moved in arrest of judgment, that authority was given to the wife to devise 300l. and she disposeth 200 by fifties, and well per Curiam, but on licence to attorney to lease for 21 years in my name, he cannot make it for more or less, contrà on such power reserved, &c. 3. By Jones, The condition is that she shall make it in the presence of the husband, unless he refuse, or in presence of J. S. or two such persons as she should appoint, which is insufficient, no refusal being alledged, or notice to the husband, which by

Windham, ought to be, Dy. *Leeks case*, Curia contrà, it being in the wives election, and a new trial was refused.

32. HALL *against* CRESWELL AND HIS WIFE.

Baron & feme.

In debt on obligation against baron & feme, being made by her in viduity, with condition that she, her heirs and assigns, keep contracts and covenants made betwixt former husband and his lessee the plaintiff. The defendant said there were no covenants made betwixt them. The plaintiff saith there was an agreement that the plaintiff should enjoy a warren of the demise of the former husband, and that he entred till put out by the defendant; issue on no such agreement found for the plaintiff. Jones moved in arrest of judgment, that there was no estate alledged in the former husband in right of the wife, whereby, though the second husband be assignee in law, yet he enters of his own wrong, and not as claiming under her: but by Allen for the plaintiff, its not requisite that the husband be assignee of the estate, but her assignee of contract, which she might have avoided; which Windham agreed: Twisden contrà, that the husband must be some ways intitled to the lease, it being not necessary that any contract, real or personal, relating to the wife, be intended; but may be as that she or her assigns would not beat J. S. in which case husband is no assignee. Foster agreed with Windham, and that she is bound for some intended interest, though no certain estate appear, which the husband hath by marriage, and doth act in her right. Adjornatur.

[349] 33. HURSTS CASE. *Ante.*

Attorny. Siderf. 94, pl. 19.

The Court refused to grant a mandamus to restore attorney of Corporation of Canterbury, though a franchise for life, being only private; so of solicitor, contrà of town-clerk.

34. WHEATLY *against* THOMAS. *Thursday, Octob.* 30.

Remainder. Apres, 249, pl. 318.

By special verdict it appeared that the Lord Cobham seised, 3 Ph. & Mar. devised to his eldest son William for life, remainder to the first, second, and tenth son in tail, and so to divers issues males, and so to eight of his sons; and in default of such issue, the remainder in tail to the heirs generally of the body of William, the remainder in fee to Edward the youngest son; Edward and the rest dyed without issue, whereby the estate by death of the rest descended unto William the eldest, who had issue George, who had issue William, who had issue Duke, George, and Charles, (and also three daughters) G. was attainted and executed 1 Jac. after which 3 Jac. the Lord Henry Cobham also was attainted by Parliament, and after the King grants to Duke Brooke by letters patents, whereby the lands were limited to Duke and his heirs so long as any issue male of William were living, prout by the will. The issue of William s the lessor of the plaintiff, claiming by the will for want of heirs males of the rest and Henry was living when Duke had issue, under whose conveyance by fine and recovery the defendant claims. Baldwin for the plaintiff, that Henry was tenant in tail in possession, and had a remainder of the fee vested in him by death of Edward, and both titles vested in the King, but by the Act of 3 Jac. of Restitution the daughters, as heirs by that will in tayl have good title, now as 9 Co. 30, *Abbot of Strata Marcellas case*, when charter doth refer to another, its all one as if they were particularly recited, Patents Br. 31 and 91. So also the same relative words are of the same force in Acts of Parliament, Pl. Com. 930, *Binkly* against *Thomas*, and therefore it being found that the lands in question were devised in tail to the issues of William, and that the lessor of the plaintiff is so, she hath good title. And whereas it is objected that this reference is insensible, being that the lands shall be and remain **[350]** to the issue according to the will, which yet is sufficient to shew the intent of

the Act of Parliament, that the plaintiff shall have them, and (shall be and remain), shall refer to the estate, and the words (shall be held and enjoyned) shall be referred to the will, and so all may stand. But the main objection is, that Henry being attainted and alive, the heirs of William cannot take: answer, by the Act of Restitution there are five estates tail to be spent before the will is to take effect, it being in default of such issue, &c. and by the will there is no particular estate limited to Henry, but its sufficient if there be an heir to take when the particular estate determins, 1 Co. 63. Dy. *Cranmers case:* and so though in strictness William had no issue, yet Henry dying before all the estates were spent, the attainder being now by the Act of 7 Jac. purged, they may devise, and as heir have formedon, had William discontinued. 2. The intent of 3 Jac. was, that so long as the Lord C. had issue, the reversion should not come to the Crown, (he having a numerous progeny, and was the first that thus setled on the first, second and tenth son) the lands in question being an allowance for their maintenance; and there cannot be no other signification of this limitation, then that after the remainders to the sons (which were provided not to be discontinued by fine or recovery) the daughters should take, which had been frivolous, unless there were estates tail to be cut off. 3. The Parliament are not tyed to the strict rules of common conveyances, 18 Ass. 5, *The Princes case* being confirmed by Parliament. Also this Act of Parliament is quasi a restitution, which shall be taken most favourably for the party against the King, as 3 Inst. 241, the nearest case to this is, Mich. 8 Ed. 1, Rot. 62, in the tally office; though William had no heirs when Henry was attainted, yet because the blood may be restored, a limitation to them may be good; if the limitation had been generally according to the will, it might be doubtful whither the heirs of William should take; but contrà here where the Act particularly limits it to the heirs of William according to the will; and so is like estate given to H. for life, remainder to the heirs of the person attainted, is good, if the person be restored before death of tenant for life; and there was no other intent of the Act of 7 Jac. then to put the attainder out of the way; also the estate hath been enjoyd according to the Act of 3 Jac. to this day. Jones for the defendant, The Act of 7 Jac. can have no operation in this case, there being an express proviso, that as to the lands in question, it shall be of no force. 2. Henry at the time of attainder had two estates **[351]** in tayl in possession, and the reversion that was to Williams and the heirs males, &c. And by the Act of Parliament, this remainder cannot be vested again in Henry, nor William: he agreed the confirmation of Acts, as Baldwin alledged, and that this is as strong as express, but yet at the time of the Act, Henry was not heir of William, and so cannot take by discent, nor by purchase, he cannot without entitling himself as heir compleatly, Hub. 31, *Counden* against *Clerk*, contrà by discent; and as in conveyances so by way of will, *Foster* against *Ramsey*, B. R. plaintiff devised to the heir of his brother, (which was an alien) and adjudged he could not take, and he denyed the case that reversion to the heirs of the person attainted is good, because no such forreign possibility shall be presumed as restitution. And here it is not the intent of the Act to make any contingent remainder, and the Act never intended to make any issue of Henry, the heir of the body of William, capable, else should it restore him and George his brother under general words; also this is the Act that confirms the attainder; the Act did intend only to such remainders as were capable, not to enable any, as if any in the mean remainder had levyed a fine, this Act would not defeat it, but settle it so upon the persons, as if there were no Act by them to deprive themselves: likewise should the Act give any estate to them, it should be to the use of the King, who is not bound without express words. Twisden, The only stress is on the intent of the Act, which, by Windham, is not to establish the estate as against fine, but against forfeiture, and hath given it in express words to Duke and his heirs, so long as William the grandfather hath heirs males of his body, according to the will, whereby its doubtful whether it may carry the lands to the heirs general through all the other disabled persons; had William had issue male such issue should inherit. Adjornatur.

35. WIN *against* LLOYD. *Ante.*

Scire facias. Moor 524, pl. 693.

Now upon a second scire facias several tenants come in, and one pleads he hath only for years; and another not summoned hath the reversion; and another in abatement, that the plaintiff entred into the land pendant the writ of error, which, by Allen, is ill, the writ being but ex gratia, and the retorn of the sheriff is conclusive; and 31 H. 6, it hath been doubted whither he may plead in nullo est erratum, a fortiori, not in abatement: and if the pleas should be false, the plaintiff cannot thereby have judgment reverst, but is in **[352]** statu quo: and should the judgment be reverst without them, its good. Williams for the defendants, Tertenants conceive that the pleas are good; and that tertenants may plead for themselves is the constant course, the entry on the roll on scire facias being to hear the process, record, and errors; and so it would be in vain, Dy. 321, should they not have liberty to plead to all of them, *Holland* against *Dancy* 3 Cr. 739. The like plea, as here, that there were other tertenants (not named) joyntenants, *Charnock* against *Worsly* 3 Cr. 129, *Bartholmew* against *Belfield*, 2 Cr. 332, and that the pleas particularly are good. 1. That entry into the land pendant the writ of error, doth abate it, the nature of the writ being a right of action in order to recovery of land, which cannot be (as the ground of remitter is) because he is in possession. 2. Retorn of this writ is to remove prejudice, which one in possession cannot have, be it rightful, or by wrong and the prejudice must be immediate, and not consequential, which is the reason bayl cannot revers judgment against the principal. 2. The end of this writ is to give possession, which he hath already by voluntary action; contrà if by act in law the possession be cast on him, *Lloyd* against *Bethells case* 11 Jac. in Assize in the Great Sessions in Wales, the writ abated by entry, and making lease, *Bridgman Knight* against *Mayor of Wickam*, 3 Cr. 484. Lease for years made or accepted, suspends the bringing error, feoffment destroys it, 12 H. 6, 6. As to the second plea, that the tertenant is but lessee for years, and J. O. seised of the freehold, is good, and no more then prayer in ayd, *Champernoons case*, 2 Cr. 392. Owen 157. 3 Cr. 471. And here the entry on the roll is, that the Court will not proceed to examine errors, till all tertenants come in, be it in necessity or in discretion to award scire facias before or after reversal, yet being awarded, it must be fully determined. Allen for the plaintiff agreed the cases, but the plea in *Hancocks case* of joyntenancy, is not in abatement, but in bar for a moiety; and that an entry will abate a writ of error, he denyed, for though one hath possession, it may be charged, which cannot be avoided till error brought; and the case of *Lloyd* against *Bethell*, was betwixt the parties, not by any tertenant, as here. Twisden The tertenants (as in *Samsons case*) have nothing to do with the errors, but only with the process and record. Windham, Where the party enters and makes a lease, that goeth properly to the tenancy, and suspends the action, but this entry is only in abatement, and its every days practice to bring error, though one be in possession; but he doubt-**[353]**-ed of the plea, that he was but lessee, because a special nontenure, but *Holland* against *Jackson*, Bridgman; per Curiam, If one tertenant be warned, and retorned by the sheriff, the Court will never award another scire facias on suggestion that there are more, but the plaintiff for expedition had taken out this scire facias; but here the Court doubted of the plea of lessee for years. Adjornatur.

36.

Priviledge.

Nota per Curiam, The course of the Court is, that one that cometh in to be made defendant in ejectment, upon his prayer confessing lease, entry, &c. shall not be charged with any actions by the bye, because he cometh in without process or arrest, only to defend the tytle.

37. MAHEW *against* Flower. Siderf. 98, pl. 28.

Trover.

Wallop moved in arrest of judgment in trover de una stanna plauca, Angl. a plank bench, which he conceived ill. Adjornatur.

38. CRAWFORD *against* MIDDLETON. *Ante.*

Slander.

Pelham moved for judgment; that *Steward* against *Butler* Hub. 177, is not like this, but 2 Cr. 154 is, for though he be not expresly charged with any felony, yet it is a defamation; 2 Cr. 347, 536, but by Bigland for the defendant, here the words are doubtful, and therefore must be expresly averd there was a felony, Hub. 305. 2. It is not said, ubi revera, he never spake such words. Pelham for the plaintiff, If the person had been named, he must say ubi revera; contrà where no person is named, for then he cannot justifie, 12 Co. 134, but by Windham, *Megs* against *Griffins case* is as this case of general report; an averment is necessary, *Lewis* against *Walter and Lady Morisons case*, contrà where one said he dreamt A. was in goal, there needs no averment, ubi revera. Adjornatur.

[354] 39. *Friday, October* 31.

Tyths.

In suit in Spiritual Court of the Arch-D. of Berkshire for tyths; the defendant suggesting they belong to another vill, prayed a prohibition, which Windham denyed, by reason the bonds are but incident, and they have cognizance of the principal: so Foster, contrà by Twisden; but the prohibition was granted, nisi.

40. HUGHS *against* HUGHS.

Wales.

Williams moved against a prohibition awarded by Court of Common Law in Grand Sessions of Wales, in the old counties, to an Ecclesiastical Court there, for examining marriage after death of the party, which he conceived they could not; Twisden contrà, Though they cannot hold plea of quare impedit, yet they may award prohibition, as well as these Supream Courts, though *Athows case*, these only grant mandamus's and habeas corpus's unto all, which the Court agreed. Adjornatur.

41. HURSTS CASE. *Ante.*

Mandamus.

The Court refused to grant mandamus, being without precedent, the lowest whereof is a schoolmaster, it was denyed to office of waterworks in London, so to steward of court baron; contrà of leet; and the attornies of C. B. are sworn, yet no mandamus ever awarded, nor can it be for any office that hath not some interest on publick government.

42. SOUTHCOT *against* RYDER.

Account. Hetly 116, seu 114. Arbitrement is bar not in discharge of account.

In action of account, the defendant pleaded specially that the mony was delivered by the plaintiff to deliver to such persons as A. B. and C. Commissioners should appoint, which was before the Act of Oblivion publisht, and judgment being against

him quod computet: the defendant afterward before auditors sheweth, that the mony was ordered by the said A. B. C. &c. Commissioners to be disposed to publick use, and so plead Act of Oblivion, to which the plaintiff demurred, as a repugnant plea, and might be pleaded in bar, and therefore cannot be pleaded in discharge now; but on the general issue pleaded by the Act of Oblivion, the defendant might have shewed this in evidence. Polixphen for the defendant, con-**[355]**-ceived this may be pleaded in discharge, being an excuse of payment which is as well pleadable in discharge as payment, 41 Ed. 3, 31, some things may be pleaded, as well in bar, as in discharge, 4 Ed. 4, 15. Account Br. 43. 22 H. 6, 55. Account Br. 48, as an accord, Latch. 59, but this plea of the defendant could not be pleaded in bar, there being a person appointed by the Act of Oblivion specially to receive it, Rast. Entries 15. 11 Co. 38. 19 H. 6, 5, and there is no difference whether the Act were before or after the resceit; and this is the properest construction of the Act, whereby disbursments may be shewed, which cannot be in bar, Rast. Entries, one may plead unque receivor, and yet plead in discharge before auditors; if they had pleaded the general issue, they might have given it in evidence, but its in the defendants election to use it one way or other; and this plea is not like a replication to the bar, nor need be so pursuant, which Windham agreed. Twisden, Upon bailment of money to J. S. to bayl over J. S. must plead bailment in bar, and not before auditors; contrà when bailor of mony to rebail, command baylee to pay to A. also because the Act is made before he pleaded, and so must be pleaded in bar, *Cheeke* against *Bayton*, as an acquittance of the payment, and release of the action, and it is not averd that the defendant paid the money over to J. S. but the account being betwixt April and August, and he pleaded payment August before. Adjornatur.

43. MOLINS *against* WELDEN.

Estople.

Error of a judgment in Marshalsey, in action of debt on bond, & mutuatus was assigned in that the Court is said to be holden before J. O. and Owen Win. &c. ubi revera, it was not holden before them; which by Jones, is well enough, being in Inferiour Court, though against the record, being confest by demurrer, and the certiorari being that the Court was holden before them by patent, the writ of error being only directed Judicibus generally. Twisden, An action upon the case will clearly lye against such person, steward or attorny, that drew up the record, but it cannot be assigned for error, which the Court agreed; and the demurrer confesseth only what is well pleaded. Adjornatur.

[356] 44. VERNON *against* ALSOP.

Obligation, Br. 42. Arbitrement Br. 29. So 20 Ed. 4, 8 b. pl. 2, but it cannot be pleaded but an action of covenant on suit.

In debt on obligation on condition to pay mony, and in default thereof, that the bond shall be void, the defendant pleaded he did not pay, and the plaintiff demurred notwithstanding 39 H. 6, 10, by Littleton in obligation, 3 Cr. 780, *Weekly* against *Blackworth*, the parts of the condition being inconsistent, and so the latter void, or else both are void, and so the bond single, which Windham and Foster agreed; contrà by Twisden. 2. The defendant pleaded, that at one day on which the money should have been paid, he made default, which by Paulet for the plaintiff, is ill, and should have been that nothing ought to be paid at such a day. Adjornatur.

45. HOLE *against* BRADFORD. *Ante. Monday, November* 3.

Executors.

Jones for the defendant, that no action lyeth, because the precedent clause of the Act speaks only of ecclesiastick persons (and no duty was due to the plaintiff during

the defendants testators life) therefore it shall not be extended in the remedy beyond it. Windham, The action of escape is founded ex delicto, and so executors are not lyable; but this is founded on a duty, and if an Act of Parliament should give a remedy against executors for a legacy at common law, no doubt but executor of executors, or other person interessed, would be charged. Twisden, Many executors not named are chargeable and relievable: and by Foster, This is a mischief this statute intended to remedy, though it be not within the words; also an indebitatus assumpsit would then lye upon receipt of my rents as a debt, *Rolls* against *Copher*, à fortiori in this case per Curiam. Judgment for the plaintiff.

46. BAKER *against* BERISFORD.

Copyhold. Entre Congeable, Br. 139. And 44 Ed. 3, 31 b. pl. 12, is express she shall. Dubitatur 1 Cr. 24, pl. 28. 2 Cr. 305, pl. 7. 1 Cr. 44, pl. 51, are that such assignee cannot enter for condition broken. But against Ordinary he must by 25 Ed. 3, c. 9. Poult. 151. Co. Entries is particular, fol. 337 b. so is Co. Entr. 365 b. § 4.

In action of covenant upon lease by copyholder, whose feme by custom is to have moiety as survivor, and if any lease be made, then she should have a moiety of the rent, after the feme of A. was seised of moiety, the heir of A. dying. By Jones, In arrest of judgment, his feme shall not have a moiety of his moiety, which the Court deny-**[357]**-ed, beside Mallet; and by Windham, If a heriot be payable for the whole, if it be part surrendred, both shall pay heriots, so no inconvenience; and by custom the wife may have the whole: so of the custom of gavelkind. 2. An assignee of copyholder is not within the statute to have action of covenant, Curia contrà: judgment nisi.

47. KING *against* GOVER. Siderf. 91, pl. 13.

Indictment of extortion quod colore officij extorsive injuriose he took money, and sheweth not for what matter or cause, which per Curiam, is well enough, the officer being bayliff of a hundred, and he needed not shew particular cause, especially being after verdict. Judgment for the plaintiff. Nisi.

48. LE-STRANGE *against* TEMPLE. *Tuesday, November* 4. Siderf. 90, pl. 9.

Forfeiture. So on feoffment to use of devisor in fee 1 Cr. 24, pl. 27. And this recovery without voucher is a forfeiture in both as Moor 271, pl. 423, so Leond. 264, pl. 354 is, that fine levyed by tenant for life to bargainee is a forfeiture only in the bargainee but if lessee for years accept grant for life to be made only tenant to the precipe in recovery or fine to the use of J. S. its no extinguishment. 2 Cr. 643, pl. 3.

In evidence to jury, Maynard for the defendant, challenged the tales, being not retorned by the sheriff, his deputy, or any sworn officer, but being by clerk of the Court, by general appointment of the sheriff, to act his business in his absence, per Curiam, its well enough, and the sheriff is answerable for it. 2. Tenant in common deviseth, and after by agreement and fine (without writ according to statute) makes partition, which per Curiam, in C. B. as now in B. R. is a revocation; (however, after so long time as here, 80 years, a new publication shall be presumed). 3. Tenant for life bargains and sels all his estate, and then upon recovery suffered against barganee, he cometh in as vouchee, whereby, by Windham, tenant for life is made tenant to the præcipe, so it is a forfeiture, all being but one conveyance, which the Court agreed. 4. By Glyn, Remainder limited on marriage settlement to the daughters, vests in them as they are born, and the postnati break in on them; contrà here upon limitation to all the daughters: but, by Twisden, Its all one, which the Court agreed: but, by Sir Jeoffry Palmer for the plaintiff, The law abhors removal of inheritances, and had the limitation been to all the daughters living at the time

of the auncestors death, it had been a good contingent; and this is the like case, and hath never yet received determination. 5. Father and son, he being tenant for life, the remainder to the son for life, [358] joyn in a voluntary settlement, if it were with any intent in the father, or both, to defeat any other purchaser, then it will be fraudulent, as *Burrels case*, else not any concluding evidence: but if the party that made it had sold; fraud would be presumed, contrà here; though *Wingfield* against *Brisford*, there be a power of revocation if it be determined; contrà if it be only releast, which the Court agreed; yet every voluntary conveyance is not fraudulent, unless the intent appear on circumstances. 6. The proviso was, that if the auncestor, by his proper handwriting to be written or endorsed on the indenture, should revoke the uses therein, which by Maynard for the defendant, ought to be by writing on the indenture, which the Court denyed; and that the revocation may be by other writings, as well as indorsement. 7. That recovery suffered by tenant for life after bargain and sale, is a forfeiture, 16 Ass. 16, Fines F. and entry being made, shall not be purged by reversing it, for want of an original. As to the reversion, Maynard conceived here can be no cross remainder, which cannot be but betwixt two persons only, as was resolved, *Gilbert* against *Writhes case* in Dodridges time expresly, and not where there are more, as might have been here. Verdict for the plaintiff for third part, that no fraud appears.

49. HAYES CASE. *Wednesday, November* 5.

Common.

Keeling prayed distringas upon writ out of this Court to distrain the next adjoyning vils on a writ out of the Chancery on Westm. 2, cap. 46, to enquire of breaking hedges, retorned per quosdam ignitos, and granted per Curiam; the same was granted for *The Queen* against *Vills* adjoyning to Somersam.

50. HILL *against* SNOW.

Usury.

Baldwin moved in arrest of judgment in debt on corrupt agreement, that J. S. on 21l. money lent, should pay to such persons as the plaintiff should name 30l. at the end of six months, if the ship retorned, or did not go forth (as indeed it did not) and that the def. for brokage should have a certain sum, the defendant to bear the hazard of the sea, which he conceived not usury; but per Curiam, The jury have found this usury, and the Court will now presume it. 2. That the acti-[359]-on is brought against the broker, whereas by 12 Car. 2, cap. the action is to be brought against the party who lent, which was J. S. to whom the bond was made. Also by Wingfield for the defendant, Its not like *Burtons case*, but the hazard goeth to the principal, and is a probable one, as 2 Cr. 507, *Roberts* against *Tremain*. The Court agreed bills of bottomree good; but contrà in this case, where the possibility is remote, and the money lent by Snow. *Post*, 359, pl. 54.

51. BROOK *against* SHARPE.

Amendment.

Scrogs prayed an amendment of release pleaded, made 1 March for 29 February, which by Allen for the plaintiff, Its needless as its pleaded, that such a day he releast whereon he may give evidence at any day before or after; contrà where H. pleaded, that by release bearing date 1 March, that is precise to the day; and though the record were made up, the Court awarded an amendment in debt on a bond.

52. BROWN *against* CHARLTON.

Slander.

B. Thou rogue, wilt thou murder my sister as thou didst thy wife, (innuendo A. then defunct): adjudged actionable per Curiam, for the greater scandal if she be not dead; and being ficta & falsa, they shall be intended scandalosa.

53. MOOR *against* PLOWMAN. *Thursday, November* 6. In Error Br. 137.

Error.

Error of a judgment in ejectment by original in B. R. retornable 12 February at the next session of Parliament. Wild notwithstanding prayed execution, the Parliament being prorogued, which the Court granted, and superseded the writ, and will take no notice that it is in esse; contrà on adjornment.

54. HILL *against* SNOWE. *Ante*, 358, pl. 50.

Usury.

Snow and M. agreed that S. should lend, and M. should be bound to such person as S. should name, and that such person should bear the peril of the sea: also in the same action is another count against the defendant, as a solicitor and procurer of H. and if either of these causes of action fall, its against the plaintiff for the whole. Jones for the plaintiff, **[360]** that its well enough, and no hazard appears, being to be paid at retorn of a ship tunc in servitio domini Regis, which the Court cannot adjudge of, but its in the jury; for the ship might be within a mile of harbor. Twisden, Had this matter been found specially, it had been no usury; contrà on general verdict as here, which the Court agreed. 2. As to the brokage its well enough, the defendant lending his own money, per Curiam, though another name be used. 3. One action cannot be grounded on several statutes, where several penalties are given against several persons; contrà upon several offences in the same statute. Judgment for the plaintiff.

55. OLDHAM *against* HEMSTEAD.

Replevin. Pl. Com. 564 b. It were sufficient if plaintiff had possession though the goods were but bayld against any but him that hath property 2 Ed. 3, 17, pl. 19. Avowant may say he hath property 9 Ed. 3, 14, pl. 19, or that property is in J. S. absque hoc that it is in avowant may be pleaded by plaintiff in replevin 29 Ed. 3, 92 b. seu 3 b. pl. 14.

In replevin of taking shoos in the shop the defendant, who avows as bayly of J. S. and that the property was in him absque hoc, that it was in the plaintiff. Plaintiff in bar pleaded, that the property was in him absque hoc, that it was in default, which, by West, for the defendant, is ill, being a traverse on a traverse. Adjornatur.

56. BASSET *against* WILLIAMS.

Error.

Error of judgment in quare impedit was assigned by Barwell in want of title, being by lease for 99 years to commence after all former advousons, (viz. grants thereof), Tr. 3 & 4 Ph. Mar. were executed, or when the avoidances before granted were satisfied, which is ill, and uncertain, as *Rector of Chedingtons case*, or as lease for 60 years habendum to executors for so many years as should be undetermined at death of lessee: but, by Allen for the plaintiff, the limitation is void, there being no avoidances granted, and so the lease shall begin presently, which the Court granted, and it may be averred that there were none, and need not be pleaded, as a lease to begin presently. Judgment affirmed.

[361] 56. CORLS *against* CALVERT. Siderf. 96, pl. 23.

Amendment. Yelvert. p. pl. 10. Moor. 704, pl. 983. 22 H. 6 b. pl. 12, per Ascue.

In action of assault, battery, and wounding, the defendants all pleaded as to the battery, justific. quod manus leviter imposuerunt, to remove the plaintiff from hindering them to remove cross, and say nothing to the wounding. The plaintiff replyes, that the assault and wounding was de injuria sua propria: the jury find three guilty of the wounding, &c. and that other three did only manus leviter imponere. Judgment for the plaintiff in Lancaster. And Allen assigned this for error, being a plain jeofail, the verdict convicting all of the wounding, which was implyedly confessed in the bar, being quoad residuum, which goeth to the whole, which the plea doth not maintain; which, had there been but one defendant, had been but a discontinuance; contrà here, where there are others that are not found guilty. *Post.* Adjornatur.

57. HOLDAY *against* HOLDAY.

Ejectment.

J. S. in ejectment, come in and pray to be made defendant, and to plead specially ancient demean, which the Court (Foster absentè) agreed; and it's now used as of course to plead dilatories after imparlance so, &c.

58. MANBY *against* SCOT. *Ante. Saturday, Novemb.* 8.

Baron & feme.

Turner third baron for the defendant, If this contract bind the husband, it must be either as hers, which cannot be the contract of a married woman, being void as well to necessaries as other things, which are no sooner taken up by her, but it's in the husband; he agreed the cases of monks and infants, and *Stile* against *West*, 3 Jac. a stronger case, the contract of an ideot à nativitate, he may marry, or thus bind himself, it being a true relief to him, and none can take them away from him: and supposing this the contract of the wife, yet it's against the plaintiff, who hath declared of a contract of the husband, and not of the wife; so if the contract were made before marriage, the count must be (as in trespass against him for her trespass) of a trespass done, or contract made by her, but yet I hold it none of her contract. 2. It's not the husbands contract ex natura **[362]** rei, for he agreed not to it, either precedent or subsequent; and though this be not specially found, yet this being highly concern'd to maintain her, is no binding evidence here to find an assumpsit in the husband, as if it were found no grant were made of common in gross, yet if it were found to be said time out of mind, that is a binding evidence of it, not so here, especially when she departs contrary to his consent, *Udalls case* B. R. who forbade his taylor to trust his wife, being departed from him, yet he did (though forbidden by him) trust her with apparel, which was allowed to be given in evidence, and it appearing that the baron & feme did after cohabit, and she wore it in his presence, here the judgment was for the plaintiff; but yet the evidence being only found, and no express contract, it's not sufficient. 3. Its better that she have no power then if she had, however it will be exceeding mischievous to the husband, who hereby shall be forced to pay every strangers demand of money for wares sold to her, so she might take up necessary apparel of one, then of another, and the last man brings the action first, and recovers, so may every one after by combination. 4. The law hath provided for her better then to be excepted out of the general rule, viz. the Ordinary: also the law of God, and of nature, hath made a better provision, 24 Ed. 4, 13, per Callow. 15 Ed. 4, 1 b. 1 Roll. 68, 76. 7 Jac. *Mantell* against *Wollingtons case.* If the husband enters into bond on dures made to the wife, it shall be said dures to him, the law looking on her sufferings as his, and he is worse then an infidel if he provide not for her: for this reason a collateral warranty is said to barr an heir on the presumption of affection, which being reasonable, be the fact what it will, the law is the same. 5. Its not

suitable to the prerogative that God and nature hath given to him (which is more then of the King over the subject) to be thus bound by her contract; this is the reason the husband shall suffer for her trespass or slander, because he hath power over her, and may restrain her, or else she would have] greater power over him, then he over her; for he cannot bind her by his contract. 6. It's not reasonable at least that such a wife as this should bind him, whose departure is sufficient to make him jealous, which is the rage of a man, Exodus and Proverbs 6, 34. 3 Jac. *Sir Tho. Gardners case*, the Court were of opinion the contract of the wife for necessaries should bind the husband; this is reasonable evidence to a jury where they live together, but not full to the case here, F. Debt 163. The contract of a woman binds not her self, ergo not the husband.

[363] (2.) Tyrrel Justice of C. B. for the plaintiff, that by the common law the husband is bound to maintain the wife he takes, is granted; as to the verdict he conceived it good enough, having found all the fact, but utrum it amounts to a promise or no, he desired the advice of the Court, as if they had found that A. lent money to B. but whether this implyeth an assumpsit or no, he desired advice, unless the Judge, before whom the cause is tried, direct them; for promise, or not promise, is matter of fact; but whether such circumstances amount to a promise, is matter of law. 1. As to the matter of law, there being no presidents, we must resort to the law of nature. 7 Co. 12, *Calvin's case*, which is part of our law. 2. To the evangelical law, which saith, no man ever hateth his own flesh, against this law no prescription or statute is good: and our law would be scandalous if it were in the husbands election to allow her, or not, contrary to those two laws. 3. Reason doth herein guide where presidents want, 1 Inst. 97. 4 Co. 94, or have no sufficient grounds of reason, i.e. of the artificial reason acquired by study and experience, not the prime or degenerate corrupted reason. This is the use and custom of all laws in all nations. Mag. Chart. cap. 7 giveth her rationabile estoverium, 2 Inst. 18, till dower assigned, which relisheth of that maintenance he should allow her whilst he liveth, of which she ought as well to partake, as after his death, feme covert being a favourite of the law, and therefore cannot be presumed to be left without maintenance. Hence also the law looks on her dures as done to him. 2. It followeth, that by our common law, the husband is bound, 40 Eliz. B. R. *Hanywell* against *Hanywell*, action lyeth not by executors against her for her peraphernalia, 33 H. 6, 31 b, pl. 5. Administrator Br. 6. 23 H. 6, 3 a. 1 Cr. 343, though there be debts unpaid, for its preferred before debts. Also there is one law of nature betwixt husband and wife, another betwixt father and son, that being not common to beasts, as this is of procreation. 2. Of the ways and means by which the husband is compellable hereto. 1. He cannot compel her, nor she him, by our law; contrà by civil law; yet no reason hinders but that he may be charged by a third person collaterally, 11 Co. 61, as well as by her tort or trespass, else it may fall out, that though he cannot murder her, yet he may starve her: the differences of having right to advowson after usurpation without remedy, &c. and this is, that there the act of the parties by which it is destroyed, contrà here where only the act of law takes it away, 1 Inst. 146, 169, & quando aliquid conceditur, concedere videtur & id sine quo **[364]** res ipsa esse non potest, 9 Co. 90, *Pinchons case*, for this reason action lyeth for rent on owelty of partition, 1 Inst. 240. 2. The remedy here he agreed, Debt F. 163, that by general contracts, 21 H. 7, 40. F. N. B. 120 B. Contract Br. 33. 1 Inst. 112, she cannot bind him without his assent; contrà for necessaries, 11 H. 6, 30, per Martyn, which is the end he there driveth at (not whether she may borrow money, or not) but that cannot be excessive, 20 H. 6, 21, per Martyn. 2 Cr. 257, *Lord Boroughs case* is a stronger case then ours, Hut. 205, admits this point, 12 Jac. C. B. *Sir H. Comptons case*, per totam Curiam, the husband was compelled to pay for cloaths taken up by the wife; the contract of the wife for goods, though they come to the husbands use, is void, if not brought for his use at first. 2. Though they come to his use, if he assent not, he is not bound; but our case implyeth both, 27 H. 8, 25, her contract by his assent is good evidence in action against him, and count on his contract, and he is at no prejudice by his being hereby prevented to wage his law, because marriage is his own act; and as *Slades case* and *Pinchons case*, it is in election of the party to bring debt, or action upon the case, both remedies being ancient, but the action upon the case applyed but lately. Also in our case no remedy is in Chancery, Latch. 169, an

assumpsit as well as debt lyeth against an infant for necessaries; and thus hath the practise been these twenty years past by learned Judges, whose experience was acquired in good, though they lived in bad times: and that there was no Spiritual Courts, was no reason to alter the common law: also trover may lye against husband for her conversion, and should not he be chargeable by marriage, 8 Co. 171. 2 Inst. 17, she would be worse then by committing felony, to whom reasonable maintenance is allowed. 3. That the Ordinary will give remedy in these cases, 2 Cr. 364, is more specious then satisfactory, the common law taking away all she hath, and sending her to another Court for relief: *Hyats case* was only a suit for separation, 8 Jac. *Agars case*, in which case alimony is by them allowable, not by original suit, where the parties cohabit, or are not separate, as here, Register 34, 37, 38. Old N. B. 35. F. N. B. 41, 48. Attachment upon Prohibition 8, but if one might sue there, it's no argument that one may not sue at common law; also they only excommunicate, not sequester the estate, as at common law, and to presume one will not lye in prison rather then pay debts, is contrary to experience, and the judgment of a learned Parliament that giveth execution against lands of the debtor dying in pri-[365]-son, in which case the wife hath lost all; and he doubted it would be harder to maintain the estoverio capiendo then this case: also this excommunication is but minor, and easily discharged; also none will trust her when they see her without remedy; the supplicavit for the wife against the husband is only for to keep the peace, not to provide her food or rayment; if it were, yet if he lye in prison, her benefit would be fruitless; as to the circumstances of this verdict, it appears not for what cause she went away; and though it were contrary to his will, yet not contrary to his beneplacitum, who might have disswaded or hindred her departure; but had her departure been an elopement, he doubted whether he should not allow her maintenance, Westm. 2, c. 34. 1 Inst. 32. 2 Inst. 435, but had she been an adultress also, at common law she should have dower, and now notwithstanding adultery shall have it, and here it appears she departed with animum revertendi; however, so long as she is his wife, though she commit felony, or be attainted, he is bound to keep and maintain her, as is collected from 28 H. 6, 4. 9 Co. 87, he also is as much inexcusable in not receiving her when she offered her self; for no certain time is limited by our law of her departure, for him to take advantage of to refuse her again, all laws against this law of reason are void; and so of prohibition, supposing the case within it signifieth nothing also, unless the offence be greater than here is exprest; he is compellable to receive her by a greater authority 1 Cor. 7, 10, & 11, then that of Esther 1, 17, which was but politick advice of heathens in their cups: also the inhibition, as it refers to the defendant, is void; for else he might inhibit all that would trust her, as well as one; where the husband giveth authority to the wife to contract, he may repeal it; contrà where the law giveth her such power as here, Stanf. 27, Coron. Br. 142, also she is no felon by stealing his goods, 20 H. 7, 2, also he agreeth to be thus obliged by the marriage, and therefore it is not in his election to do it, or not after: if A. imployeth B. as his bailiff to prohibit C. to trust him, is to no purpose, but A. is bound (notwithstanding his inhibition) by B.'s contract: and so in our case, so long as she is his wife, a stranger may trust her contrary to his inhibition; for though it were for her apparel, yet its his also: should she come into a shop, and cause wares to be cut out, and take them away, the husband is chargeable in trespass or trover; and its more honourable to be charged in action without damages, then with: also the law is not to be altered, 7 Co. 27, (but only by Parliament, not by the Judges) for it's inconvenience; the danger of set-[366]-ting up two judicatures in one family, is not in this case, for it shall be tryed by jury, as maihm done to her, Lit. sect. 212, but yet her will is not so subject to his, that if his be unreasonable, yet it must be an uncontrollable law; this can be no argument for wives departure from husband, being only pro victu & amictu, not for variety, or for jewels or money, which he ought to allow without suit; in this case only the purse of the husband is lyable, in the other her life also; now he may keep her, in the other case he must part with wife, and marry by the Ordinaries law, also he that trusts her last, doth it at his peril; and it's not in the husbands power to strip his wife, as the words of the supplicavit shew: also the law in many cases, as F. N. B. 25 K. giveth liberty of court as well as of suit, as for taking away the wife; nor doth it follow that the husband shall be hereby double charged, for

when the effect is had in one, it shall not after be had in the other, Hub. 225, *Needlers case* is a law of nature, which admits of many exceptions, as in cui in vita, & Hub. 225. But the law of nature of the husbands providing for the wife hath no exception; and therefore to be preferred; and though the wives will be at the husbands, yet not her life; and the husband shall not hereby take advantage of his own wrong: besides, this will make men that part with their daughters, to provide such fetters for the husband, that his will shall be always subject to theirs. *Ante.*

59. MOOR *against* PLOWMAN. *Ante. Monday, Novemb.* 10. Error Br. 137.

Error.

That the prorogation is to a day certain, and that taken notice of by the writ of error, yet a retorn of a whole term is no supersedeas, *Limry* against *Langham*, & 5 H. 6, so here, for it may here be further prorogued.

[367] 60. TULL *against* OSBASTON. Siderf. 90, pl. 11.

Prohibition.

Powis prayed prohibition to the Arches on citation out of the dioces, the defendant procured letters of request of the archdeacon, which being subject to the Ordinary, (Hutt. *Dr. James's case*, Hub. 23 H. 8, cap. *Jones's case*, Hub. 186), it was said he cannot transmit his jurisdiction per saltum, but first to the Ordinary, and so to the archbishop: but by Windham, Generally all peculiars are immediately subject to the archbishop, and that it's subject to the Ordinary, must be special suggestion. 2. Such letters of request cannot come in by suggestion only, but must be entred, that so plea may be had to it, which the Court agreed to be the regular way, and ordered the defendant to plead his letters of remission, and granted prohibition. Nisi.

61. COXE *against* GEERING. *Ante.*

Wales.

Upon suggestion that the county where H. was arrested by process from the lord marcher was English, the Court awarded prohibition according to course, which is either to the Court, to the party, or to both.

62. DETHICK *against* YAXLEY & UXOR.

Baron & feme. In default Br. 52.

Feme covert in suit against baron & feme is arrested, and giveth bond for her appearance, and now prayed to be delivered on common bail, the sheriff having retorned cepi corps of the baron & feme both, having only taken her, which the Court denied after retorn of cepi corps, contrà if non est inventus had been retorned as to the husband; but yet if it appear only a practice, they will discharge her, to examine which, they gave rule for the sheriff to retorn the body of the husband.

[368] 63. DOVE *against* DARKIN. In Continuance, Fitzh. 16. *Tuesday, Novemb.* 11.

Error. Siderf. 93, pl. 17. Execution sued by executors in the name of the testator being dead, is void. Stat. Merchant Br. 43. Jones 410. Error Br. 117. Error Br. 144.

In ejectment, judgment in B. R. being had, and scire facias against the plaintiff quare executio non, &c. The defendant assigns for error, that the plaintiff was dead before the verdict in the ejectment; upon issue of the parties joyn'd by attorney, in the scire facias that he was living, the jury found he was dead; which, by Allen,

cannot be, without making executor or administrator party; for else there is no proper persons to joyn issue but the man in the moon. By Twisden, Though the party be alive, there can be no other course but to punish the attorney, and by affidavit or information ad informandam conscientiam judicis; but no error in fact can be assign'd without making a true party. Adjornatur.

64. BERRY *against* WHEELER. Siderf. 91, pl. 12.

Execution.

Maynard for the defendant in ejectment in evidence, excepted to an extent under which the plaintiff claimed, because after execution by fieri facias of part, elegit was for the whole, without mentioning any thing levied by the former elegit which recited the scire facias, but was retorned nichil. But, by Allen, Nothing here appears but an award on the roll of elegit, and a vicecomes non misit breve after another is taken out, which being filed, the party hath no remedy but by aud. quer. no such recital of the scire facias being in this second elegit; but the defendants suggestion not appearing on record, Maynard waived it. 2. He objected that it appears that more then a moiety is extended; for its said that the defendant was seized of a rectory of the value of 100l. and other lands appurtenant, quæ quidem rectoria sine terris glebalibus is the moiety, which is not like a conveyance or agreement of parties, but in brevi adversario; but it appearing that the rectory consisted of glebe and tythes, &c. else by Twisden, it is no rectory, but a parsonage; but here it may be understood of the church-yard, &c. distinct from the other lands pertaining, which the Court (Windham absentè) agreed, and as long as the extent continueth, it cannot thus be denied but there is glebe; but in count of ejectment of rectory, H. cannot give evidence only for tythes, per Curiam, contrà by Wild for the plaintiff. 3. Its said that the rectory delivered was a moiety, not say-**[369]**-ing according to the value or quantity, which by Maynard is ill, sed non allocatur. 4. It was not said tenend' in seperalitate, sed non allocatur.

65. THE LORD FITZ-WILLIAMS CASE. *Ante. Wednesday, Novemb.* 12.

Execution.

Audita querela is supersedeas of execution per Curiam, though grounded on the Secondaries report, or other suggestion; but the plaintiff shall not be bailed, unless it be grounded on release or deed, &c. 2. The Court conceived the attorney ought to be punish'd, that knowing one lived in Westminster upon judgment on action in London brought scire facias, and rotorn'd two nichils there without any testatum.

66. BUTLER *against* YATEMAN. *Ante.* Siderf. 89, pl. 8.

Prohibition.

Powis moved against prohibition, that it ought not to be granted here, because the bounds of the parish are not in question, but only of the vill: but if it were, yet it could not be tried by suggestion, without pleading; for they having conusance of the principal, this bondary is but collateral, as F. N. B. 50, contrà by Holt for the plaintiff, these parties being not spiritual, but patentees of the King, Latch. 116, *Huttons case*, & Yelvert. 92, and so the bounds are properly triable at common law, it being the main question, whether it be within one tything within the vill or borough, 7 Co. 44 b. or in another without it in the same parish, Hub. 296. But by Powis, Here only the close, out of which, is only in question, not the vill, 13 Car. *Whiscars* against *Fuller* in *Roberts case*, 12 Co. 65. Twisden saw no difference betwixt the bounds of tything, and of the parish, but it never was granted upon suggestion of the bounds of a vill, being only incidental, and against common right, and therefore though question temporal, is triable at common law, which the Court (contrà Mallet) agreed: and by Windham, Should A. sue B. for tythes of a close, and

B. saith he is not owner of it, this shall be tried in the Spiritual Court; the Court denied prohibition, and the authority of Yelvert. 92.

[370] 67. BUXTON *against* BATEMAN. *Ante.* In Chattels Br. 11.

Church.

The plaintiff counted that he was seised of an ancient messuage, and that he, and all, &c. have used to have a seat in a pue in cella or quire of the church, not saying he used to repair; which, by Williams, is well enough without; that reparation is good evidence, but needed not be pleaded, especially this not being within the body of the church, which is generally to be repaired by the parishioners, 2 Inst. 489, so of publick isle, otherways of particular isles, which by common law the particular persons are bound to repair, and so need not shew it, for it may be for other causes then repairing, as for being co-founder, or having been contributory to its building, 3 Inst. 202, *Corven* against *Prin*, 12 Co. 105. Also this question is betwixt two common persons, which is stronger then if it had been betwixt a common person and the Ordinary, or the parish, 1 Inst. 121 b. 122 a. Also this is after verdict in action upon the case, Latch. 116. Allen for the defendant, It doth not appear but that this cella is part of the body of the church, but if it be not, the law is the same, Noy 104, *Day* against *Bedingfield*, for the prescription must appear to be legal, and on good ground, and not only by usage, Co. Entries 8. And there is no more reason why a prescription must be to repair precisely in a prohibition, then in action upon the case, in both the party may plead the same; and if it be necessary in point of law, it must appear at common law in declaration; contrà in the Ecclesiastical Court. Foster conceived consideration ought to appear by pleading. Twisden doubted whether of necessity they ought to plead it; and cited a case about 4 Car. 1, one prescribed for the upper end of a long seat belonging to his house, and adjudged good, Noy 78, which Windham agreed, the property of the founder is not altered by consecration, and by this prescription the freehold of such pue remains in the party, not the parson; but yet being after verdict, though this be great evidence, it is doubtful whether it ought to be pleaded, and both denied the difference of prescription and usage, and of suit at common law, and in Spiritual Court: but by Allen a composition betwixt parson, patron, and Ordinary to allow seat, is only a ground in Spiritual Court, not at common law: and by Foster, There is a great difference betwixt an isle of the church, and the seat in an isle, which may be since the foundation of the church; Mallet agreed with Foster. Adjornatur.

[371] 68. HERBERT *against* ROBERTS & UXOR.

Variance.

In error of judgment in C. B. Allen in action of escape for the plaintiff, moved a variance betwixt verdict and declaration, the count was that the defendant by virtue of a cap. in force was taken, &c. 15 Apr. 1657. Verdict find that there was a writ of Hill. 1656, retornable at a certain day therein contained, not saying that it was the writ in the count, nor can it be intended. Sed non allocatur. The point of the judgment in C. B. was, that H. had counted on arrest of baron & feme; the jury found they arrested him, saying nothing of the wife, and held good, being variance of fact, which alters not the writ on special verdict, *Foster* against *Jackson*, Hub. Judgment affirmed, nisi.

69. SMITH *against* CONYERS.

Assumpsit.

Error of a judgment in Durham in assumpsit, without shewing for what sum, and counts in consideration quod emissit a certain quantity of coals the defendant C. promised to deliver them, which, per Curiam, is good enough. 2. Another case of

error in action of covenant on articles, wherein breach was assigned, that the defendant did not pay 20l. during the time of a lease made by the plaintiff to the defendant at the several days therein mentioned, which, by Allen, is ill, and the breach must be assigned particularly, so that the other party may plead to it. Windham conceived it well enough; as if really a breach had been at every day; contrà in debt on a bond to perform, which Twisden agreed: but by Allen, he might have pleaded he did not pay at such, or such a day, or that it was generally not paid; but as it is, none can tell what he will insist on before jury, whether breach at one, or every day, and is contrary to all presidents: and though this may be cured by verdict, yet not here, the judgment being by nil dicit, and so the jury ought to try all, as on non debet pleaded in action for rent on lease; and this involved issue is better than prolix pleading several breaches in several days, which must have several issues. Judgment affirmed in both.

[372] 70. LATHWELL *against* PALMER.

Usury.

In action of covenant on bill of bottomree, that the ship intended to go forth should proceed to A. and should not deviate directly or indirectly. The defendant pleaded performance generally. The plaintiff demurred as insufficient, quod non deviaret being negative: and the not being said quod procederet directly, per Curiam, the plea is ill, as if they had been several covenants; but the Court advised amendment by agreement.

71.

Prohibition for annuity awarded to parson, vicar, &c. by the Ordinary, as an arbitrator shall be at common law, 3 Ed. 3, 17, pl. 24.

Williams moved for prohibition to the Consistory Court of Hereford for the administrator of the vicar against the parson, the suit being for a certain annual sum, Co. Entries 445. 1 Cr. 217, which shall not be intended pension, unless mentioned; and that for the same cause prohibition was awarded in C. B. upon motion of Serjeant Earl, but the Court refused to grant it here, F. N. B. 51 B. especially the suit being betwixt the parson and vicar; though it was alledged that for this arrear an action of debt did lye at common law.

72. WISEMAN *against* COTTON. *Ante.* In Custome Br. 44.

Entred Hill. 13 & 14 Car. 2, Rot. 476. *Thursday, Novemb.* 13.

Custom. General custom of borough Engl. goeth not to brother, Hitch. 11, pl. 30, not to son without special pleading, Hub. 51. Suit by ex gravi quer. is not incident to burgh that may devise by custom, 39 Ass. 6, Br. 352. Nor is custom to devise incident to a vill or burgh, 40 Ass. per Wind.

In action upon the case upon a feign'd issue out of Chancery, that the mannor of Farmingham was not devisable by the custom of Kent, jury find 2 Ed. 6, cap. that the lands inter alia of Sir H. Islip, which then were gavelkind, should be changed, and not be departible among heirs, but shall be as lands at c. law to all intents, as if they had never been of gavelkind; they find the lands in question part, and that all the lands of gavelkind are devisable by custom. Jones for the plaintiff, The only question is on the Act 2 Ed. 6, whether it take away as well the custom to devise as the partition, or only the custom to be departible as at c. law, the words being as full to abrogate the whole custom, as can be devised; else the latter clause, that they should be as lands at com. law, cannot be satisfied to all intents and purposes; for at com. law lands were not devisable: also at common law she shall have but a third, and if this custom should stand, she would have half; **[373]** and this appears by the different penning of this statute, and 31 H. 8, cap. 3, which is only that they shall be disgavel'd, and no further; and most of the persons named therein,

some of great judgment, are again named in this of H. 8. The intent of 2 Ed. 6, was to preserve those families, that it might not be diminisht, which was done by partition, and also as pernitiously by devise and dower, and the practice hath been according to this opinion of taking away the custom. Winnington for the defendant, argued only what is intended by the custom and nature of gavelkind, which is only intended by the Act to be defeated, which by Lamberts Peramb. 584. Spilmans Gloss. verbo, Gavelletum is only the discent among heirs males, and to devise is a custom distinct from it by its self: so 1 Inst. 140. Lambert 251. 2 Ed. 4, 18 b. the custom to have dower or devise must be specially pleaded; contrà of the general custom of gavelkind, 5 Ed. 4, 8. 1 Cr. 461, *Launder* against *Brooke*, Da. 50. And it may be gavelkind, and yet not devisable, nor the feme have dower. 2. It shall be at common law as if it had never been gavelkind, F. N. B. 190, 200 B. but no otherways, for it's not inconsistent with lands at common law to be devisable, and so to all intents and purposes, is only as if it were not gavelkind: this also is the intent of the Act, that the nature of the discent is only to be altered thereby; and therefore its said, that it be hereafter in no ways departible, &c. and this was to preserve families, to which end to devise was a benefit and priviledge. Twisden conceived that it was always hitherto taken to be of the nature of gavelkind to devise; and unless it be so, it will retorn again to gavelkind; for when it cannot be proved that such lands belong to any named in the Act, country men that purchase part will take it to be of the general nature of the custom. Windham conceived the general words must be circumscribed by the particular, which is principally that of discent, which Foster agreed as the mischief the Act only intended to relieve; but yet would not suddenly turn the tyde, as used contrary. Adjornatur.

[374] 73. HOLDEN *against* SWINDALL.

Travers.

In trespass, the defendant pleaded Charles P. was seised in fee, and leased 4 Jac. to Hall for three lives, which H. assigned to the defendant, whereby he put in beasts into common. The plaintiff replyes (absque hoc) that Charles P. was seised in fee when he made the lease. The defendant confesseth that C. P. was tenant for life, and enfeofft Hall, but that before seisin of C. P. the Lord Powis was seised, and levied a fine to the use of himself, reversion to H. P. who enfeofft Holden, lessor of the plaintiff. The defendant rejoyns, and confesses the fine, but saith that H. P. dyed before C. P. absque hoc, that Henry enfeoffed Holden; on which the plaintiff demurred, as an ill travers. But by Wilmot for the defendant, the travers in the replication is ill, being of what was confessed and avowed before, viz. the seisin of C. P. 13 H. 7, 12, *Stoners case*, 27 H. 6. 1. The difference is betwixt an assize and trespass, 2 Ed. 4, 11, where title is necessary to be made, there H. may travers the seisin confessed before; contrà in trespass, which is but a possessory action. 2. It is a repugnant plea in replication, which confesseth the feoffment of C. P. and consequently a fee in him, and so cannot travers it after, F. Double Plea 11, which the Court denied; contrà if tenant for years be said to make feoffment. 3. This is a travers of matter in law, as 7 Ed. 4, 13, by Danby, and so void. 4. It's of an implication which is void, as by Fitzherbert in 27 H. 8, 48. Windham conceived the travers was most proper, and it's not like the confessing that lessee for years enfeofft, which admits a fee in him; contrà of tenant for life. Also it's not here sufficiently confest without travers; for if C. P. had fee, the under leases are good, else not: and in trespass, if the defendant pleaded J. S. was seised in fee, and enfeofft, the plaintiff replyes that he was seised in fee, and leased to J. S. for life, absque hoc, that J. S. was seised in fee, it's good: and per Curiam, this nor the case at Bar cannot be pleaded otherways. Judgment for the plaintiff, nisi.

[375] 74. DOVE *against* DARKIN. *Ante.* In Continuance F. 16.

Such plea is good so long as the parties are demandable, or may plead 2 H. 6, 13, pl. 6, but after writ of enquiry awarded by default, its ill, 9 H. 4, 1, pl. 4. So after issue

joyned and nisi prius, such plea is frivolous, and cannot be joyned by attorney, by Fortesque, 31 H. 6, 15, seu 8, pl. 4, yet attorney may plead mort ou deposition, &c. puis Dar. Cont. 9 Ed. 4, 24, pl. 31. But if the defendant plead mort del plaintiff, the plaintiffs attorney cannot confess it, 21 H. 6, 10, pl. 23, by Markham. The death of attorney doth not abate writ, because the continuance is in the name of the master, 5 H. 7, 3, pl. 7. Or notwithstanding a prece partium taken out after the death of A. yet if the defendant do confess A. is dead, the writ shall abate, 26 E. 3, 70, seu 16, pl. 6, in Continuance Fitzh. 16.

The warrant of attorney is determined by the judgment, unless to some purposes, as acknowledging of satisfaction, &c. but the writ of error is quasi a new suit, in which he cannot plead on the old warrant quære, fol. 107.

It's assigned that the plaintiff in ejectment was dead before the judgment, in a writ of error the party himself, by attorney, joyned issue that he is alive, and its found he is dead, which by Allen is void, without scire facias against the executors or administrators. Windham agreed, that if no party had been summoned, it had been ill; but here its well enough, as Rast. Entries Brief in division under mortmain; for if he be alive there is an end of the case, as after darrain continuance the defendant pleaded death of the plaintiff, and the attorney joyned issue thereon for the plaintiff: but by Allen, there is a rightful attorney constituted, contrà here; for if the party be dead, there can be no attorney: but by Windham, the Court will suppose one when such entry is made, and there needs no scire facias, unless none come in to plead. Twisden conceived, that upon error brought the errors must be assigned, and the party may come in and alledge the other dead: but here the verdict hath found he is dead, which makes a discontinuance, which Foster agreed, being the very error assigned; contrà if he had been found alive. But it's necessary, by Allen, in errour of judgment in debt or trespass, to have scire facias against executors or administrators, especially when none appears; and here upon error assign'd, a new attorney is made by the plaintiff: but by Windham, he is punishable by the plaintiff, but not the judgment reverst. Adjornatur.

75. PETTYWARE *against* HAMSON.

Escape.

Nota, that if committitur be entred in the marshalls book in an action of escape against him, H. must prove he was in his custody since the time; contrà per Curiam, where it's entred on record; but by the clerk, and Wild the Kings Serjeant, the course hath always been of late, that in case it be entred on record, yet H. must prove that he was in custody since that time, because its the usual course to enter committitur against every defendant, though he be upon **[376]** bail. Wherefore they ordered the marshall to shew whether one were in custody, or no, inter *Pettyware* against *Hamson*.

76. MOULD *against* WALLIS. In Departure Br. 10.

Apprentice. Moor 135, pl. 280, doth impliedly grant it's no departure. Godbolt 122, pl. 143. 1 Cr. 159.

In action of covenant against an apprentice, breach assigned in not serving him: the defendant pleaded nonage. The plaintiff replys by the custom of London, which by Jones for the defendant on demurrer is a departure, 1 Inst. 304. Kelway 76, *The Abbot of Buckfaces case*, Yelvert. 13, pl. 22. Hoell for the plaintiff, 21 H. 7, 17, Feoffment. The defendant pleaded nonage: the plaintiff replys by custom of the mannor, and held good, contrà to 37 H. 6, 5, pl. 9, and so in 3 Cr. 652, but contrà where one alledged general custom in the count, and replys by a special. Windham, This is no departure from the title, but is an answer to a disability pleaded in barr, as where in action the defendant pleaded moin professe; the plaintiff replys, that before the action he was deraign'd, agreed good, which the Court agreed. But by Allen, all the presidents are to count on the custom, this being the very ground of the action. But by Twisden, Hutt. 63, *Gennings* against *Pitman*, H. 5 Car. *Gilbert* against

Fletcher, the action is founded on the covenant, not on the custom, 21 Ed. 4, 6, pl. 17, in Labourers Br. 42. Infant Fitzh. 2, & 5 Eliz. 4, § 43 b. 1. Infant is not bound by collateral contents, but only of apprenticeship, 6 H. 7, 8. Adjornatur.

77. TRIPIT *against* REYNOLDS. *Ante.*

Assumpsit.

Allen prayed judgment for the plaintiff, that the promise is created by operation of law, and so no necessity to alledge to whom the promise was, but the wife that is to have benefit may sue for it, though the consideration moved from the husband, as *Rippon* against *Norton*, 3 Cr. , *Bayfield* against *Spencer*, and *Agar* against *Goddard*, in consideration the father would settle in marriage on the son, one promised to pay to the father, yet the son may have action, so here. Twisden, Had the promise been made express to the husband, as *Frenches case*, to the father, there the son could not have action unless it be upon marriage. But by Windham, either party may have the action where both are to have benefit of it; contrà where money is to be paid to a third person to the use of the assumee, for there only he shall **[377]** have the action, as where promise made to an attorny or servant to pay the master for wares sold, only the master shall have the action. Adjornatur.

77. FRESHWATER *against* PIGGOT.

Priviledge. Hut 63.

H. charg'd as in custodia, may plead priviledge, which the defendant did under the Great Seal, being clerk of the Chancery.

78. LUMBERSTON *against* THORPE. *Friday, November* 14.

Pardon.

In trespass, special verdict being found for the defendant, a souldier under the Parliament so called 1659, that as such he used the horse, and find the Act of Oblivion, and the repeal in relation to Sir G. Booth, when the secluded members came in, after which, viz. 25 July, the horse, for which the action is brought, was taken: which, by Windham, was intended that none should proceed criminally against such, but still the property is in the owner, which the Court agreed. Adjornatur.

79. CRAWFORD *against* MIDDLETON. *Ante.*

Slander.

Allen prayed judgment, this being as much as a positive charge, that he had stole the mare; and the case in Hub. 177, that H. was in goal for stealing a horse, hath been otherways ruled. 2. The ubi revera that no such words were spoken is not necessary; the words being layd false and scandalous, though the relation of another; but it had been moved according to presidents, but here the falsity and scandal must refer to the relation, as in indictment that H. did falsely depose, the plaintiff need not aver ubi revera, the matter was false, and this is found all by verdict, but the words were not laid quod falso, &c. but only quod hæc falsa, &c. verba. Windham, The words shall not be aided by intendment, because the jury only enquire of the words, not of the falsity, and agreed the case in Hub. 177, which shall be intended that he was in the goal before. Twisden, Ubi revera I never conceived of any use, the scandalosa verba refers to all, and I conceive the case in Hub. 177 scarcely law, it being a scandal to have such an imputation laid on him. Mallet and Foster agreed with Windham, the scandal must be fixed some where, and if the party can produce his author, he is cleerd; and therefore the ubi **[378]** revera is necessary, according to auncient forms, which is not readily to be altered: but for the words, he conceived Hub. 177 a hard

case, and these words not actionable in themselves, but if the narrator cannot produce his author; but by Allen, The defendant may justifie that J. S. told him, and need not take issue on the falsity, 21 Jac. tryed before Hub. One told J. S. that Cantrell was hanged for a robbery, and J. S. told the defendant in another action so, and not being said falso & fictè, he was found not guilty, which Twisden remembred, yet per Curiam, præter Twisden, nil cap. per bill.

80. ANNISON *against* PERKIN.

Mich. 13 Car. 2, Rot. 336.

Error. March, 8, pl. 20.

In debt on bill of 40l. to be paid at Hyam prædict. (which is out of the jurisdiction of the Court of Jernemutha) being in the county of the City of N. which by Allen is error, the count being upon payment generally, which per Curiam agreed ill; so entry of continuance, not saying per Curiam; so continuance is to the next Court, which is said held 12 Dec. and the entry is ad quam quidem Curiam tent. dicto 11 Dec. Windham conceived the leaving out the place but a trick to hedge in jurisdiction. Judgment reverst.

81. LOWD *against* COLEDAM.

Assumpsit.

Error of judgment in H. in action upon the case; on agreement to pay on delivery of corn, & indebitatus, &c. Verdict find one promise and the 5th for the plaintiff, for the rest for the defendant, and generally damages assessed. Judgment affirmed.

[379] 82. MORGAN *against* THOMAS.

Covenant.

In action of debt on bond, condition whereas L. S. had purchased land, which discended to W. T. and the plaintiff was obliged to pay rent to T. P. now if W. T. to whom he attorned tenant should save harmless, the bond to be void. The defendant pleaded that he hath saved harmless; to which the plaintiff demurred, as *Mansers case*. But by Williams for the defendant, *Mansers case* is to discharge and save harmless, this only to save harmless. But by Twisden, He might have pleaded non damnificat. for this that he hath saved harmless, doth imply he was damnified; which the Court agreed. Judgment for the plaintiff.

83. NICHOLAS *against* PULLEN. In Br. Cond. 18.

Tr. 14 Car. 2, Rot. 345.

Condition.

In action of covenant to save harmless, quiet, &c. from suits and lawful evictions. The defendant pleaded performance of covenants. The plaintiff replyed, that J. S. took out a writ of hab. fa. poss. out of B. R. debito modo exeunte, and by vertue thereof entred on possession of the plaintiff, and did expel and amove him. To which the defendant demurred: and by Powis, The judgment needed not be recited, the issue being tendered on expulsion, Curia contrà, debito modo is not sufficient without shewing particulars; contrà in Spiritual Court. As by Twisden, To say in debt for rent, that H. did demand debito modo is ill; and *Allen* against *Thorn*, in debt on bond to save harmless from lawful eviction, dower being recovered after bar by fine, and nonclaim without exception to it, which might have been taken; it was held no lawful eviction, and so the defendant found not guilty; for the plaintiff must sufficiently entitle himself. Windham, It is hard here for the defendant to shew any other title, being tourned out in ejectment against fain'd ejector; but yet conceived

it ill, because the hab. fa. poss. doth always recite the term of the judgment, and therefore that must at least be shewed, but not the title of him that evicted. Judgment for the defendant. Nisi.

[380] 84. NICHOLAS *against* PULLEN. In Condition Br. 12.

Covenant.

In debt on bond for performance of covenants, one whereof was, that defendant should not deliver up possession to any but the lessor, or such persons as should lawfully recover. The defendant pleaded he did not deliver, but to such persons as lawfully recovered it: which, by Powis, on demurrer by the plaintiff, is well enough; and the plaintiff may shew it was to be delivered to J. S. contrà to law: and so by Twisden is Stiles, *Eals* against *Lambert*. Windham 5 H. 7, Condition to deliver so much bread as required, the defendant pleaded he did so, which was held ill, without shewing what; so here, he ought to shew that he delivered to J. S. by lawful title, or else that he delivered none, which Mallet agreed. 2. Here is no breach necessary to be assigned by the plaintiff, the plea being on perticular covenant, which is like releas pleaded on arbitrement. Adjornatur.

85. BANCOMB *against* AYLWIT.

Ordinary.

Error on judgment in debt in C. B. after verdict by administrator, to whom administration was said to be committed by the Archbishop of Canterbury, not saying loci Ordinarius, which the Court conceived well, being after verdict; contrà on demurrer, for if the administration belong to the Archbishop of York its void. Judgment affirmed. So not profering letters of administration per Curiam.

86. LAWSON *against* WITHERINGTON. In Error Br. 175.

Trin. 14 Car. 2, Rot. 596.

Days. 1 Inst. Co. 207.

In debt on obligation of 200l. upon condition for payment of 100l. 10 Jan. next ensuing on three months warning (being dated 1 July) defendant in bar pleaded, that he had not three months warning before the action brought: to which the plaintiff demurred, and Weston conceived, that the certain day is 10 Jan. and the obligee must give the warning 2d. if the warning be intended three months before any 10th Jan. then it must be given by obligor, and so is 3 Cr. 202. *Isham* against *Paget*, Brief. Br. 77. 3 Cr. 842, *Gawen* against *Syms case*, its only a plea in abatement, which cannot be pleaded in bar. 3d. The breach is [381] not well assigned, in that warning was not to the defendant, for it might be to the other joynt obligor. Twisden agreed, that 10th Jan. may be intended next after three months warning, not next after the bond; but its hard to maintain that the obligor must give warning, and by Windham, Had the mony been payable 10 Jan. next after the bond, and three months warning by the obligee, though that day pass without warning, yet the money is not lost, as hath been resolved; but three months warning may be given after to the obligor, and he is bound to pay, the ascertaining the day being for his benefit. Adjornatur.

87. HORSEMAN *against* WATERS.

Tr. 14 Car. 2, Rot. 484.

Executor.

In scire facias, on judgment in B. R. by executor shewing testator recovered against the Sheriff of S. and that part is unsatisfied. The defendant pleaded that

administration was committed to J. S. not traversing absque hoc, that the plaintiff was executor, and this after imparlance ill, per Curiam, judgment for the plaintiff on demurrer by the plaintiff; so to say that H. dyed intestate without traverse, absque hoc, that he made will, *Greisbrook* against *Foxe*, Pl. Com.

88. PRICE *against* COWLY.

Administrator. Yet H. need not say that the archbishop that committed it was loci Ordinarius. 3 Cr. 457.

In debt against an heir by administrator, not saying administration was committed to him, debito modo, nor by whom, which was assigned for error on judgment in C. B. which per Curiam is error; but being mistaken, and the record right, judgment affirmed.

89. BRAZIER *against* ACTON.

Estople.

In debt on bond to perform all covenants specified in an indenture betwixt A. and B. the defendant pleaded there was no covenants; to which the plaintiff demurred; and per Curiam, this being general of all, is well; contrà if it were to perform any certain covenant; as to be nonsuited in formedon, he cannot say there is none; contrà to be nonsuited in all actions pendent in C. B. But the party is estopt to say there is no indenture, but he must set forth the indenture it self, though he have agreed there is such a one: **[382]** for whither the words in the indenture, as deed, &c. do amount unto covenant, upon issue, that these are such covenants, can never be questioned, but only of fact: but the plaintiff shewing the indenture, if any covenants be therein, the jury must find for the plaintiff. And by Wild for the plaintiff, This is a windlace to make the bond void; for if there be really no indenture, which the defendant is bound to shew, the plaintiff should be put to shew it. Adjornatur.

90. SAUNDERS *against* GODFRY. Sinderf. 87, pl. 2.

P. 14 Car. 2, Rot. 296.

Jurisdiction. Presentment that abbe did distrain certain persons (not saying whom nor where) sans cause, shall be intended infrà jurisdiction.

In action upon the case on promise within the jurisdiction, to pay money on the sale of two cows, which is not said within the jurisdiction, but it is express that being in debt within the jurisdiction for sale prius made, not shewing where; the defendant promised within the jurisdiction; after verdict for the plaintiff, this was assigned for error, and per Curiam, Though it do not appear the sale was out, yet they will not intend it within the jurisdiction of Marshalsea, or any other Inferior Court; for the sale, which is the consideration of the assumpsit, must be enquired of, which cannot be by the Inferior Court.

91. RUSSEL *against* LEA. In Coverture Br. 51.

Infant. Penal bill is void if infants except to it. Godbolt, 364, pl. 456.

In debt on obligation for necessaries, no oyer being demanded, its intended single bill. The defendant pleaded infancy; the plaintiff shewed that it was pro necessario apparatu & vestitu, not saying it was for him, nor that it was suitable to his degree. The defendant demurred, but it being said it was sold to him, it shall be intended for him; but 2 Cr. 560, *Ive* against *Chester*, it must be said necessary, and the particulars set forth, by Foster; contrà per cæteros, the particulars are needless. Adjornatur.

[383] 92. MANBY *against* SCOT. *Ante. November* 15. In Contract. Br. 19.

Twisden for the plaintiff as before, conceived the verdict very proper, for this being sufficient evidence, had the jury found it, they had made an end of the case, and they need not shew the particular, what is necessary, unless the question had risen thereon, as *Stone* against *Withipoll;* and as in ejectment of copyhold, if question arise on the reasonable fine, then the particulars must be found; contrà where its on demand, so 24 Car. *Parker* against *Coxe;* and here is no doubt but its necessary; but the question is, whither it charge the husband to the point; he conceived the husband chargeable, because she is wholly disabled to contract, and therefore when things are necessary, the law will create the means, as if she take bread and eat it, trover lyeth against him, 7 Car. *City of Westm.* against *Gerrard*, the defendant a married woman, of personal estate, she had a grandchild, who was laid to the parish, and the question was; whither the husband, (so *Drapers case*, out of Leicestershire) as the grandfather of the infant, should keep it, or the parish, and resolved on reference to two Judges, that though Gerrard were no grandfather within 43 Eliz. yet for the benefit he had by his wife, 39 Ass. 1, he was bound to keep him; and when the husband will thus take advantage of his own wrong, in not keeping her, its reasonable he should be charged; and the disability of the wife is no hinderance to contract for necessaries, Perk. 4. 14 Ed. 4, 2 i.e. to charge the husband, as infants contracts are void, except for clear necessaries convenientiæ, H. 2 Car. As if infant be housekeeper which is not necessary quo ad esse, yet for such provision he is chargeable, B. R. Tr. 15 Jac. Rot. 1374, *Hill* against *Blacksto* 9 H. 7, 21. Lease by infant without rent is void, and trover lyeth for goods delivered with his own hand; contrà of trespass, because it cannot be said vi & armis, if the wife be beaten, being absent from her husband, and be cured, she is not suable, but only the husband; and its no reason this should charge the husband, more then for meat and drink; for in want of both, she will perish: so if she have a child cured, the law will charge the husband, Hub. 11, *Bridgmans case* master of a ship, who hath only conduct of it, may yet pawn it in case of danger; and shall the law take care **[384]** of danger; and take care of such things, and not of the lives of men? To abjured persons the law yet allows food, &c. (Coron. 407, Artic. Cleri, 13 H. 7, 3), much more here: so moin for necessity of the house may take up necessaries, not that he can put life into them, but because else the house would want support, 9 Co. *Hussyes case* she shall not suffer imprisonment for ravishment of ward, because she cannot satisfie; so here, because she cannot acquire any thing, the husband shall be charged: nor is it much doubted de re, but de modo: alimony is not mentioned in Art. Cleri, nor *Caudryes case* 5 Co. 9, nor in 25 H. 8, cap. 12, which all sum up the heads of the ecclesiastical jurisdiction, the estoveria was doubtless grounded on excommengement propter sævitiam, and could it be made good (though the practice hath been always against it) it were to the purpose. I agree the rights of matrimony 7 Co. 44, *Kens case* 4 Co. 29, as divorces, &c. belong to Spiritual Court, but all things that belong to matrimony is no matrimonial cause, 48 Ed. 3, 18. 50 Ed. 3, 90, 19. F. N. B. 44, 45. 52 Ass. 7, promise of money in marriage is suable in the Spiritual Court, contrà of promise to give money to such as shall marry my daughter; Debt. 8, and alimony is not properly a matrimonial cause, by reason it depends not on separation: F. N. B. 139. So the register must be understood of debitis & catallis given in testamento or matrimonio, but yet alimony is 1 Car. *Greens case*, a consequent of the judgment of divorce in Spiritual Court, and so may be there then allowable; but its hard she should have no allowance, unless she be divorced; and by the course of the Spiritual Court they do not allow alimony till separation; and no case hath been cyted where alimony alone originally was sued for there, F. N. B. 53 b. 139, and yet if it were, Hut. 116, and 24 Car. *Globenyes case*, she hath liberty of Court, and the suit in the Spiritual Court, suits not with this case, being for necessary support, 2 Car. *Penelope Owens case*, in prohibition to the marches, it was held the Spiritual Court cannot sequester estate, and they will not allow alimony till causa est contestata, nor after 37 H. 6, 14. So 18 Eliz. cap. 3, of Bastdras, might have provided that the father should be imprisoned till he allow the son maintenance, but it goeth a surer way that the parish shall allow present subsistence, and charge the father after; and it was foreseen, 21 Jac. cap. 24,

that men would live in prison rather then pay debts; and though it be cause of divorce for severity if the husband take away her necessaries, yet that doth not take **[385]** away her liberty of charging the husband, no more then her taking supplicavit and binding him to the peace, and if the fault be in the husband, that then she may charge him, then all the arguments of her contract fall to the ground, and the obedience or disobedience signifieth nothing; also could she obtain a separate maintenance, as she shall in Spiritual Court, and separation beside, then she may rant and live as feme sole and laugh her husband in the face; but if she sue at common law, it will make her very cautious how she proclaim her defaults before a jury in open Court: also a trover will lye 21 H. 7, 40, or trespass if the contract be void against both, and so she, as well as he may be imprisoned; and if elopement alone be cause at common law to lose dower, that is when she is become feme sole, and able, but she doth not hereby lose food and rayment during marriage; nor is it said she shall lose alimony in Spiritual Court: also here is no time defined, when such elopement shall be a forfeiture. 3. As to the prohibition, its annexed to the liberty of the wife, and so void contrà where annexed to feoffee, as not to infeoff J. S. Also should he adhere to the enemies of the King or have the plague, she may be a good woman, and yet refuse to go with him; and therefore there is no reason she should want maintenance for such cause: also this is an incident inseparable to her, and there is no reason the abuse of the mercer should take away her use of such things as the law alloweth. I agree the case of the wives resceit of rent to be void, but that's nothing to necessaries: also we defend the liberty of common law, and so though plaintiffs are not put to shew authorities, but such must produce them that would draw the cause ad aliud examen, as the defendants, 11 H. 6, 30, by Martyn is put as a case unquestionable, and so is a full authority; and the opinion of the Court went a step further, that he need not say the things were for the necessary use of the house 8 Car. Jones said it had been adjudged in *Bill* against *Lake*, that the cause of action began by the request that this is a new action, cannot be said, seeing the several opinions before, yet it hath not been very frequent before; but before 12 H. 8 no action upon the case lay against the executor on promise of testator, but many authorities to the contrà, 7 H. 7, 12. 11 H. 7, 26, only *Norwoods case;* Pl. Com. 183. So of latter times, action upon the case on 43 Eliz. 6, 12, Policy of Assurances, so assumpsit against feme for not marrying with him, lyeth now at common law every day; also when this action was brought, **[386]** no alimony was allowable, the Courts being taken away, of which the stat. 17 Car. taketh notice, and all the spiritual law is but branches of the common law, and therefore when they cease, they retorn again to common law 12 H. 7, 18. Atkins for the defendant as had been argued before.

93. BROAD *against* HALL. *November, Monday,* 17. In Incumbent, Br. 7.

Quare impedit. Sinderf. 93, pl. 18.

Twisden denyed the opinion in *Bosvills case*, 6 Co. 51 b. and conceived that H. that recovers in quare impedit, as Hub. 127, pl. 15, shall remove the incumbent whoever he be, unless the presentation of H. be obtained pendente placito; but the incumbent, if he have a better title, may have spoliation, which the Court agreed. Adjornatur.

94. BUXTON *against* BATEMAN. *Ante.* In Chattels Br. 11.

Church.

If the repairing were but matter of evidence, the party need not alledge it as suggestion for prohibition, no more then in prescription, because no issue can be thereon: and the matter being ecclesiastick, there must be a temporal reason given to draw it thence, and so are all the books: and in this very case a prohibition was granted in C. B. because that by the common law he must alledge he doth repair, whereas usage alone, in the Spiritual Court may be sufficient by their law. Winnington for the defendant, 2 Cr. after verdict its well enough, as prescription for common not saying pertinent. but only for beasts levant and couchant. Twisden, upon advise

with some other Judges conceived in action upon the case, its sufficient to prescribe generally, but in a prohibition (as all the presidents are) they doubt it is necessary to alledge a cause; but here its not found, tanquam ad messuagium pertinent. which may be for other cause then of reparation, but only that all such as had ancient house have used to sit, which may be by placing of Ordinary; and its not like the case of common, which shall be intended pertaining to the land after verdict. Windham agreed the distinction betwixt an action upon the case, and prohibition, the one taking away the jurisdiction of the Ordinary, the other not; and it doth not appear whither isle peculiar or not, and therefore it shall be intended it is, now after verdict: but the not saying ad mes-[387]-suagium pertinent. its ill; which Windham agreed. The Court agreed the prescription sufficient in this action, but upon this last point of not saying tanquam ad messuagium spectant. Adjornatur.

95.

Prohibition.

Jones moved for prohibition for Cookson administrator of Pots, to the Bishops Court of Lincoln, upon suggestion that the last incumbent was for some time put in by the late usurpers, and so by the Act of Oblivion is to be discharged for so much in suit there for pension, as in action for tythes, if H. suggest its barren ground, on 2 Ed. 6, he shall have prohibition presently, which the Court here denyed, before this he pleaded in the Spiritual Court; and it there appears this to be the single issue, whereby the party hath tyed himself up, and then if the Spiritual Court will not allow the plea, prohibition shall be granted, as in action for tythes, if the defendant pleaded unity, and so discharged by the statute, then prohibition shall go, but not before.

96. HURSTS CASE. *Ante.*

Attorny.

Raymond conceived on the rules of *Bags case*, that mandamus lyes to restore an attorny, Co. Entries 436, which is as much an office of administration of justice as steward; and they are compellable to serve the parties as attorny, 1 Inst. 295, and should not this Court take notice of such injuries and oppressions, the mayor may turn out all at pleasure: its like the case of *The Sheriffs of Nottingham*, Mich. 12 Car. 2, B. R. a mandamus being awarded to the old ones to deliver over rolls to the new ones; also whither there be cause or no, the Court will grant the writ, though not restore without cause: and in the Common Bench the justices by 4 H. 4 have power to turn out at pleasure; also that is an Inferiour Court, and so not like the Courts in Westminster. And (*Underhills case*) a mandamus was granted to the Borough Court of Southwark to restore attorny; and an assize will not lye of such office, and so the party without remedy. Windham conceived this a new case, and the president not warrantable, and a mandamus may be as well granted for scriveners clerks in London, or cryer of Inferior Court, which Foster agreed. Twisden, This writ is grounded on Magna Charta, that none shall be disseised of liberties or franchise, &c. and conceived a mandamus grantable. So Mallet and Twisden conceiv-[388]-ed *Blagraves case*, that recorder chosen, ad libitum, may be turned out so without cause, no law; but Curia contrà, for the same way he is created, he may be discharged: but the Court being divided, the mandamus was denyed.

97. MOLINS *against* WELDIE. *Ante.* In Error Br. 148.

Error. To say that J. S. was no alderman tempore judicij, is assignable for error, 3 Cro. 320, pl. 8, but not in stat. merchant, for that must be avoidable by audita querela, 3 Cr. 319, pl. 6. 1 Bulstr. 207, pl. 223. Godbolt 239. Siderf. 94, pl. 20.

Wild for the defendant in the writ of error 7 H. 7, 4, that a judgment was given as before James Duke of Ormond, &c. whereas he was not then present, which being as a Judge, is contrà to the record, as if it should be said that judgment in Common

Bench was not given, 2 Cr. 359, *Whistler* against *Lea*, a Court certified held secundum consuet. the defendant cannot say there is no such custom; and here in nullo est erratum, cannot be pleaded the matter being not proper to be assigned for error, but demurrer to it, as here, is proper; this was assigned as error of judgment given in the Marshalsea in action on indebitatus on insimul computaverunt, which the Court agreed; but clearly trespass, or false imprisonment lyeth: and a stranger shall not be estopt in collateral action of the party himself against which the judgment is: and in such action, if the defendant justifie by this judgment, the plaintiff need not plead nul tiel record, but may plead specially that there was no Judge present judgment affirmed.

98. WIN *against* LLOYD. *Ante.*

Scire facias.

Jones for the defendant in writ of error 26 H. 8, 2, is that on recovery against J. S. who makes feoffment over, scire facias must be against feoffee, 28 Ass. 42 Ass. 22, by Fulthorp: the Court agreed there must be a scire facias, else an assize will lye; and for the time many of the books say that it shall go after reversal, and before restitution: but Dy. 321, the course is altered, and on great advice, thought most fitting to go before reversal, and since many presidents are according, and else one would be prevented of remedy by release of errors: and here, that there is another ter-tenant, is confessed by the demurrer. Allen for the plaintiff agreed scire facias; but after in nullo est erratum pleaded, and issue thereon, as here, is only ex gratia Curiæ to inform them, which is sufficient by the retorn of the sheriff, and no farther plea may be in delay of judgment, which the Court agreed, and refused to grant farther Scire Facias F. Utlary 40. *Williams* conceived there is no record in Court the [389] judgment, being on recovery of lands in Llan vaiwr, and the record removed was Llan vaier, which differ as much as Dale and Deal, but it was mistaken. 2. This writ of error, being on common recovery, ought to be special, according to his case, and this being brought by heir of the vouchee, reciting only judgment against tenants in plea betwixt demandant, tenant, and vouchee, whereas he should have shewed farther, that judgment was also against vouchee, per quod he was damnified: but by Foster, the error being not assigned in the judgment against the vouchee, but against tenant, its well enough, which the Court agreed, and ruled to plead to the errors in chief.

99. SAUNDERS *against* EDWARDS. Sinder. 95, pl. 21.

Mich. 13 Car. 2, Rot. 69.

Slander.

In action upon the case quod crimen feloniæ imposuit, per quod he lost his office in Chancery. The defendant pleaded as to any charge, beside speaking the words, not guilty, and issue thereon found for the defendant; and that to the words not guilty within two years, which by Wild for the plaintiff on demurrer, is not within the statute, no more then slander of title, 1 Cr. 100, *Harwoods case*, for the dammage may accrue long after the action is grounded on the dammage, and so he should have pleaded actio non accrevit infrà duos annos. Jones for the defendant, The plaintiff hath set forth he was an officer, &c. And so the words were actionable, without any special damnification, and so within the statute; contrà if the words themselves were not actionable without special dammages, then the cause doth appear to begin there, and so the plea must be quod actio non accrevit infrà duos annos, &c. and the defendant hath liberty to sever this plea, for the plaintiff may give evidence by any imputation of felony, as well as words. But Wild denyed that issue not guilty, on such action quod crimen feloniæ imposuit, may be maintained by bare words; as saying to the constable, that the plaintiff stole my horse, else none would ever bring action for the words themselves, but generally quod crimen imposuit, which Windham agreed. And by Twisden, if I charge H. with felony, for which he was carried before a justice, there its specified the manner, and so bare words is sufficient; but if it fall out H.

were not carried before a justice, then the action is not so mayntainable, which the Court agreed: and that the words are with-[390]-in the statute, on the difference put by Jones, judgment against the plaintiff, for that the first plea is a full bar, not guilty of all, but speaking the words, and that coming after is impertinent, the action quod crimen feloniæ generally, is only within that clause for six years, not of that for two. Wild desired to know, here being demurrer for part, and verdict for part, whither the defendant should have costs, both being found against the plaintiff, which the Court conceived he should, as the plaintiff should have if any part were found for him.

100. THE KING *against* BOUND. *November* 18.

Indictment.

Jones moved to quash indictment of a woodmonger for selling coals, wanting so much of measure, not saying fraudulenter, which being a great abuse, the Court would not quash it till pleading.

101. SMITH *against* EASON.

Trover.

Trover de duobus mensis & tapibus, Angl. two tables and carpets, good. 2. De una cathedra & pulvinaribus, Angl. a chair and cussions, which by Windham is like, *Web* against *Washborns case*, of beam and weights, *Lufton* against *Stanton*, 20, oves matricibus & agnis, and as trover of ship, cum apparatu, which though hard cases, after verdict were ruled not good, and the Court awarded ven. fa. de novo.

102. COO *against* CAUTHORN. General Issue Br. 83.

Common.

In action upon the case for digging soil, and the spreading it on the lands, per quod he lost his common for 44 beasts, the defendant pleaded there were auncient mines, and that he was lord, that he digged there, and did as little damage as could be, to which the plaintiff demurred specially, 9 Co. 95, as amounting only to the general issue, because this trespass is not to be considered as relating to the lord 9 Co. *Morris case* but as it takes away the benefit of the commoner; and here the defendant hath said he left sufficient. Jones for the defendant, as this case is, it doth not amount to the general issue, but is a special matter of law, because if there be sufficient left, the breaking the soil is no tres-[391]-pass; and if there be any matter of law, as in traverse, it may be induced, and not left to the jury; and as in trespass for eating in soil, he that hath way, and his horses going here and there sparsim, its a better plea then to take issue not guilty. Allen, Should the plaintiff rely de injuria sua propria, it would not answer the relinquendo sufficient common, and should the plaintiff have taken issue on the leaving sufficient, the same point would have been in issue, as on not guilty pleaded in the bar. Twisden conceived the defendant hath election to plead as here, or take issue: and by Foster, the commoner, hath right all over the common, and therefore he shall have action against a stranger, but the owner of the soil digging part, must justifie specially, as on approvement; and when a common is for certain number of beasts in great fields, the grantor cannot improve: and per Curiam, this bar could not be better. Allen agreed, if the point of action were for the digging; contrà here where its but for a consequent dammage. Adjornatur.

103. NORFOLK *against* AYLMER. In Dett. Fitzh. 80.

Tr. 14 Car. 2, Rot. 278.

Sheriffs. Dyer 324, pl. 33.

In debt on obligation of 200l. condition that Ed. Smith, one of the Kings Judges, committed to serjant at arms of the House of Commons, should be a true prisoner

unto the plaintiff, his executors and assigns, until discharged by the House of Commons, and shall not go abroad without licence, but shall pay his due fees; the defendant pleaded it was for ease, and so void by 23 H. 6, 10. Powis for the plaintiff 2 Cr. 46, that the serjant at arms is not within the statute, as being officer superior to those there named, and hath not properly belonging to his office to keep any prison, but to attend them; it hath been held contrà to 3 Cr. 66, that the marshal of this Court is not within that statute, Latch. 23, Elworly; but the Court held Sir George Reynolds, 9 Co. 98, and common practice, to be contrary, that he is, 1 Cr. 309, *Jones* against *Stratford*. Levin for the defendant, that the bond is void by the statute; the preamble, keepers of prisons, which he is, when he hath any prisoners committed to him, and the purview according to the roll of Parliament, is, that all the officers and ministers taking such bonds shall be void, and the sheriff is superior to the serjant at arms, and if he be not within the words, he is within equity, as 9 H. 6, 19. Pl. Com. 35. Actions on **[392]** escape grounded on the statute 2 Inst. 382, & 3 Cr. 66, & Dy. 321, it hath been resolved, that this statute shall be taken by equity against officers. 2. Its void at common law, 1 Inst. 206, the condition being against law, being that the defendant shall be a true prisoner to the plaintiff, his executors and assigns, which is like condition not to exercise trade, 2 H. 5, by Hulls, and Owen 143. And also to say, that he shall be a true prisoner till discharged by the house, as 2 Inst. 52. 1 Cr. 579, *Feremans case* and *Barkhams case* 507, pl. 59, and *Brices case* 593, 70 is ill, but he ought to conclude generally, till he be discharged according to law, and not to tye him up to any particular way. Also this is a bond for fees, and so void at common law, 2 Inst. 210. Hut. 52, and *Lyster* against *Bromely;* also here is no place said where the fees shall be paid, and so must be to the person; and its not said when, and so they are due every day. Windham conceived it did not extend to serjant at arms, and hath been so resolved, because the statute was only intended of such as were committed for due fees, and he is only a messenger and so the Court conceived, but whither it were voyd at common law dubitatur. Adjornatur.

104. FOUND *against* SMITH.

Baron & feme.

In replevin, the defendant avows as grantee of rent-charge as heir of the baron & feme, the grant being to the feme and her heirs; to which the plaintiff demurred. But by Windham, Its but surplusage, and one may make himself heir to twenty, so he appear heir to the right person, which the rest, Foster absente, agreed.

105. TAVERNER *against* QUATERMAN.

Poor.

In debt on obligation to save harmless the plaintiff and inhabitants of N. from all charges that may happen, by placing A. or any poor person in cottage; the defendant pleads non damnific. The plaintiff replyes, they were damnified by placing such a child in the said house, in being forced to provide necessaries for him, by reason of a rate set on the inhabitants by the major part of the justices and overseers. To which the defendant demurred, as not shewing any of the particular inhabitants were taxed or charged, as 2 Cr. 425, & 6 Co. *Braughtons case*. But by Windham, its needless; but the possibility that they may, by the rule made, is a suf-**[393]**-ficient damnification, which the rest agreed. And 2. The overseers are but by 43 Eliz. But they may provide, and the rate is to be set by them, and the churchwardens afterward, and confirmed by the justices. Adjornatur.

106.

Admiral.

Kirkham moved for prohibition to the Admiralty, upon refusal of pleading of the Act of Oblivion in libel against a master of a ship, who with his lading bought a ship

taken from him by the Kings enemies, which the Court refused, and left the defendant to appeal; contrà if they will take on them to expound an Act of Parliament.

107. DAVIES *against* JONES.

Slander.

That the plaintiff being a broker, the defendant said he was a cheating knave, and cheated him with brass mony, *Gettings* against *Ransford* Hut. 13, which Pemberton moved, the words are not actionable, in arrest of judgment, being of things not in his profession. But, by Windham, where he only said generally of a tradesman that he was a cheating knave, is actionable, which the Court agreed; and that the money shall be now intended on bargain in his profession; but by Twisden, the not saying he did it scienter, to be brass, is ill, which, by Windham, had been a good exception on indictment; contrà here, which Mallet agreed; but its not necessary, to shew where he exerciseth his trade, *Tuttle* against *Milton*, Yelverton, which is needless. After verdict, judgment for the plaintiff. Nisi.

108. GLYN *against* ———. *Wednesday, November* 19.

Trespass.

In information for entry on his land, with force, and expelling him, and riotous setting dogs on his cattle, not saying ad tunc existens liberum tenementum, which, per Curiam, is needless here; because the party can never have restitution: this suit being only to punish one as trespasser; contrà in indictment on 8 H. 6.

[394] 109. COULS *against* CALVERT. *Ante.*

Hill. 13 & 14 Car. Rot. 480.

Trespass.

Tourner for the plaintiff conceived the verdict aided by the statute; as Hub. 187, *Frestons case* & 76 *Banks case;* and that it being good for part, its but a discontinuance to the rest omitted. Allen for the defendant that the verdict is void, finding that three did assault, beat, and wound absque tali causa; and that three who justified, did molliter manus imponere, neither acquitting them, nor finding them guilty, only of part, he agreed to be law, Hub. 76 & 187, but not like this case in action upon the case for words in B. R. verdict found, that he did speak such words, but say nothing of the other, which was held ill; which Twisden remembered. Also its like an action on assault and imprisonment, where some are found guilty of both, and some not guilty of assault, not saying any thing of the imprisonment, which is ill. Windham held here was no issue on the wounding, being only mentioned in the count, and replication, but not in the bar, and so is a discontinuance: but yet the jury having found for all, and dammages intire, its ill, which Twisden agreed, and the Court: but though the verdict be for all, yet they assess dammages only for the trespass and assault, prædict. not saying any thing of the wounding (which though the usual form) yet really nothing more being in issue then assault, &c. it may be intended the jury assessed dammages only for that, though they find all, as in the count. Adjornatur.

110. SHEFFIELD *against* MORRIS.

Judgment.

Judgment on default in trespass, &c. ought to be recuperare debeat, and because it was quod recuperet in Inferior Court, it was reverst for error.

[395] 111. SOUTHCOT *against* RYDER. *Ante.*

Account. Yelvert. 171, pl. 244. Moor. 408, pl. 551.

In an action of account from 1 May, to the 1 August, the plaintiff is tyed up precisely to the time, and the defendant having alledged a discharge of the duty accruing before the days, this, per Curiam, is ill, there being no charge as to that in the declaration. 2. Polyxphen for the defendant conceived the count ill, charging him as resceiver, and saith not by whose hands, which per Curiam is needless in action against Bayly, and so against receiver, unless there had been demurrer; but contrà here on verdict and the plea being before the Act of Oblivion publisht, could not be otherways, then that he resceived to pay over to such persons; though in truth those persons were ordered by the commissioners to resceive it: the Court ordered amendment, and to go to new tryal by consent.

112. BAYLY *against* EXECUTORS OF BAYLY. *Ante.*

Executors.

In action upon the case for not delivering a cow delivered to the testator, to redeliver on request, nor paying the money for which the testator sold it. Bigland for the defendant, Though this be a misfeasance, yet wherever one may plead not guilty, the action is gone by the death of the testator, H. 17 Jac. Rot. 206, *Hauthorn* against *Lea*, B. R. An action in terminis, with this a kind of trover of a virginal, was by two Jndges, on the first motion, held it would not lye against executors; and per Curiam the cause of action began by the sale, which was a meer trespass; and by Twisden, This is a meer trover, and the plaintiff hath no right to the money. Judgment stayd.

113. HOLLAND *against* FISHER IN C. B. *Ante. Thursday, November* 20.

Tail.

Brown after special verdict opened put the case, that G. Lord C. had issue eight sons and two daughters, and by will deviseth to Brook his eldest son for life, remainder to his first son in tayl, and so to all; remainder in tayl general, remainder to George his second son, remainder to the rest of the sons in general tayl, remainder, to Edward his youngest son in fee; William had issue Henry and George and three daughters, whose issue are living; William dyed, H. enters, and so was seised to him, remainder **[396]** to his brother George, they are both attainted, and G. executed, the King for great consideration giveth to Duke Brooke heir of George and his heirs, so long as G. or H. or any heir of them be living, all those lands which were of Henry or George by devise of G. Lord Cobham, tam amplis modo & forma, as by any means they came to our hands; and further grants the remainder to Duke and his heirs for ever. Duke by fine and recovery, P. 3 Jac. sells to Preston, under whom the defendants claim. Afterwards 5 November 3 Jac. its enacted by Parliament, that all the Kings gifts and sales shall be good, according to the effect of the grant; all the Brooks are dead except the lessor of the plaintiff, who claims as heir in tayl of Henry, and the purchaser Preston, who married one of the daughters and coheirs of Duke Brook. The first question he made on the grant of the King, which he conceived good, or at least made so by the Act of Parliament, and the recovery good, and so judgment ought to be for the defendant. By this attainder the King hath the estate tayl in Henry, and the remainder in George in fee determinable upon Henry his dying without issue, and the remainder to H. as heir general of G. Lord Cobham, and the remainder in fee as heir in remainder: and though the King take no notice what estate he hath particularly, yet its good, being for valuable consideration, and he intends to pass all: the objection of that grant by the Kings tenants in tayl, *Altonwoods case* 1 Co. Reversion in fee was void, hinders not, because there the King intended to pass a possession, and so he would do a wrong; and he intending to pass it in possession, it shall not pass by fractions. But here is no wrong in the case at

Bar, but the grant shall enure out of those lawful estates which the King hath in him, all which though several, he may pass 1 Co. 49, *Hussyes case* where the King hath several fees, he may grant by fractions, because the fees are intirely in him; 3 Cr. 519 is all one with the case at Bar, and these estates are granted as amply as they came to him: and the King need not recite the particular estates, having granted ex certa scientia, as if he have fee conditional or determinable, 1 Co. 45, 48, and grant absolutely, its good, Dy. 100, *Culpepers case.* The Kings was in possession, as here, though the traytor not executed as here, nor need he recite how it came to him, Tr. 30 Eliz. B. R. *The Queen* against *Green*, Ed. 6, was seised of the manner of Hackney and Step. valued &c. which he had in exchange from the Bishop of London, there was 20 acres of a great marsh parcel of another priory; the King granted to the auncestors of the Lord Cleveland, all the mannors, &c. **[397]** nec non omnia & singula marisca sua ibidem. Here though there were special recital, yet all the lands passed, as well the twenty acres held of another manner as the rest. 2. The suggestion or quæ quidem, if false, it shall make the grant void; but here is no false suggestion, but of the true estates that were in him, 21 Ed. 4, 48. 16 Ed. 4, 46. 5 Eliz. Moor 45, and the King himself without suggestion takes notice of the will, and so it shall be a part of the grant it self; and referring to the will its all one, as if the particular estates to the heirs females thereon had been expressed, though the will be only averred, and not on record. 1 Co. 64. So 9 Co. 29 b. *Merediths case.* And 3. For the habendum it will not hurt, especially if it be granted that the will is part of the grant, the habend. is so long as George or Henry or any heir of William Lord Cobham shall live, with reference only to the will; and so when that fails the grant fails, and thus there is no wrong to the King, or any, but that when the heirs males fail the females may enter 9 Co. 97. So grant of felons goods after waifs, strays; and mannor granted dicto manerio spectant, shall refer to the waif to make good the grant, not to the mannor, to which they cannot appertain; also there being here a perfect grant before unto Duke Br. and his heirs, and so the habend. shall rather be void then avoid or perplexe the grant, specially being adeo plene, &c. which often passeth things prohibited by Parliament, as advowson 10 Co. 64, and else the words of the patent would be void, so is 10 Co. 61, *Whistlers case*, and Moor. 872, pl. 1214, Hub. 126, want of these words adeo integre hindered the grant, which are here supplyed, and no doubt but tenant in tayl remainder to the father in tayl, levying fine, or being attaint, doth forfeit and cut off all, and that the habend. shall be void rather then perplexe the grant is express in 8 Co. 56, *Auditor Kings case*, for the King may be deceived as well in abridging his intent in grant as enlarging it, Dy. 77, *Harrington* against *Pool.* 4. This grant being for valuable consideration, the law will strain his words as far as may be, Dy. 100, 8 H. 7, 3, grant of liberties with rent reserved probis hominib. de D. is good; and its not the Kings title is here set up, but the heir male to overthrow his auncestors recovery; therefore the consideration being so long passed, and possession accordingly, 10 Co. 67, it shall be intended true, (nothing being found contrary,) that it was not paid; and this is by way of restitution and so most favourd. 2. However it be void, yet by the Act of Parliament its made good, being as general and large as any, curing all defects in persons or grants; **[398]** and if it were a lawful grant, there is no need of the Act 39 H. 6, 30, 38. 29 Ed. 3, 24, Grant F. 100, which cases are stronger then this, *Dr. Atkins* against *Longvill*, 2 Jac. C. B. Hub. 230. 2 Cr. 50, Mich. 19 Jac. *Ats* against *Golsford*, C. B. The defendant justified as servant to the Dean of Winsor. The plaintiff replyed by grant of rectory to the said dean which by 21 Jac. were made good, and the question on the point of confirmation, whither this rectory passed by the words all advowsons, &c. which being particular, cureth all defects; so in the case at Bar; contrà of general words only. 3. However this recovery by Duke being at least tenant of the freehold, though he come in on the base fee, is good; as recovery against discontinuee, as vouchee, binds all remainders, contrà to Maynards opinion, for he cometh in in all his estates that he ever had; but he shall not bar estate he never had. Bendloes, *Apprise* against *Apprise* 25 H. 8, baron & feme tenants in tayl, he discontinued to his eldest son and dyed, his son coming in as vouchee (living the feme) shall not be barred; so *Herbert* against *Binnion*, Tr. 17 Jac. B. R. tenant in tayl attainted suffers recovery as vouchee, and adjudged good; and

the Court would not suffer the Attorny General to argue it, this being a common assurance, of which the Judges ex officio ought to take notice. *Barton* against *Bemors case*, 37 & 38 Eliz. B. R.

2. Tyrrel observed the King had four estates in him by attainder, three qualified, one by Henry, another by George, which became the same in the King, in whom two such estates cannot consist together; another when the issues male should be dead to Henry, so long as he had heirs females, &c. and one an absolute fee, limited to Ed., who dying without issue, discend to William the eldest brother, and so to Henry, and so is in the King distinct, by reason it came to him by act in law, so 1 Inst. 18. Dy. 150, as on attainder of tenant in tayl (reversion being in tayl of his gift) he hath distinct fees, and the King might have granted all by special recital, 1 Co. 47, yet without it its void. 1. For its uncertainty, out of which of the fees the King intended to grant; but be agreed that if the King have conditional, and grant absolutely, its good; so if the King hath base fee, and reversion and grant in fee, its good, 3 Cr. 519, contrà here where there are mean remainders to support such fee distinct, as 2 R. 2, & Co. 46, contrà in grant of common person also, 1 Inst. 145, the King, Hub. 229, though he need not recite his estate, must be truly informed of it; and this grant cannot enure out of the first estate in possession, no such intent appearing, but **[399]** being dubious, it shall pass as most for the Kings advantage, which is out of the absolute fee, which here cannot be: also it cannot be good to pass all the estate out of him, because his intent appears to pass but one intirely, which would else enure by fractions, and the patentee be seised for the life of the person attainted, and so let in all the remainders again, and as they dye, be revested, which is more then we ever read of: for this reason the law abhors perpetuities 1 Co. 84, *Corbets case*, & 8 Co. *The Princes case* had not been good, had it not been by Parliament; so *Sir Rowland Haywards case*, & *Borans case*, Moor 496, H. 1 Jac. Yelvert. 46, parcel cannot pass one way, and part another, though there be sufficient words, Hub. 224, *Ann Needlers case;* and this intire grant, without apt words could not be made good by recital of his estates, and the subsequent clauses of the grant do not make it better, but worse, that quæ quidem being the suggestion of the party here, contrà where the King is truly and fully informed of his estate and title, 6 Co. 55, of which the patentee hath here faild, telling the King he had an estate so long as Henry had issue male, but saith nothing of the others; when the quæ quidem is in the body of the grant, its the suggestion of the party; so it is here, and so makes the grant void, 29 Ed. 3, 8, being false, 10 Co. 110. 1 Ed. 448. 16 Ed. 4, 7. 8 H. 7, 3, having not fully, as well as truly, enformed the King: but when the quæ quidem is in the habendum, its the Kings, but when the falsity is not in a thing material, it doth not avoid the grant, but here its the ground of it; and though the lands be particularly recited, and so the quæ quidem is but demonstrandi causa, yet here it is to declare the Kings title, of which he was not before enformed, and so no estate passeth to Duke for the life of Henry, and so long as he hath issue male, no such being in the King, for the estates of H. & G. meeting in the King without remainder, are both consolidate, and become one in the King, so long as they, or issue male joyntly live; and should the King pass a base fee to Duke, so long as H. & G. had issue, he would retein another base fee, so long as W. had issue, which cannot be where he hath but a base fee, contrà if one were an absolute fee, and the surviving of one to the other is but a possibility, which the King never intended to grant; and the quæ quidem shall never enure to pass an estate out of the King, where the rest may receive prejudice, 16 Ed. 47, and *Legats case* 10 Co. 15, the words prout apparet in the will being part of the words of the patentee, will not help the matter, being in general words, none enforming his title by the death **[400]** of Edward or George: also that clause habend. adeo plene & integre, &c. adds nothing to the estate granted in the other clauses, but only to the particular lands, 2 H. 6, 20. F. N. B. 31, and *The County of Salops case*, are not like this, which leaveth the passing of the estates as before; nor is it like refeoffment adeo plene, as H. is in feofft, 1 Inst. 9, nor like passing advowson 19 Eliz. Dy. & 10 Co. 65, as appertinent. adeo plene; and had these words been absolute and alone, they might have passed all his estates; contrà where it depends on former grant, as here, in which case the grant would be void and useless; and that the grant is

ex certa scientia, 1 Co. 45, is favourably expounded for the patentee, with respect to the estate expressed, Pl. Com. 333, but is of no validity where the suggestion is false, or the King deceived. But the grant in this case is ex humili petitione, and so could not be ex certa scientia, or mero motu, and yet the grant and habend. being contrà, shew the King is deceived. Again, the grant of all such reversion and reversions pass nothing of the qualified fees, which were not so in the King, but as remainder; but admitting an estate to Duke passeth in the grant, the habend. is not contrary, but as large as the other, though in another manner: so lands given to H. and his heirs, 30 Ass. 47. 35 Ass. 14. 8 Co. 154. 2 Cr. 476. 1 Inst. 21, the habend. to H. and the heirs of his body, is good, especially if remainder be limited over; so here, had it been to D. and his heirs, so long as H. and G. had issue of their bodies, this had been good; but yet here its void, shewing that he intended to make one fee intirely contra to the premises, but yet it may expound the meaning of the grantor, Hub. 170. 2 Co. *Bucklyes case* 1 Cr. 155, Cossack, and cannot make the premises void, unless on grant to A. habend. to A. and his heirs, there if habend. be void, the grant is so, and should the reference to the will be to all the issue of William Lord C. it would be void, because the King had nothing to do with the estate of the rest of the sons; also the grant to D. and his heirs make the fee, and the saying so long as H. and G. or either of them have issues male, is but the limitation, 5 Co. *Swails case* and so implyes the whole time, 1 Inst. 1 b. 10 Co. 97. Pl. Com. 57, *Walsinghams case*, else is the habend contra to the premises, and so void, Dy. 56, as grant to H. and his heirs, 56 Co. 8, habend. to H. and his assigns, the habend is void, Hub. 171. 3 Co. 9. 2 Co. 32, being a several clause; otherways if it had been but one intire sentence, as grant to J. S. and his heirs, for the life of J. S. is good; **[401]** contrà of grant to J. S. and his heirs habend. for the life of J. S. 3. This is not made good by the Act, the jury finds a Parliament began 5 No. 3 Jac. whereas that was the second sessions, and it began 29 Sep. 2 Jac. Pl. Com. 84, in which case in plea, as 2 Cr. 111, pl. 9, its certainly void, and so he conceived, here the jury having found si super totam materiam, &c. Special verdict must find all things of substance certain, being that all things therein are supposed to be done by counsel, as this, 5 Co. 97. Hub. 262, the Judges must judge on the juries doubt, if it be on special points, as here, 1 Leond. 306, but had the Act been well found, it would not make the recovery good, being words of the future tense, that the Kings grants shall be good, which shall not make good by retrospect the recovery suffered before; 4 H. 7, 10, per Vavisor; but I relye rather, that void mean acts, as this recovery, shall not be made good by this relation of the Act to the first grant, so *Butler* against *Baker*, no more then it should make good an act tortious; and if it should, here would be a double relation to the grant, and to other sales, but principally the Act, whither of confirmation or new constitution, doth refer only to the first grant 3 Co. 74, not the patent, as 31 H. 8, cap. 13. 1 Ed. 6, cap. 8. 34 H. 8, cap. 21. 4 Ph. Mar. cap. 1. 43 Eliz. cap. 1. 35 Eliz. cap. 3, in which case it confirms all Acts thereon done, but this leaveth the grant as it found it; and this appeareth rather to be the meaning here, Hub. 231, by the saving to all persons in the Act such right, &c. as before, not like 2 Inst. 675, for here the recovery was void, as well as the grant, and so the Act shall not make both good by relation, which is but for necessity; and in 28 H. 8. cap. *Altonwoods case*, the saving was general of all lands, though the Act be special: here its a special saving in general Act of all the lands of either of them. As to the plaintiffs right of entry its not good against the King, by 26 Ed. 3. or 2 Ed. 6. the King being intitled by double matter of record, though he may traverse, or have monstrans de droit, especially there being yet an estate, so long as the daughters of William have issue in the King, so is 29 Ass. 31. 4 Co. 55. Dy. 139, 324, but yet if the Act of 3 Jac. be good, that saves such right, &c. and so the entry would be good. As to the consideration, it doth not appear whither the money were paid or no, and if it were not, its a void patent, 10 Co. 67. 5 Co. 92, and if the payment be past, the jury need not find it, contrà where the payment is to be at future days, Patents Br. 4 Hub. 222, 231. Pl. Com. 455. 21 Ed. 4, 48, and in all cases before, the Court can judge cer-**[402]**-tainly, Pl. Com. 84, (notwithstanding 2 Cr. 144, 64), in verdict as to the writ, count, and pleading must appear 9 Co. 74. 4 Ed. 3, 15, and shall not be ayded by intendment; and so the verdict being void,

no judgment can be for the plaintiff; but as to the matter of law, he concluded for the plaintiff.

83. In C. B. *Saturday, November* 22.

Hyde conceived judgment ought to be for the defendant, and in all agreed with Brown, holding this a good grant by the King, and that nothing remains in him after it, but Duke hath the whole estate in him, Henry being at the time of his attainder seised to himself in tayl, remainder to him in general tayl, remainder to him in fee, both the estates tayl being vested in Henry as heir, and heir male of William Lord Cobham, and George having no issue female, he had also the remainder in fee, and 1 Co. 45. 8 Co. 56, 176. 10 Co. 67. 11 Co. 11, put this for a rule in construction of patents, that when they may be taken good in one sense, and void in another, for the honour of the King, and benefit of the subject, it shall be taken as good, on which rule I found my judgment; and if by any reasonable construction, not contrary to the rules of law, we may maintain the Kings grants, we ought to do it, by reason of the late nice interpretations that have been made thereon, to subvert the Kings intent: and it appears here is sufficient certainty of the estate the King intends to grant, without passing it by fractions, for the King hath a limited or conditional fee, which he may grant absolutely, Lit. sect. 11. 1 Inst. 18, the one being as great an estate as the other, though not in so ample manner; and had the case rested in the limitation to Duke, so long as Henry had any issue of his body, or such issue had an issue, it had been good: and there as to the residue the King, recites the estates of Henry and G. and how they came by this estate, viz. by the will of G. Lord Cobham, and for the particulars, referreth to the will, and after grants to Duke adeo libere & plene, &c. by which particular recital it appears, the King was non misconusant of his estates and title, and so not deceived in his grant: and though the estates were several in H. and George, as different persons, yet in the King they are consolidate, as they may stand together, the estate tayl of L. Cob. and remainder in G. are coupled intirely, as one in the King, and their remainders in general tayl are joyned in expectancy after the particular estates in George, as *Hussyes case*, and so the remainder in fee in him apart, not all clapt together as one fee; and hereby the **[403]** best exposition may be made to support the Kings grant, and to make the estate of Duke to operate according to the estates vested in the King; and the patentee may as well hold as the King, as Duke shall have it during issue male of Henry, &c. and then to the younger sons, and in remainder to Duke, and so the King doth not grant a greater estate then he hath; nor can the estate be said to be in esse, and not in esse, because it continueth as long as each estate doth continue, and the first estate in the King, so long as Henry had issue, might have continued for ever, and so no unreasonable construction to pass first, and then remainder as limitted to younger children of George L. C. especially the King taking notice of each distinct estate in him, and the remainder; and this construction shall be the rather, because the grant is ex certa scientia & mero motu, 6 Co. 56, *Chandois case*, on which words the King doth not rest, but declaring in the quæ quidem how he hath the lands in his hands, ex uberiori gratia, doth de novo grant it adeo plene libere & integre, which are always so by themselves (and not in the premises of a general patent) to declare a genuine effect in grants according to the Kings intent, and they would be useless, should they have other construction; and hereby the absurdities mentioned in *Altonwoods case* are avoided, and the rules kept: for the patentee hath not only an estate during the Kings life, but a qualified fee, which may by possibility endure for ever: but here is a remainder intervening after this, before the absolute fee commenceth, of which the King takes special notice, and so grants no more than he lawfully may, and the remainder to the younger sons are not hereby discontinued or displaced: and its no violent construction to say the patentee by this grant shall have such estates as were in Henry and George, 8 Co. 77, and other construction would be to the dishonour of the King, and disherison of the subject, to frustrate the grant under the Great Seal by nice constructions. 2. The habendum alters not the case, but well serveth the premises; and so the case is, that the King having a qualified fee so long as H. and G. have issue, remainder to Duke, remainder to the younger sons of the Lord

Cobham, grants to D. and his heirs, habendum so long as any issue of H. or G. have issue, which is as good as if he had granted absolute fee, and better; for it appears the King intended not to grant one intire estate by this several habendum, but such as he had, and no greater; for he had their estates in special, with remainder in general tail, which will well warrant this grant, referring to the will whereby they had estates in spe-**[404]**-cial tail, remainder in general tail, Pl. Com. 154, and the rather, because else it would be void, and because hereby no wrong is done to any; for the three daughters of William cannot pretend right, because by his death both the estates of William, as male and heir general, were in H. and so is forfeited by attainder, and their estate was but contingent that Henry had died before attainder without issue, so by fine of the eldest son of A. to whom estate is limitted in special, remainder in general tail, all the mean remainder is barr'd, because the younger children must claim by him; and though the habendum be void, yet the patent shall not be so, having premises sufficient to pass the estate, as Pl. Com. 152, and *Auditor Kings case:* as to the verdict, not finding the consideration paid, being to be made at future days patents, Br. 4, 100. 5 Co. 94, and if not made, make the grant of the King voidable, 1 Cr. 548, *Swift* against *Ayre;* but no books say that the grant is void, but that the lands are in the patentee till failure of payment, and the failure must be found by matter of record, as breach of condition subsequent before the King be intitled, 14 H. 8, 32. Pl. Com. 82, the non-payment going only in defeasance of the estate: also hereby though the King might have right, yet that is nothing to the plaintiffs coming in as remainder-man, at least not till the King hath avoided the estate; also no book requires the payment as necessary to be found in special verdict, but the contrary is presumed, 5 Co. 97. Mich. 24 Car. 1, *Denham* against *Baker*, B. R. devise to J. S. paying debts and legacies, the jury find the devise, and not the payment, which being a special verdict, was held good, and shall be intended; so were the cases of *Sherman* against *Johnson*, Trin. 1657, B. R. and 3 Cr. 387. Also the quæ quidem being the suggestion of the patentee generally, when false shall avoid the grant, 10 Co. 110. But here it's not the suggestion of the party, but its added by the King after the consideration and grant to declare a more full declaration, that those lands he intended to pass came thus and thus, and is warily penned, and by learned counsel also it's all true: and so were it the suggestion of the party, it's all one; and though it be not full, yet it's only surplusage, and no part of the consideration or inducement to the grant, nor of the grant it self, and so shall not avoid the grant that is sufficient to pass all the estate without any recital: but here it is full enough, reciting all the estates the King hath, and also taketh notice of other remainders limited by the will, and therefore referreth to it, 10 Co. 62, which yet needs not be expressed, or on record: **[405]** and the King may as well take notice of this will here, as in the premises and habendum of the grant, and so it is as parcel of the grant. Hence followeth, 4. The Act of Parliament, which, had the grant been void, had made it good, and the verdict binding, the Parliament begun the second of Jac. which really was but the second session, which mistake was partly grounded on the printed statute, partly on the default of the clerks who drew not the Act right, the notes being to find the Act 3 Jac. prout, by which the mistake of the clerk may be amended, 3 Cr. 149, 677, especially here being an agreement that any thing omitted shall be amended according to truth: but an express verdict finding the Act prout it was made, and being drawn up otherways, is amendable. 5. By this it appears the actual possession of the estates of the persons attainted was in the King; and the Act enables all grants of the King made to Duke, 11 Co. 69, whereby they intend to make good what was before defective, not that they should be good according to a strict sense of law, but according to the true effect and meaning of the letters patents. Also the ends of the Act are, 1. To vest all the lands of H. and G. in the King; and 2. To strengthen the estates of purchasers who had bought before it, which would be frustrated should it not be thus expounded, Pl. Com. 538. Again, as to the title of the plaintiff, he cannot enter though the patent and Act be void, but he is yet barr'd by the recovery, so that he hath no right: and so the case is, Duke bargains and sells to Prescot and his heirs, so long as any issue male of William shall be living, the remainder in fee to P. and his heirs, and after suffers recovery as vouchee unto Prescot; for here is a good tenant of the præcipe, and no estate in the King, and that recompence being on base fee,

cannot go unto the other remainder, is no reason to avoid it; for 8 Co. 77, this is not the sole reason of the barring reversions, for it is also a common assurance not to be defeated by such fictions as *Gennings case*, and *Blunket* against *Holms*, and because it bars the estate tail it's consequential, 2 Co. 74, that it bars the remainders.

4. Bridgman Chief Justice, observed that the lease is expired, and the lessor of the plaintiff John Brook is dead without issue, but yet in regard of the consequence, he argued that judgment ought to be for the plaintiff. And 1, contrà to Tirrel, and admittance of the others, that the entry of the plaintiff, had he right, might be on the King without office wherein the case is, but only H. is tenant in tail, remainder to John lessor of the plaintiff, found by office, and then **[406]** died without issue, the office is gone; and 15 Eliz. *Sir William Say's case*, *The Earl of Northumberlands case*, 3 Ed. 4, 25, him in remainder may enter. Also this is only an office by commission out of the Exchequer, 5 Co. *Pages case* 52, which is only information, Moor, *Legers case* in Englefields, no double matter of record, unless the office be particular out of the Chancery. Also 2, The not finding payment is no cause of ven. fac. de novo; for if the patent be naught, and the plaintiff have title without it, it needs not, also the patent is only voidable by non-payment clearly, 21 Ed. 4, 48. So grant quod relaxavit before Mich. or ad solvend. faciendum, do only avoid the patent by office found, and this is collateral to the matter in question, and it shall be rather intended paid, *Villers case*, Mich. 14 Car. C. B. Lease to Villers paying such rents, the jury find it accordingly, and it was held a condition; and though nothing was found paid, yet the point being, whether it were condition or no, it was held a condition without other doubting. He agreed that the want of recital in the quæ quidem doth not avoid the grant, yet is the information of the party: also the first habendum is void, because it's quam diu H. and G. have issues of their bodies, and not so long as they have heirs males, &c. and so that shall avoid the grant: also the common recovery shall not be confirmed by the Act, though without question of it self it shall barr all subsequent remainders, though he be in the post of another estate, so are most vouchees, *Parker* against *Ingram*, the coming in in privity only of estate or right he might have by possibility, doth bar it. As to the main point, he conceived nothing in the premises to make the patent void but the habendum, for Henry being tenant in tail, remainder to him as heir of the body of William, remainder in fee by death of Edward and George tenant in tail in remainder, the King by attainder had only the estate of Henry immediate interposed with several remainders, though revera, the estates of G. and Henry were but one in the King, yet grants habendum omnia præmissa to Duke and his heirs, so long as Henry, or any issue of him or G. or any issue of such issue, inheritable by the will should live; and also habendum such reversion and reversions adeo plene, &c. these are two, and all the habendums: and the quæ quidem, though surplusage and suggestion of the party, if false, it would make the patent void; before it was much controverted in *Legates case*, whether these clauses, being only demonstrandi causa, were the suggestion of the party. And Popham held to his last the grant of such lands **[407]** as the King had by attainder of J. S. being intire, if any part were void all was so, *Mason* against *Chambers case;* contrà if only in the quæ quidem, which was then held the King's declaration: also there is no judgment now that the quæ quidem before, more then after the habendum, should make the grant void, being false: but I conceive in either case, if it be any part of the consideration, it will make the grant void, as *Legats case;* or if thereby the King be deceived in his title, or other persons may have prejudice, and the King could not know by the office that H. was seised in general tail with remainder, but only by the information of the party: and in *Chandois case* there is only quæ quidem, &c. once, 6 Co. 55 b. and then concludes virtute cujus the King was seised; but here is no misrecital, but it's not full, yet good, and though too short a recital may make the grant void, as here, had only this quæ quidam only recited the Kings estates; but the King taking notice of them in other parts of the deed, it's good enough. He agreed the reference to the will to be as well as if the will were in terminis, but all doth not tell the King his whole estate, viz. that William had daughters, that Edward is dead without issue; and therefore the King being deceived in part, it's all one whether in estate or lands: also no other estates can pass than are recited in the quæ quidem, and the grant of other remainders shall, as *Mildmayes case*, be intended of another nature, and not to the King himself; but the

King taking particular notice of all his other estates, this recital hurts not, 1 H. 7, 13. 1 Co. 49, and though the King need not recite any thing, yet if he recite part, as that J. S. is sheriff, and so pardon omnia debita, this shall extend to no more than is recited, so as if the recital doth mislead or restrain the King, it may be void. And as to the main point, though I may believe in my private judgment, that all the estates in the King pass, yet not judicially, for this is all one with *Altonwoods case*, as to the honour of the King, which must be looked on as not to be deceived by the parties mis-information: and ex certa scientia & mero motu, are words of clerks of course now, and the King's Attorney inserts them without any special warrant. The last estate and habendum was the absolute fee which came to H. by the death of Edward, which is specially passed, and no other were forfeited but this; he forfeited estates tail which were fee-simples in the King, but no other estate in fee. Also the King had the estates of H. and his issue male, and G. which in him are but one; for the law without cause will not make two fees, as at common law, 15 Ed. 4, vil-**[408]**-lain tenant in tail, lord enters, he hath fee so long as villain hath issue, and the donor hath another fee; but where the donor cometh to be lord, both fees are one: but Henry also forfeited the estate he had to himself, and to the heirs of the body of William, which is in the King distinct, to take effect after several mean remainders; and then the King granting to Duke, habendum so long as Henry, &c. shall be in being, both pass, neither all nor any part of any of the estates forfeited (but the fee-simple passeth by the other habendum) but this is too much to pass one estate, viz. to the heirs, but too little to pass that to the issues male of the body of Wil. It must be agreed, that when the King hath several fees, as here, he may sever them in his grants: but though the King have one fee, and out of it limit base fee to J. S. so long as A. hath issue male, no remainder can be limited; but the difference is when the estates are created as thus by act of the party, 10 Co. *Seymors case*, and when by act of law, as in the case at Barr, for these being extracted out of estates tail are several, and not consolidate in the King, as the estates of Henry and George were, but may be granted severally; and by the second habendum with the fee, all agreed it passeth, so that must be laid aside: and the only question ariseth on the first habendum to Duke and his heirs, so long as Henry and G. had issue of their bodies, which doth not pass the whole estate of the King, that being the judicial intent on the patent expressed, and the King doth not grant so long as William hath issue of his body, and so parts not with that estate the King had, so long as any of the three daughters have issue, and it must take effect out of two estates, or not at all, viz. the estate determinable on default of issue male, nor out of the estate that H. had, and the heirs of William; out of the first it cannot, not being sufficient; out of both it cannot, for then it leaveth part behind, and the estates are several in the King, and he intended to pass but one, and passing two, he is deceived; so he intended to grant but one intire estate, continuing so long as Henry or G. have issue; and such estate cannot pass here but by fractions, viz. the patentee takes whilst Henry or G. have issue male, then the King takes so long as William hath issue, then the patentee the fee, and the saying so long, the words imply one continued estate, as Black Acre grant to A. so long as B. suffereth J. S. to enjoy White Acre, when B. hinders, it ceaseth, and can never revive; so grant to A. and his heirs, so long as B. hath heirs of his body B. dyeth, the estate ceaseth, and *Pool* against *Needham*, Yelvert. 149, it shall not revive by post-**[409]**-natus of feme then inseint. So here also, this habendum is a prejudice to those in remainder, if it should be good, for on faylure of issue male in H. and G. John Lord C. lessor of the plaintiff cometh in, being the next male line, and so come before the general heirs of the body: and the patent is so long as H. or G. have issue generally; and though John might enter, yet he cannot have action, for the tenant would pray ayd, and so he should be put to the great delay of search: and the King by dedi here warrants the estate to the patentee, which though it bind not the King, is ground of ayd; and this is the reason that if the King, tenant for life, granteth fee, this is void, because here is colour by this patent, which is wrong to a third person, and he grant more then legally he could do. And this is the case in question; for the King hath a base fee, so long as J. S. hath issue male of his body, and he grant so long as J. S. hath issue of his body, this is void, and the King deceived, taking on him to grant a greater estate then he had; and the reason why his estate cannot enure by

fractions is in *Englefields case*, lease for 40 years by tenant for life, but had that been be in 100 years, or 99 years, it had been void, which yet is no tort, otherwise in *Altonwoods case*, should the grant for tayl to J. S. by the King tenant in tayl, remainder in fee; and in *Chandois case* less passed then the King intended, but he intended to pass possession, and yet a reversion passed, 6 Co. 56, but if more had passed then the King intended, it had been void: but had the case been of grant of reversions to J. S. of tenancy in tayl in A. that's void. All these estates pass without fractions, contrà here in the case at Bar; the estate may be granted by fractions by one habendum, had it been generally to Duke, and his heirs, for that consists with what he hath; but contrà now he hath specified what estate he granted, 1 Co. 49. 3 Cr. 519. Also he need not recited his estates, nor shall there be any fractions in the Kings grant; but here, out of those estates which the King passeth, there are fractions, which makes the difference; for the King would have kept the estate so long as William hath daughters, and so the restraint is not by operation of law, but in the very grant it self, though this might have been good against a common person, against whom it shall be taken strongest, yet not here, where the strongest shall be as most agreeable to the Kings intent, Yelverton 47, 48, and the analogy of this is as near *Altonwoods case* as may be, the King being there conusant of his estate, and recited it, yet the ground was the estate of the Kings, Hub. 224, **[410]** would not bear such grant: also because the King erred in the manner and form of his estate, 6 Co. 56, intending that intire which could not pass but by fractions; both which reasons are full to this case. And though there it was urged it would be a tort, and not here, because the King hath a base fee, which may last for ever: yet here is no livery, and so the reason of tort is out of the case, enuring only as all patents by way of grant, 1 Co. 50 b. Also the King could not grant an intire estate in possession continuing, and therefore it shall not be good by fractions, which the King intended not, for he had no such estate as he granted, and he shall not pass part in possession, and part in reversion, which must be, if this patent be good; also being not good to all, it shall not extend to be good, so long as H. and George have issue male: for the King intended one, and it shall not be good for the rest. Also were the habendum void, and the grant sufficient, yet it would make nothing for the defendant, because the second habendum going to the absolute fee is sufficient; *Pasmore* against *Proud* cited in *Lofields case* 10 Co. 107, if the King had granted to A. and his heirs, habendum the reversion which the King hath by attainder of J. S. to A. and his heirs, its good; but though this habendum be void it shall controll the premises, and make the grant void, which is the difference betwixt the King and common person, which answers *Auditor Kings case;* lands granted to J. S. and his heirs, habendum to him and his heirs, so long as A. hath issue male, is good by common person; contrà of habendum for life of A. Yet I doubt, grant by the King to H. and his heirs, habendum during the life of J. S. is good enough; but by the same reason the habendum is void in case of the King, the grant is so, for thereby it appears the King is deceived; and by this habendum the King hath limited the estate to D. and his heirs only in this form and manner, which he could not do, 1 Inst. 21, contrà to *Althans case*, 8 Co. 154. Lands given to A. and his heirs, habendum to A. and his heirs males, its but an estate tayl, which shews the gift to one and his heirs not to be so certain, but that its qualified by the habendum, 7 Ed. 3, 10, and where the general and special words agree, the limitation shall go according to the special words, and the adeo plene makes nothing to the quantity or quality of the estate granted, but passeth things as in case of a common person, cum pertinentijs, as grant to A. adeo plene as J. S. hath it, who hath fee, yet A. hath not so thereby: as to the grant to Duke, so long as H. hath issue, its good enough, i.e. till **[411]** issue fail, as long as tree grows, natis natorum & qui nascentur ab illis, not only to the issue, viz. children of H. and George: and were it so, yet issue of issue is general, and comprehends all. 6. As to the Act of Confirmation, it will not better the patent, for the saving to all persons doth include the lessor of the plaintiff, and such mean remainders, and their rights of entry, and remainder, which had it been gone, would have restored it to them; and that all sales are made good according to the letters patents: doth not touch the remainder, nor was it taken away by the recovery, which was of another, and void estate: also another saving is to all persons as before the attainder. Also were there

no saving, the Act only helps the want of power of the King to grant, not any defects in the patent. I was never satisfied with *Lord Leycesters case*, and the rather oppose it, as not argued at the Bench, and so might fall off on the pleading; the difference is where there is no entity, which is confirmed as the customs of D. there being none, its void; or where the King grants lands of J. S. in fee to begin in futuro, its not made good by confirmation of Parliament; contrà on general grant of lands of J. S. 38 H. 6, 33, *Abbess of Syons case* which the King hath no power to make. Tyrrel agreed the verdict amendable, and that here was no double matter of record, and that the finding payment is needless, the plaintiff having title without it, and adjornatur, the Court being divided.

115. IN B. R. TURNER *against* WOOD. *Ante. Monday, November* 24.

Trades.

Wild the Kings Serjeant, prayed judgment for the plaintiff in debt, on 5 Eliz. because a barber is a trade within 5 Eliz. and though 32 H. 8, c. 42, it may be soon acquired, its of great concernment, and it cannot be intended private, though it be not said a common barber, its said contrà formam statuti, and that he did unlawfully use, erect and exercise. Jones conceived it only an occupation, as Gardiner, and not within the statute, which intended only to remedy in such trades that do immediately relate to the publick welfare, as clothing, dyet, &c. So that's not here, though it be an addition within the statute 2 H. 5, yet is not within 5 Eliz. 2. Its not said he was a common barber, Old Entries. 1. As 8 Co. *Wagoners case* is expresly: and Twisden remembers the case of a reader or thatcher of Norwich, was ruled not within **[412]** the statute; so of a porter; and it must be said he commonly used it, as *Taylor of Ipswichs case;* so of brewer or chandler. But by Windham, After verdict this will be intended, and being a usual trade, it's fitting they should be included, which Mallet agreed. But colliers or plowmen, though offices of skill and use, are not within the statute; so of perriwigmaker. Adjornatur. 422, pl. 143.

116. CORLS *against* CALVERT. *Ante.*

Trespass.

Tourner searched the record of Hub. 187, where the replication was as here, Co. Entries 643, *Withers* against *Ainsly*. Jones for the plaintiff, that the verdict is erronious, having found the assault and wounding as the plaintiff alledged, and assessed damages occasione transgr. & insult. prædict, which is the usual entry, and comprehends the whole, especially when they have expresly before found that he wounded, &c. And in Hub. 187, the question was only, whether the plea (not whether the verdict) be good, as here. Windham was for affirming judgment notwithstanding, because it's agreed by all, that no issue is as to the wounding, the defendant having pleaded nothing to it: but the issue is on the cause of the defendants justification, and so the verdict is proper, that absq; aliqua causa, they did beat and wound, &c. But the Court will apply the assessing damages only to the issue, and will not intend more. Twisden contrà; that it's error; for a demurrer should have been to the bar for omission of the wounding, which is a discontinuance: but then replying that he beat and wounded de injuria sua propria, and hereon issue; which if the verdict had distinguisht them, it had been good; but having given damages for assault and wounding, ratione insult. & transgr. prædict. its presumable the jury were lead on by this issue to find the wounding, or else the jury may be attainted if they give 1000l. damages, which for assault is unreasonable; contrà if they assess it for the wounding, which Mallet and Foster agreed. Judgment reverst. And per Curiam the issue being ill, and judgment given, no venire facias can be de novo.

[413] 117. NICHOLAS *against* PULLEN. *Ante.* Cond. Br. 129.

Covenant.

Jones, for the plaintiff, conceived it negative pregnant, as 2 Cr. 559, Lea; in debt on bond, if H. followeth the words, and plead performance of all covenants contained; but when there is a particular covenant, there must be such a particular plea as the plaintiff may take issue on, or answer to; and this is shewed as special cause of demurrer. Powis for the defendant, that the barr is pursuant to the count, 12 H. 8, 6 & 7, and lying not only in the knowledge of the defendant, but that the plaintiff may as well have knowledge of it, 2 R. 3, 17. 5 H. 7, 8 a. 9 Ed. 4, 15, it may be generally pleaded, Dyer 279. Twisden conceived, that on affirmative covenants general pleading performance is sufficient, and so on negative; for its sufficient for the defendant to plead an excuse, and the plaintiff must assign breach to intitle himself. Windham ad idem, Negative covenants may enwrap many particulars, as to say he did not cut down any timber, unless for the making of barrs and stiles, &c. which Foster agreed; contrà by Mallet; but judgment for the defendant, nisi.

118. PLAYES CASE.

Admiral.

Newdigate prayed a prohibition to the Admiralty, who had sent out process to the plaintiff to appear and account for prize-goods upon oath, which are pardoned by the Act of Oblivion by pretence of subsequent Act, which giveth them general jurisdiction without any time certain. But the Court refused to award prohibition till they have judged contrà to law, or taken on them to expound those Acts.

119. DOVE *against* DARKIN. *Ante.* In Continuance, Fitzh. 16.

Mich. 13 Car. 2, Rot. 239.

Error. Moor 186, pl. 332.

Stroud for the plaintiff, in the writ of error, conceived this Court cannot reverse their own judgment, sed non allocatur, for its error in fact. 2. Here is no proper persons in this suit, because till error found, none know who shall be party thereto; 40 Ed. 3, 13. 41 Ed. 3, 1 b. for should the party be found alive, then scire facias against executor would be ill; contrà if he be dead, Rast. Entries 107. And so the issue is well enough joyned by the attorney. It is generally true, **[414]** that when H. alledged that the party to the first action was dead, there must be scire facias against executors, but not here, where the party himself as it were pleads this plea, as here; and had the executors come in and pleaded this plea, and it had been found he was alive on the like issue as here, that the plaintiff died before judgment, this had been a discontinuance; and the writ of error is only a commission to inform the Court, and now it appears the plaintiff was dead. Windham held the judgment ought to be reverst, and to say there is no party, is to judge by event, and the Court could do no other than accept this plea; and there is no difference betwixt a plea puis dar' continuans, and here in error, because the party for whom he pleads being found dead, the attorney could not plead; and the saying that the defendant per attornatum venit, 48 E. 3, is well enough after verdict; but it had been more formal to say such a one pro magistro, &c. which Twisden and Mallet agreed; contrà by Foster, that the writ of error is only discontinued, because by legal plea it doth not appear the party is dead. 2. Allen suggested that now, before the reversal of judgment be pronounced, that scire facias against executors may go, which the Court refused being after verdict, and the errors assigned on the roll upon motion in Court, upon affidavit no executors or administrators could be found. Judgment reverst.

120.

Executors.

Quære if executors after ne unque executors pleaded, may give in evidence that the party is living. Wild, Recorder of London, conceived they may; but the Court doubted.

121. HOUSE *against* LAUNDER. In Departure, Br. 15.

Arbitrement. *Rugles* against *Witherly*, Tr. 15 Car. 1, Rot. 604, adjudged accordingly B. R.

In debt on obligation to perform award; the defendant pleaded nul award: the plaintiff sets it forth, being for payment of money at a future day, and that then general releases shall be made. The defendant shewed, that after the submission (which was of all differences to the time of the award) and before the day of payment a special matter and cause of action arose, and so the arbitrement void. To which the plaintiff demurred, because here it appears not but that there is only one cause of action, viz. the payment and mutual releases, and so good; contra where it appears there are other causes. 2. This is a departure to shew an intervening cause after nullum fecerunt arbitrium generally pleaded in bar. 3. The cause alledged is not sufficient, being speaking of **[415]** words of a merchant without any colloquium of his trade, that he was a cheating rogue, and cheated all the country. Windham conceived it a departure, and that after nul award pleaded, H. cannot maintain it by being void in law, so *Gubbins* against *Clerk*. Foster and Twisden doubted. 2. They conceived the words not actionable, nor H. cannot libel for it in Ecclesiastical Court: but being colour of difference, they doubted the arbitrement void. Adjornatur, and after compounded.

122. LAWSON *against* WITHERINGTON. *Ante.*

Condition. Moor 313, pl. 454.

Jones for the plaintiff, that the defendant ought to give warning, the condition being in his favour, and no person certain who should give warning; but after 10 Jan. the warning must be by the plaintiff, and then the payment must be January next after three months warning, Tr. 1650, Rot. 1607, *Wentworth* against *Wentworth*: the Court held rather, then duty should be lost, the assurance should be made within any month after request, the condition of the bond being to assure within a month when he should be required, and this admitted the plea of the defendant, the day of payment being not yet come, is only in abatement. Twisden conceived the payment to be any January after (which is the same as upon) three months warning, as to pay upon retorn of a ship, i.e. after its retorn. Judgment for the plaintiff, nisi.

123. VERNON *against* ALSOP. *Ante.*

Obligation.

Windham conceived the condition void, and the bond single, or according to the meaning of the bond, to transpose the words, making it if defalt, be then good, if not, then void: but Curia contra. Adjornatur.

124. LEWIS *against* BULL. Siderf. 97, pl. 25.

Covenant. Moor 3, pl. 9, so in pleading performance of on award but by 7 H. 4, 1, pl. 1, it ought to be set forth by parol on oyer, demanded by the plaintiff.

In an action of debt, the defendant pleaded it was for performance of covenants, and that he hath performed all, not shewing forth the indenture: to which the plaintiff demurred, as *Syderton* against *Netherton*, and *Day* against *Lambert* expresly, he must

set it forth, which the Court agreed. Judgment for the plaintiff: which, as a rule, may decide the same point in the rest of the actions now pendent.

[416] 125. RUSSEL *against* LEA. *Ante.* In Continuance, Br. 51.

Infant. Moor 555, pl. 752.

In action of debt on bill given in security for mony due for necessaries. The defendant pleaded nonage. The plaintiff replys it was pro necessario apparatu, which per Curiam is well enough the last case, 3 Cr. 928. And if the bond be unreasonable, then issue may be taken, it was not due for necessaries; and then the plaintiff must shew the bond to be suitable to the price of the thing, and the whole bond is void if the price be unreasonable, 21 H. 6, 31 b. per Paston, 26 H. 8, 2, was always taken of obligation with condition; and here by demurrer, the defendant hath confest it due. 2. It's a bond for necessaries eidem deliberat. and doth not say it was pro necessariis of the infant, as 2 Cr. 560. But Popham 151. 2 Cr. 494, agreed it well enough without it, and so the Court here. Judgment for the plaintiff, nisi. 423, pl. 148.

126. SMITH *against* JONES. *Tuesday, Novemb.* 25.

Baron & feme.

One Mrs. A. came to Smith, and desired him to sue her by the name of Jones, in which action she pleaded she was covert baron by Carre, and so by declaration, plea, and issue the same term, giving notice to Carre, who tried the cause, and a verdict for the defendant, that she was covert with Carre, of which practise Smith knew nothing: and now Carre prayed this judgment might be set aside, which the Court granted sub modo, that the parties try the issue in the Spiritual Court.

127. ESCOURT *against* STOKES.

Leet.

In replevin, the defendant avows for distress for pain assessed in leet, for not serving there as constable, nor finding sufficient deputy, according to the custom, that he that is chosen must serve per se, or another: and the presentment is, that the plaintiff should find sufficient person to serve for him, not giving him liberty to serve himself; for which cause Jones for the plaintiff demurred. Judgment for the plaintiff, nisi.

[417] 128. HALLAM *against* BARCROFT.

Church.

In ejectment in special verdict, Allen for the plaintiff; the King grants advowson to an infant, lessor of the plaintiff, then a caveat is entred, and after he is instituted and inducted by letters mandatory of the Ordinary, which is good enough, 33 Ed. 3, 9. Pl. Com. 528. And the defendant is after inducted by the arch-deacon the proper officer, and continueth till the Act of Confirmation of Ministers, viz. from 45 to 59, and instituted by the Vicar General, which is void, coming after the other; and so the plaintiff ought to be restored. Adjornatur.

129. CORPORATION OF SOUTHAMPTON *against* RICHARDS.

Coroner. Moor 127, pl. 274. Owen 155. 2 H. 4, 2, per Till.

In debt, the count was that felo de se, the obligee, was commorant within the vill, which may be in the county, and they entitle themselves by grant of bona & catalla infrà villam, only S. being town and county: but per Curiam that should be specially pleaded, and by appearance is made good. 2. By the grant of bona &

catalla generally, obligation will not pass, which was agreed. But by Allen for the plaintiff, in this case of grant of bona & catalla felonum de se, all the forfeiture, as well debts as other things, will pass, which Windham agreed; and so are all the grants to the City of London, this being an inheritance known by no other name, which the rest doubted, P. 11 Jac. *Duckets case* in Exchequer, resolved that things in action do not pass by such grant of bona felonum, and so was 4 Jac. *Fourd* against *Shelton*, 12 Co. 1. 29 Eliz. *The Lord of Northamptons case*, and *The Lord St. Johns case*. 3. When one alledgeth inquisition, it must be præsentatum est, Westm. 1, cap. 10. But in pleading it's sufficient to say compertum est. Adjornatur.

[418] 130. COLDHAM *against* LOE. *Wednesday, November* 26.

Visne.

In action on promise laid (in the parish of D. in the ward of P.) in Norwich, and the venire facias is of the parish generally, which may extend into several vills or wards, which Wild, the Kings Serjeant, assigned for error, sed non allocatur, 2. *Brown* against *Every*, the sheriff need not retorn the name of all the 24, on the distring. or habeas corpora, or venire facias, nor affix them to the said writ; judgment affirmed.

131. CAUS *against* ROBERTS. Sinderf. 97, pl. 26.

Slander.

Error of judgment in the borough of Southwarke, in action for calling the plaintiff brazen-faced-whore, and running away with the defendants husband; custom being alledged that all whores, lenones, and such as keep any bawdy-house, commorantes & exercentes such trade there, are punishable there by corporal punishment; which by Maynard is ill, being all one sentence, is intended only of such whores that keep baudy-houses, commorantes & exercentes, and these words do import so much; contrà if it had been all whores or lenones, &c. which the Court agreed. Judgment reversed. Nisi.

132. BAKER *against* WESCOT.

Maintenance.

In action upon the Statute of Maintenance, quære if on 18 Eliz. 5, the defendant, on nonsuit of the plaintiff, shall have costs. Adjornatur.

133. THE KING *against* CHUTE.

Place.

Jones excepted to an indictment for not serving as constable, according to the order of the justices of sessions, for not alledging any place where he was requested to take the oath; and quasht, especially being on order repealed by the Justices of Assize on appeal.

[419] 134. BRIAN *against* FITZHARRIS. *Ante.*

Tr. 14 Car. 2, Rot. 1353.

Estople.

As *Newis* against *Scolastica's case* on demurrer on evidence on general issue, the fact is agreed, viz. that such a writ was taken out, Dy. 239, and therefore the jury may find it taken out, but here they could not find, it being confessed; by Twisden,

and the Judge before whom the cause was tryed, ought to have directed it, which the Court agreed and so no error. But 2. By Foster, this consideration is void, being unlawfully to forbear Jesuite, which the Court agreed. Adjornatur.

135. THE KING *against* SADLER. Sinderf. 97, pl. 27.

Restitution.

Coleman prayed restitution on indictment on 8 H. 6, of forcible entry and deteiner; the verdict find guilty of peaceable entry, and forcible deteiner, and that the party need not be indicted de novo of forcible deteiner, the statute 31 Eliz. putting lessee for years in the same condition, with tenant of the freehold, on 8 H. 6, and per Curiam restitution awarded, nisi; the verdict being sufficient for part, without new indictment, contrà to Yelverton 99, pl. 135.

136. ANISON *against* STARKE.

Tr. 14 Car. 2, Rot. 1690.

Jurisdiction.

In action on indebitatus infrà inferior jurisdict. for wares sold and delivered, not saying where; after judgment by non sum informatus assigned for error, that the sale was not said infrà jurisdict. Sed non allocatur, per Curiam, the indebitatus being created by law. 2. Its that the defendant per attornatum venit & dicit quod non est informatus, which per Curiam, is error. So 3. Judgment quod recuperet for recuperari debeat, being executory, error per Curiam. And judgment reversed, nisi.

[420] 137. BLUNT *against* SYMSON.

Rent.

In action of debt for rent on a lease, not saying by deed: the defendant pleaded the plaintiff had nothing in the land at the time (as 5 H. 7, 3, primo deliberat' on bond) the plaintiff replieth, it was by deed, and so that plea ill: to which the defendant demurred, supposing it a departure, sed Curia contrà; the deed being but the evidence of the contract, and therefore its sufficient in the count to mention the contract. Judgment for the plaintiff. Nisi.

138. THE JUSTICES OF PEACE OF DARBY *against* GILLIBERT.

Bastard.

Bigland moved for confirmation of an order made in pursuance of order by overseers to place bastard-child an apprentice, with gentleman that had no trade, who having refused it, made this course. Windham conceived, they that are grieved have no remedy, but before the justices, who in this case are Judges of the fitness of the parties with whom they place them, which Foster agreed: and that if the party have wrong upon his indictment, or information preferred, on contempt, or refusal to obey the order, he may plead it; contrà by Twisden; they may tax any man; but he doubted the statute never intended to give such power, because so they may put the child of my greatest enemy on me: also hereby London will be sufficiently discharged from taking great sums with apprentices. Adjornatur.

139. BUXTON *against* BATEMAN. *Ante.* In Chattels Br. 11.

Church.

Windham conceived, that after the verdict, the not saying ad messuagium pertinent. is not material; contrà by Foster: and that the reparation ought to be averred, being part of the title. Adjornatur.

140. HARRISON *against* VANDEBECKE. *Thursday, November* 27.

Executors.

One as executor de son tort brought scire facias on judgment had by the testator, and on 2 nichils, and after execution, H. as administrator brings scire facias on the same judgment, as per Curiam, he may, and recover the money all over again, as by Twisden hath been before 15 **[421]** Car. 1, and the party is left to his remedy against the pretended execution.

141. FLOWER *against* MAHEW. *Ante.*

Trover.

Trover de uno scamn' planca, Angl. a plank bench, good, being mistaken for stanna, &c. 2. De una salsura, Angl. a salting-trough, which though insensible, the verdict shall be intended to give damages for that which is good, Hub. 38, and 2 C. 403. That 3. This action being by executors, they do not proferre literas testamentarias, for which cause, though after verdict, Wallop for the defendant, conceived it ill; Twisden contrà, because its no part of the count, but cometh in after the inde producit sectam, and it was introduced in favour of the Spiritual Courts: and all the presidents since Car. 1 have been that its needless, the same of administrator, which the Court agreed. Judgment for the plaintiff, nisi.

142. THE KING *against* BROWN. In Coron. Fitzh. 401.

Admiral.

The defendant justified, by warrant of the Admiral, the taking verdict on a body hanged in a ship at Blackwall, which by Keeling for the coroner, is void, as 2 Cr. 544, notwithstanding 13 R. 2, c. 13, or 15 R. 2, cap. as 4 Inst. 113 & 135, being done within the body of the county, 27 Eliz. cap. 7. 8 Ed. 2, Coron. F. 399, and Stanford 51, which all rivers are, 3 Inst. 73, cap. Coron. the land on either sides whereof may be discerned; and the statute of 15 R. 2, c. printed, for death and maim is below the bridges, whereas the roll of the statute is below the points; i.e. where no land is visible, 28 H. 8, cap. 15. Windham, In creeks and havens, the common law and Admiral have divisum imperium, and so of points; Milford Haven may be seen from the west parts. But by Keeling, Deal hath been adjudged within the body of the county: but yet to punish the defendant, where his warrant is doubtful, is unreasonable, which the Court agreed; but to settle this point, ordered an information against the Admiral, who as the coroner, had taken the enquest.

[422] 143. *Ante* 411, pl. 115.

Trades. Surgeon or scrivener are no handycrafts within 22 H. 8, cap. 13.

The Court conceived a barber a trade within the statute of Eliz. but in such action of debt tam quam, need not be said a common barber; contrà in action for calling him bankrupt, or in information or indictment against them.

144. KING *against* LOCKE.

Assumpsit.

In action by executors on indebitatus for wares sold to pay quantum meruit, not shewing what the particulars were: for which cause Barwell moved in arrest of judgment, the difference having been betwixt this and indebitatus in certain sums, for diversis mercimonijs ante tunc venditis, this is good enough; for then it must appear, that there was some particular agreement to pay the 20l. or that the goods were worth so much: but the Court conceived both cases well enough; sed adjornatur.

145. SIR THOMAS FANSHAW *against* THE INHABITANTS OF S.

Way.

Jones excepted to an information against the county for not repairing a bridge, alledging there was no hundred, wapentake, &c. bound to do it, and say not (nor any other person) were known: but per Curiam, after verdict, this is well enough. 2. It was said 3 October there was a certain bridge for all the Kings subjects ire, redire, &c. 3 November fract' & adhuc est ruinosus (not saying qui quidem pons, &c. 3 November fuit ruinosus) which the Court conceived well, being after verdict, though information be not within the Statute of Jeoffails. So in *Adams* against *Lopus*, in action upon the case, quod sciens canem ad mordend. oves consuet. scienter retinuit, not saying canem prædict. yet adjudged good after verdict in the Common Bench cited by Twisden to be this term. Adjornatur.

[423] 146. THE KING *against* BUCKERIDGE. *Friday, November* 28.

Trespass.

Lea excepted to an indictment of trespass, quod tunc viz. 1 Junij fregit domum, &c. & cepit equos, not saying ad tunc & ibidem, which by Twisden, is ill: Windham & Curia contra, quod 1 Jun. vulneravit & percussit, not saying ibidem, is good. Adjornatur.

147. DADE *against* SADLER.

Executors.

In action on single bill, due in the time of the testator, in action against the executors, by Allen for the plaintiff, after verdict on payment pleaded, and found for the plaintiff, and damages taxed generally, occasione detentionis debiti, that so the executors, not having specially discharged themselves by plea, are chargeable for all, though they have no assets; sed Curia contra, that executor shall answer damages only for his own time. And by Windham, The jury ought to distinguish how much is due in the executors time, and how much in the testators: and by Twisden, The executor might confess the action, and so be liable to no damages. But by consent it was referred to the Secondary to separate the damages.

148. RUFFEL AND LEA. *Ante* 416, pl. 125. In Coverture, Br. 51.

Infant.

Judgment for the plaintiff, in an action on single bill against an infant: and per Curiam, If it be of excessive value the infant may traverse absque hoc, that it was for necessary apparel, and the plaintiff must reply specially: also the jury in such case ought to find non est factum, 21 Ed. 4.

149. THE KING *against* HARDY AND EDWARDS.

Force.

Powis excepted to an indictment of force quod disseissivit. exp. & ejecit contra formam stat. which is ill, for it is said to be copyhold, and so he cannot be said by 21 Jac. to be disseised, 4 Inst. 176, so of lessee for years, which the Court agreed: for 21 Jac. giveth only restitution, but alters not the form of the indictment given by 8 H. 6, which extends not to copyhold. Quasht, nisi. *Post.*

[424] 150. ELLIOT *against* BLAGUE.

Covenant.

In an action of covenant to deliver five hundred maunds of salt-peeter generally, after oyer the indenture in hæc verba was to deliver, or if any be lost by the way, unless hindred by act of God, to pay five rubies for each maund, for which variance betwixt this general count and the special deed, Allen moved in arrest of judgment. Jones for the plaintiff agreed the exception, and that it's needless to declare of this distinct clause, which maketh against him, which the Court agreed: but the attorney not attending with the postea (according to the rule of the Court) though no notice were given to bring it in, this being the last day of the term, adjornatur.

151. TRIPIT *against* REYNOLDS. *Ante.*

Assumpsit.

Tourner moved in arrest of judgment in assumpsit, that the plaintiff declares of communication betwixt him and R. of the lands held of A. and thereon in consideration the plaintiff would assign his tenant right, term, claim and interest unto the defendant, he would pay unto the wife of the plaintiff, and her administrators yearly, so long as he should enjoy the said term; and for arrears the administrators of Mary brings the action, averring that Tripet did assign and set over, which he conceived ill; 1. Because (as Rot. 1665, *Shon* against *Beelby*, assumpsit to surrender, &c. Yelvert. 49) the manner of the assignment is not specially mentioned; as also because it is not said, whether the promise were to the husband or the wife; so to say H. surrendred generally, is ill; so that H. offered sufficient person to be bound, (not shewing what he was worth). Windham conceived this a thing collateral, and so it ought to be averred to whom the promise was. Sed adjornatur.

[425] DE TERMINO SANCTI HILLARII 14 & 15 CAR. II. B. R. DIE SATURNII, JAN. 23, ANNO 1662.

Foster Chief Justice; Mallet, Twisden, Windham.

1. HALLAM *against* BEARCRAFT. *Ante.*

Amendment.

In trespass on special verdict, Powis prayed an amendment according to deed given in evidence, after draught with counsels hands, though the notes did not warrant it, which the Court denied, only by consent referred it to agree, &c.

2. THE KING *against* ———.

Indictment.

Baldwin excepted to an indictment of trespass at sessions of borough of St. Ives, held before the mayor, that it's said quod juratores impanellati & jurati, &c. præsentati fuerunt, for præsentatum, &c. which is but a recital, quasht per Curiam.

[426] 3. BILLAGE *against* BLAKE. *Ante.*

Variance.

In an action of covenant, Allen moved in arrest of judgment for variance betwixt the count and the deed, there being a bond given for performance of covenants; and the action is only founded on the clause of the covenant, viz. to deliver salt-peeter at

a day, and relating to the deed, which an oyer demanded, mentions such a covenant; but further giveth liberty, that if the defendant, by act of God, be disabled, he should not pay, which by Jones is well enough, the deed being not pleaded in hæc verba, nor the action founded on the penalty, but only on the breach of covenant, for not delivering: and its more proper for the plaintiff to count as his case, and the defendant to shew the defeasance, as *Utreghts case*, which the Court agreed, there being no demurrer on oyer demanded for variance, as Hut. the case of *Alom-works*, but on collateral points. But 2, by Allen, the issue can make nothing in this case, the bond and deeds being entred in hæc verba, if the count do vary it's ill: and to this end men demand oyer to save this advantage: but per Curiam, if the count be of bond, dated 1 May, and the entry is of 2 May, on release pleaded, and issue thereon, it's good enough; and here the issue was on the disability: and here it doth appear the plaintiff hath cause of action quoad the substance. Also by Jones, here the plaintiff hath agreed the deed to be the same; but if he had pleaded non est factum, he might have had advantage of the variance. Judgment for the plaintiff, nisi.

4. KNIGHT *against* PALMER.

Amendment. March, 1, pl. 2. He must say of what estate the grantor was seised. But March, 166, pl. 233, to travers the seisin of services incident by grantee, &c. is ill.

In replevin, the defendant avowed for rent-charge granted by H. seised in fee. The plaintiff in barr pleaded H. was not seised in fee, to which the defendant demurred, and after entry as concilium, but never argued. Wild Recorder, prayed an amendment, because it doth not appear H. is dead; and so if he be alive, it would be good so long as he liveth; but the Court refused, it being in another term, but gave them leave to discontinue.

[427] 5. NOYE *against* DOWNING.

Tryal.

Nota pro regula per Curiam, and Jeakell Secondary on ne recipiatur entred on default of the plaintiff, the plaintiff may try it the next sitting without notice, in Middlesex, before the Chief Justice; but if he delay the next, the third he cannot try it, without eight days notice, as at first, though this be in the term, and a new trial awarded on notice, being only two days before such trial.

6. THE KING *against* SADLER. *Ante.*

Force.

Jones excepted to an indictment of forcible entry and deteyner, that was found that the defendant was guilty tantum of peaceable entry, and forcible deteyner; he agreed, that on such indictment the jury may find guilty of either part, as of forcible deteyner, and not guilty for the rest. And so by Baldwin for the King, if H. be found guilty of any part of the charge, whereby the King is intitled to a fine: but then the verdict, being further, that the defendant was not guilty of all the rest, but that part whereof he was found guilty, it's well enough. And so by Twisden, on great advice on the doubt, whether on indictment of forcible entry and deteyner, H. may be found guilty of one; it was resolved that it may well enough be, the statute forbidding both. Restitution awarded for the plaintiff, nisi.

7. BACON *against* ———.

Nosme. Moor 687, pl. 1260. Elen for Elionor. Cambd. Rem. 38, in tit. Names its said Bennet is the corrupt for Benedict. So in assise of lands in C. the defendant said they were named D. and doth not say, and not C. yet good. 6 Ed. 3, 1 b. pl. 2.

The plaintiff declared by the name of Bennettus: the defendant pleads his name was Benedictus, and doth not say that his name was not Bennettus, and issue thereon. 2. The plea was, that prædictus Bennettus habet pro nomen Benedictus, which being of Christian name, is ill, but of sirname it's otherways; for one may have many names. Carew prayed an amendment, and awarded per Curiam, but to avoid paying costs. By Allen, should the issue be found for the defendant, it would be a jeoffail, there being no denial that his name is not as the plaintiff counts: but the replication being that the plaintiffs name was Bennet, absque hoc, that it was Benedict, and thereon issue is taken, and so it being void, costs were not to be paid; the Court conceived it well enough: and that the plaintiff, after issue joyned in paper, cannot waive his count, but the defendant **[428]** may waive his plea; and the course of the Court being, that on the plaintiffs amendments the defendant is to have costs, or an imparlance, the Court ruled him to one, viz. to accept of costs; and so amendment granted per Curiam.

8. FLOWER *against* MAYHEW. *Ante.*

Trover.

Trover de una salsura, Angl. a saltingtrough which by Wallop, in arrest of judgment, is ill; as Tr. 24 Car. 1, *Hertford* against *Hobson* de cervitio argent. Angl. a silver salt-seller, adjudged ill P. 1652, *Morgan* against *Lloyd*, trover de quodam instrument. ferreo, Angl. racks, brandirons; judgment reversed as ill, there being another proper Latin word for the same things: but by Windham, when the proper Latin is insignificant, as salsura is, so duodena fili, ruled that damages shall not be intended given for them: so here; contrà de uno instrumento, &c. which is too general to apply to any particular. Twisden agreed, that where the words are insignificant, no damages shall be intended given for them, when generally given inter alia; but here damages are particularly given for this salsura, &c. and so its ill: to which Windham and the Court inclined. Adjornatur.

9. THE KING *against* HARDY. *Ante.*

Force.

Powis excepted to an indictment of forcible entry, 1. That its taken before A. & B. Justices, not saying at general or special sessions: sed non allocatur, for any may take it any where. 2. Quod expulerunt & disseisiverunt. H. being said to be seised in fee, according to custom, of the mannor of copyhold, which by Windham, is well enough, there being a seisin in the copyholder in common pleading, contrà of lessee for years: but by Foster & Twisden, such indictment was not good at common law, and 21 Jac. giveth only remedy by indictment, which must be by expulerunt, for disseisin must be taken in suo genere, as it is. But by Allen, here disseisivit is but surplusage, and there are other sufficient words to express entry, and ousting of him, as quod ejecerunt, expulerunt, &c. But by Twisden, the indictment shall not be aided by intendment, though after a verdict. Adjornatur.

[429] 10. THE KING *against* THE INHABITANTS OF SOMERSHAM. *Ante.*
Saturday, Jan. 24.

Common. Sinderf. 107, pl. 19.

Pemberton moved to stay distringas grounded on Westm. 2, c. 46, awarded nisi, after writ of enquiry who, and what value the wast was, and another after that

retorned to enquire of damage, 2 Inst. 476, which is found to 900l. being not within the statute, which was only intended against commoners on improvements, not where hedges are casually thrown down, 15 Car. against the inhabitants of Darby, the Court refused to do any thing, without scire facias on the enquest; so 14 Car. *The King* against *The Inhabitants of Frampton;* and so he prayed that execution might not be awarded on such writ of enquiry. Jones moved for time to plead, which hath never been denyed, *Gibbons case*, 1 Cr. 280. But by Twisden, the exceptions, that there is no indictment, or that it was not by commoners, must come in on the defendants side; and therefore they may have time to plead: and by Windham, this statute relates to the Statute of Merton, and can only be on improvements, which the Court agreed, and allowed the party to plead on the distringas.

11. MANBY *against* SCOT IN THE EXCHEQUER CHAMBER. *Ante.*
In Contract, Br. 19.

Baron & feme. Modern, &c. 128.

Hyde for the defendant. Its agreed that generally feme covert cannot charge, without assent precedent or subsequent of the husband, but whither she may charge him for necessaries, hath been doubted: and I conceive, that for them he shall not be charged, though he allow her no maintenance; for she hath no will legal, Pl. Com. 13, 17, and so here can be no actus contrà actum, or as Dr. & St. cap. 6, any aggregatio mentium, necessary in all perfect contracts: and the difference of the books is, that its not the contract of the feme that binds the husband, but his licence, which may be expressed or implyed in the coming of the thing bought to his use; and the authority of law is to be allowed by the consent of books, not by single opinion precedent; and the inconvenience (which the Judges in all cases, specially heed, as 1 Co. 52. 1 Inst. 279, & 379) following, if he should be **[430]** charged, are of great weight: she might on complaint take up of several tradesmen, linnen, woollen, &c. in infinitum, and each of them hath as just right, as the other, to his debt on such contract: and though the law is not to be changed for inconvenience, yet when doubtful, the inconveniences are considerable to determine one way or other, and it doth not appear she wanted apparel, or ever asked him for supply. And though the husband be bound to provide for his wife, yet only so long as she is helpful to him, and liveth with him. And by her wilful separation, without the churches sentence, she is out of his protection and provision, as Pl. Com. 315. F. N. B. 232. Subject is out of the Kings, by denying his authority, which are their own defaults, to seek to set up imperium in her self, contrary to his, and by the F. de nuptiis of the civil law, si uxor virum propria temeritate reliquerit non tenetur vir sibi alimenta subministrare; so the words of an appeal are, quod occidit virum inter brachia sua, as register; so unless she be inter brachia viri, she shall not have maintenance; for by the law, in no case, nor for no color what ever, she cannot depart from her husband, F. N. B. 238. If she be in fear, she may have supplicavit against him, and on want of maintenance, she may complaint to the Ordinary, who first joyned them, si uxor quæ propria culpa a viro recesserit sit pœnitentia ducta.

Therefore she should not barely have desired, but submitted; and if she will rather starve than submit, as in Pl. Com. 68, of debtor, let her starve, for the law provides for none in such condition; and it is no more strange to send women to Spiritual Courts for alimony, then for C. B. to send cutpurse into B. R. or B. R. to send feme for dower into C. B. or into Chancery for equity, *Caudries c.* 5 Co. 39. L. Entr. 228. Bract. 107, this being an incident to matrimony; Bract. 61, lib. 2, c. 6, which 24 H. 8, c. 12, recited of common law to belong to them, 1 Cr. 220, *Blakes case.* The reason of the prohibition to the High Commissioners was, because alimony properly belongs to the Ordinary, 14 H. 6, 14. If the husband appear, and feme be waived, she cannot purchase pardon without him, 18 Ed. 4, 4. Thus the law giveth him remedy to tame her; but she hath no remedy against him: and L. Entr. 4. Co. Entries 38, no trover lyeth, because no wrong is done, it being his own default to deliver them to a woman, Action upon the Case, Br. 109, 113, and not guilty must be here pleaded, 1 Cr. 10, 104, for conversion before coverture, or during coverture,

when its by wrong, and against the will of the party, as after contract, 21 H. 7, 6. 14 H. 8, 22. One takes away his mony and goods, trover lyeth; but if the seller **[431]** take his word to pay at Mich. no trover lyeth, 11 H. 4, 83. 26 H. 8, 2. And this case differeth not from that of infant, if he know her to whom he sells to be a feme covert, and in trover only, the property is inquirable, not any circumstances of necessary convenience, &c. and this would beget the same inconvenience: and the Statute of Merton, c. 7. 2 Inst. 93, it's a disparagement to many a burger, much less should such therefore be judges of differences betwixt gentlemen and their wives: but 2 Inst. 56, reasonable, necessary, is quæstio juris, and to be decided by the Court, 22 Ed. 4, 38, but were it admitted he were chargeable, yet judgment ought to be against the plaintiff: for as in assault against baron & feme, Yelvert. 106, it appeared she only had assaulted, held ill; because it ought to have been special of assault by her: so here the count ought to be special, and the general authority given by husband to the wife, F. N. B. 120, is repealed by this express prohibition, which doth no more take away all the power of the wife, then feoffment not to alien to J. S. and one may as well prohibit to trust his wife as his servant. 3. The verdict find the wares necessary and fit for the husbands degree, but shew not what the wares were, nor that they were for apparel; and without particulars the Court cannot judge, none being mentioned in the count or pleading. Mallet for the plaintiff. *Ante.*

12. THE KING *against* NEWTON, &c. *Ante. Monday, Jan.* 26.

Bastard.

Allen excepted to an order of sessions made for taking a bastard-child apprentice, not shewing that the child was a poor child, and charged on the parish, nor in what trade he was to be bound to, but especially because (43 El. c. 2, § 5) that it shall be lawful for the churchwardens, with the assent of the two next justices, to put out such children as aforesaid, where they think convenient, doth not restrain them to the bounds of the parish, but giveth them liberty to do it any where; and such binding shall be as effectual, as if the child had been of age, and bound himself; which here could never have been to this person, being tenant at will in the parish, especially no longer then they remain in the parish: nor the law never intended that any person should be bound to take. Bigland contrà, That this is no inconvenience; should an alderman of London come into the parish and use husbandry, such servant is able to do him service, and to be a **[432]** benefit to him, and so no inconvenience; and without compulsion none will take them but in hope of gain; and such do generally beat, and by hard usage destroy the poor children, or cripple them; 9 Car. by Hutton and Croke, to whom the justices referred such case, resolved accordingly: and an order made by the council board to quicken the Judges in all counties to the like rule. And by Foster, the statute would be fruitless, should there not be compulsion to take, as well as put out; and a child was laid to a person that occupied lands in the parish, as was resolved by all the Judges of England on debate. Twisden, The parish should raise a stock for putting out such children: so *Farlyes case* in Kent, the justices menaced him, but would not force him to take him against his will without consideration; else the greatest enemy I have may be put on me: but by Foster, it was part of the resolution of the Judges, that consideration should be had of the age of such children. Twisden, It was held, as I alledged, all Huttons time. Windham, The meaning of the law was only to advance husbandry, not to bind to other trades, Dalt. Justice, p. And it will be intended the sessions, being a Court, will do justly, and it's without mischief that it be so. But that which staggered his opinion was the division betwixt the Judges, on putting the case at Serjeants Inn in Chancery-lane; but yet he conceived they may place such children where they please. Twisden conceived the better opinion of the Judges in his inn in Fleetstreet, to be of his opinion. Mallet accorded with the other two. *Steers case* of Maidstone in Kent on an information, ruled that the parish could not force one to take an apprentice: but notwithstanding the Court confirmed the order, and held the exceptions insufficient.

13. THE KING AND MILLER *against* SADLER. *Ante.*

Force.

Jones excepted to an indictment of forcible entry, that it's said coram A. & B. Justices, and that after at another sessions before A. and B. it was tried, which must be intended private sessions, which have no power to try: and though there were a precept to the sheriff, and eight justices present, and within a liberty, yet the Court will not intend it good: nor, by Windham, ad sessionem pacis shall be no more intended of private then publick sessions. He doubted whether private sessions may not try the force. Twisden, Ad sessionem pacis tent. for such a place, is intended at general sessions; but ad sessionem coram A. & B. &c. justices, **[433]** is intended private generally. 3. Here it appears the justices have joyned issue, and tryed it the same day; though justices of oyer and terminer may do so, justices of peace cannot without consent, which was here given, which Foster agreed: and that here being ad sessionem tent. pro libertate clausi canonicorum de Sarum, it's well enough. Also by Windham, No continuance is necessary to be entred in the certiorari from one sessions to the other, but it must be by adjornment or venire facias, as *Samsons case*, which here had no time of its retorn. Adjornatur to search presidents.

14. PARKER *against* WILLIAMS. Siderf. 100, pl. 4.

Prohibition.

In prohibition on suit for dilapidations, on suggestion that the freehold was in question, 12 Co. 65, *Roberts case*, Register 58, which by Windham, shall never be till they disallow the plea pleaded: for if letters patents, or Act of Parliament come incidently in question, they may try and judge it, according to the rules of our law; but if they refuse such plea, prohibition lyeth. Twisden, Hub. 52, They cannot try any title by quarrel at circumstances, as at institution, and so avoid presentation, tried at common law. And this suit for dilapidations is only for damages; and minister, or not minister, cannot be tryed by them, which Foster agreed: but on suggestion that the Spiritual Court will not allow the plea, prohibition awarded: and by Twisden, on a bare suggestion, without actual pleading in Spiritual Court, and refusal; sed Curia contrà.

15. BUXTON *against* BATEMAN. *Ante.* In Chattels, Br. 11.

Church.

It being an action upon the case, grounded on possession, Twisden and Windham conceived it well enough; contrà in a prohibition; then usage to repair must be set forth in the count: Foster contrà.

[434] 16. BAYLY *against* LEWIS. *Ante. Tuesday, Jan.* 27.

Account. If H. come in by cap. ad respond. only, he shall not be per mainpris; but contrà if he came in by cap. ad computandum, 11 H. 6, 31 b. pl. 18, per Curiam.

It was agreed by the Court, that common bail is sufficient in account originally begun in B. R. but when special bail is put in in London, in a cause removed here by habeas corpus, it was doubted whether it should be discharged, or stand only as common bail; but after judgment, quod computet, capias goeth forth, and on retorn of that special bail is requisite. 2. When bail is put in to one cause in L. it stands for all on removal hither the same term: but if no declaration be in three terms, or if nonsuit be after, its discharg'd but only against him that was non-suited. Adjornatur.

17. TAYLOR *against* GORE.

Administrator.

Windham conceived that administration cannot be committed of part of any debt, but may be severally of the goods in several counties; sed Curia contra: They may commit administration to as many as they will, but not by several parcels, because given by statute, Dy. Adjornatur.

18. THE KING *against* SADLER. *Ante.*

Process.

Venire facias ad respondend. &c. without day, is good enough, and cured by appearance: but venire facias ad triandum, whereby the party may be utlawed, must be retornable ad prox. sessionem by Twisden, and so is the course, which the Court agreed. Restitution awarded for the prosecutor.

19. DEAN *against* EASON. In Departure, Br. 15.

Arbitrement. Contrà of a repealance in rejoynder after bar, that no will was made.

In debt on bond for non-performance of award: the defendant pleaded nullum fecit arbitrium. The plaintiff shews it, which was to release all actions to the day of the award. The defendant rejoyns, that new cause of action arose by trespass after the submission, and before the award, which, per Curiam, is a departure, as nul wast pleaded, and rejoynder that H. fell'd to repair: and though the plaintiff traversed this new cause of action, and did not **[435]** demur on the rejoynder, yet being found for the plaintiff, judgment for the plaintiff, nisi.

20. THE KING AND DAVIES *against* HARDY. *Ante.*

Force.

The Court conceived the indictment ill, being copulative quod expulit & disseisivit of copyhold. 337, pl. 443.

21. SMITH *against* TAYLOR. *Ante.*

Rent.

In debt on articles of agreement to pay annuity during the residue of term assigned to J. S. not shewing for what years or term, and breach assigned in non-payment during the residue of the term, without saying yet to come: and so when the damages are laid, the term might be expired; after judgment by nihil dicit, the Court conceived it to be ill; contrà if the verdict were, then a term will be intended, as Hub. 3, *Puncionby* against *Rudge*. Adjornatur.

22. NEALE *against* DENNISE. *Wednesday, Jan.* 28.

Slander. Siderf. 103, pl. 9. Is not demandable after the count, 8 Ed. 3, 2 b. pl. 4. He may have it in local action although he be plaintiff. 3 Ed. 3, 42 b. pl. 22.

In action upon the case for words laid in London, after imparlance, and before plea, farther than in paper, Evesque Ely, by special warrant to attorney shewed in Court, and charter pleaded, demand conusance, as Dy. & 40 Ed. 3, 10 b. suggesting that the words were spoken at Ely, which the Court doubted, the action being transitory; but agreed that of things local he might do so, being not summoned, as the party himself is. Adjornatur.

23. THE KING *against* THE INHABITANTS OF SOMERSHAM. *Ante.*

Way.

The exception of the quæ quidem fuit in decasu being over-ruled, a new trial was desired, because the county being charged to repair, several that were of the county were allowed witnesses, which, per Curiam, is ill if such person be chargeable; but if not, he may be a witness.

[436] 24. WHEATLY *against* THOMAS. *Ante.*

Tayl.

George Lord Cobham seised, devised to the first son for life, remainder to his son, and the heirs of his body, and so to eight sons: William the eldest hath issue Henry Lord Cobham, and George Brook, who being seised to them, and their heirs males, the remainder to Edward the younger son in fee; that Henry and George are attainted, and now dead without issue, and so the lands come to one daughter of William, lessor of the plaintiff: he agreed all the estates, as in Henry by the will, are forfeited by the attainder, and no more: and the Act of Confirmation, 3 Jac. 26 H. 8, 13. 32 H. 8, 20, doth only declare the effect of the former attainder, and applyed it to the lands in question, to satisfie the lay gents and encourage purchasers, and so as Earl of Leicester, Pl. Com. 368. The attainder being erronious, no new attainder is made: whence I infer, that the Act 3 Jac. could only be for settlement of the estate, whither it enure by way of grant or restitution; and though the King had several estates in him, as fees determinable, whither conjoyned, or severally in him, may pass by patent generally, as 1 Inst. 118, all the males are to inherit before any females, as by the will, notwithstanding any fine, recovery, or other act, which extends to the attainder it self. And though the proviso in 7 Jac. be, that the restitution should not extend to any lands in the King by attainder, that is answered by a farther saving therein, that the lands given to Duke, by Act of Parliament, or other lawful means, should be as effectual as in him, had there been no attainder: and so as to this mannor, the dissability being removed, before the title of the plaintiff commenced, and so as *Godfry and Dixons case*, 2 Cr. she is enabled to take, and remainder to the son of an alien, is good, if the alien be naturalized before his death; and this is a stronger case, being only ratione culpæ, and avoided by the Act of Parliament, 15 H. 7, 10, lands given to a married man, and feme of J. S. in tayl, is present execution with cross remainders, Br. Done 42, Dy. 56. The law doth not suppose this such a remote possibility, or contingent, but that it may take effect, Dy. 274, and I conceive the plaintiff was remitted, as Kell. 58, and so prayed judgment for the plaintiff. Allen for the defendant, Henry was seised to him and his heirs male, the remainder to George, the remainder to Henry as heir male of William, the remainder in fee by the death of Ed-**[437]**-ward, and the plaintiffs as heirs of William cannot inherit; every clause of 7 Jac. is only to restore the issue of George in blood against his attainder, but not against the attainder of Henry; that is still a stop to them: and by particular proviso, that all estates shall remain in the King, as by attainder of Henry; and the particular saving makes nothing to the heirs of William the son of George, who had by 3 Jac. a particular estate given him; and Henry was now his heir, and William was in as good case without this Act as with it, the attainder of tenant in tail in remainder, before his remainder vested, hindering nothing, but the son may after inherit, as *The Lord Lumlyes case* cyted in *Dowtyes case*. As to 3 Jac. on which the question mainly rests the remainder limited to William the grandfather, cannot be revested, and as a new purchase it cannot be, because at this time there was no heir of the body of William, Henry being attainted; William the son of George being restored in blood, cannot take as remainder to the heirs of J. S. dead, or monke, or attaint is void, though he be after deraign'd or pardoned, because as Pl. Com. 27 b. *Blodwell* against *Edwards*, Moor 430, pl. 602, remainder to reputed issue, the estate in remainder is not by way of use, but in possession; and A. was in being and uncapable at the time after

attainder made void, H. may plead nul tiel record; but this Act confirms the attainder, and the intent of 3 Jac. which may be gatherd from the circumstances of the fact: the Act was made after the settlement on Duke Brook, which was pendent in C. B. by division of the justices on construction of the patent; as to the other lands, this manner of cooling being supposed setled by the Act, but that it cannot restore William the son of George to this general remainder in Henry, there being no mention of Henry, with any kindness. 2. It runs not as an act of restitution, but first changeth the course of the will, giving to Duke, and the heirs males, and then to the heirs males of William, then of George, skipping over Harry, and so could not be intended to give him any estate, though he had an estate tayl by the will: also Henry at this time continued attainted, and therefore the Parliament could not be supposed to give him any estate, without reversal or pardon of the attainder; unless it be expressed to be their meaning, no such construction can be made. The vesting of remainder by Act of Parliament to person attainted, doth not take away the Kings estate, unless some words be, that he should be discharged of his attainder, or else by implication. But **[438]** admitting the Parliament should make such express remainder, they would not have generally limited it, but the particular estates, and especially having provided for all the other issue male by express name: and still the remainder in question is more doubtful, being to the heirs of the body of William the grandfather, which cannot be thus hudled up among general words, especially if it be presumed the Parliament did see the will; the intent of the proviso is not against the forfeiture, but to limit the Kings grants to persons particularly mentioned, and quoad other estates, that it go as the will: and this meaning is explained by the subsequent clause, that serveth against fines, recoveries, &c. And the general limitation is to no persons, but to such estates as by the will, which shall not be the remainder in tayl of William the grandfather, to revest that in Henry, but only qualifie the estates in Duke Brooke, which was so long as Henry or George had issue, and now turn'd to a new estate, being one of the five persons to which this Act giveth estates with these cautions: and had the Parliament intended to give Henry any estate, they would likewise have restrained him from docking any of the other remainders.

25. THE KING AND SHERES *against* LARKING, HOLLINGWORTH, &c.
Saturday, Jan. 29.

Force. Sinderf. 101, pl. 7.

Newdigate excepted to an indictment of J. S. weaver, and A. confectioner, being an English addition, and there are proper Latin words, sed non allocatur; for as laborer, yeoman, baker, they are all as good additions. 2. The forcible entry is in ecclesiam parochialem, which Newdigate conceived not within any of the statutes, there being a proper remedy on certificate of the bishop to have a vi laica removenda; but ejectment lyeth de capella, 12 Co. by Windham; vi laica, F. N. B. was not to put the party into possession, 5 R. 2, & 15 R. 2, did not give any restitution to any churches, but only an action upon the statute: and per Curiam, 8 H. 6 extends to all places within the other statutes. 3. Its said the plaintiff was seised of the church, ut de libero tenemento, which, per Curiam, is well enough; for though layman may have the freehold, as on the dissolution many had, yet the parishioner shall have the use.

[439] 26. THE KING *against* CHEDLE.

Error.

In error of an attainder on scire facias, the tertenants cannot plead only releases, nor doth the Kings attorny joyn issue in nullo est erratum: but the Court examined the errors, as alledged, as *Samsons case*, which the Court agreed. Adjornatur.

27. THE KING *against* WRIGHT.

Leet.

Johnson prayed certiorari to remove an order of sessions, to remove a gentleman, chosen constable in the leet by spleen, which the Court granted: but whither the justices may, or not, they will here remove such person, being unfitting, as in *Alderman Abdyes case:* and if the new one be not duely chosen, the old one must serve.

28. BOOTH *against* LEECH. Siderf. 103, pl. 10.

Slander. 1 Roll. 43.

Thou art a trayterly rogue, said of a justice, the Court conceived actionable, as bankruptly knave: or of an attorny, that he is a knavish attorny, is actionable: so to say, H. is a cheating, or bribing knave, &c. But by Allen, these refer to the professions; not so here. Adjornatur.

29. STONEHOUSE *against* BODVILL.

Assumpsit.

In indebitatus for wares provided at the defendants request, and delivered for his daughter, worth 40l. which after a verdict, shall be intended a good debt; contrà if it had been for wares sold to the daughter, F. N. B. By Jones, who prayed judgment for the plaintiff; as *Tayler and Tirrels case.* Twisden remembred that indebitatus against H. for wares, sold at his request to a stranger, staid after verdict, for not declaring specially, as the case is, judgment was staid. Windham conceived in action upon the case, the plaintiff must declare, specially, but not in debt, nor assumpsit as here. Also by Foster, The father is bound to provide for the child, and so its his debt, though it do not appear the child is in the fathers tuition. Williams for the defendant, 3 Cr. 843, the daughters buying chargeth the father, no more then a strangers, *Rippon* against *Nortons case:* Yelverton, *Bosden* against *Thynne:* but had **[440]** the father promised to pay for wares bought at his request, that would have charged him: the Court agreed, had the sale been alledged to the daughter, they would not intend it a debt in the father; but now being for the daughter, it shall be intended that they were sold to the father now. Judgment for the plaintiff.

30. TAVERNER *against* QUATERMAN. *Ante.*

Bastard.

The Court conceived the alledging H. became poor, is a present charge to the parish, though no rule be made; and the churchwardens ought in such present exigencies to provide for the poor, and shall be re-imbursed. And it is better that they provide for them in specie, with such things as they want, then to give them mony weekly. Judgment for the plaintiff.

31. ASHBURNAM OR ASPUNWELL *against* BRAHAM.

Hill. 12 & 13 Car. 2, Rot. 814.

Lieu.

In debt on obligation to pay at the house of one Yarrow in Woodstreet Magna. The defendant pleaded payment at the house of Y. generally, and the visne is of the parish of St. Michael in Woodstreet: and after verdict, and judgment for the plaintiff, this was assigned for error, as 6 Co. *Arundels case;* because this cannot be intended the same place: but, per Curiam, if it be error, it is only in fact, and should have been pleaded; but now it is well enough. Judgment affirmed. And the Court after

examination will not suffer any to quash the record for male removement, unless for great cause.

32. HARDY *against* ROBINSON. *Ante.*

Baron & feme.

An action of debt on bond to the feme, dum sola, brought by the husband solely without her, 37 Ass. 11, which, per Curiam, is ill: for if cause of action arise before coverture, though but trespass, where only damages are recoverable, they must joyn; so (as this was) in indebitatus, on mony due from the wife, dum sola, on account, action being brought against him alone. Judgment stayed: and after, by prayer of the plaintiff, reverst for expedition.

[441] 33. THE KING *against* TAYLOR.

P. 14 Car. 2, Rot. 492.

Slander.

Action upon the case, quod falso, malitiose, &c. writing and directing a letter in the prosecutors name to his brother, and causing it to be publisht in discovery of a plot, inclosed in a letter to a colonel, by which the prosecutor was taken and imprisoned, and therefore brought his action. The defendant demurred to the count. *Post.*

34. HAMSTEAD *against* OLDHAM.

Trin. 14 Car. 2, Rot. 728.

Replevin.

In replevin, servant alledged property in J. S. which, by Baldwin, is ill, on 11 H. 4, 4 b. 1 Inst. 145, and ought to be claimed in person, or by proprietate probanda. But by Windham, this is intended before the sheriff; but in Court H. may justifie under any person whatever, as is usual, which the Court agreed, proprietat. proband. F. 6. For here is no fine due from H. that avoweth as servant or baily. 2. The plaintiff replys, that the property was in him, absque hoc that it was in J. S. which, per Curiam, is ill: which the plaintiffs counsel waived as ill, but relyed on the first exception, which the Court disallowed, being only an excuse of himself, and not delay (as 2 H. 6, 14 a.) of execution. Judgment for the plaintiff.

35. MANBY *against* SCOT IN THE EXCHEQUER CHAMBER. *Ante. Saturday, Jan.* 31.

Baron & feme. In Contract Br. 19.

Hales Chief Baron for the defendant, First looking on the case, I thought it of little difficulty, and less concernment, but the way of arguing which hath been taken, hath made the case of great consequence. 1. He premised the nature of contracts, which are duorum consensus vel plurium, whereby a mutual obligation is induced, wherein is considerable the persons contracting, which are all not disabled by law, as an infant is quoad hoc not universally, so non compos may bind himself, not his executors; but feme covert by our law in no case can contract to bind her self. 2. The con-**[442]**-sent, which is the knot and formality of contracts, which is either expresly precedent, concomitant, or subsequent, or implyed in point of contract, which is such as the law doth raise: as when I make one my baily, he may transact, 2 R. 2, Debt, F. 3, & 27 Ass. 5, contract as a baily for whatever is within the power of such: so of a factor, apprentice, steward, or feme that the husband appoints house-keeper, such things as are within such administration, as to provide for the family, is implyedly committed to her, 21 H. 7, coming to my use, doth not bind me, unless I have some notice of the contract; and any finding of either of these consents is sufficient. But beside this, there is something that is no consent, expressed or implyed, but an

evidence of fact; as if I sometimes send my servant (without ready mony) to some place where I am known, this is a presumption of fact; but the finding this evidence, without conclusion that it is a consent, is not sufficient ground for the Court to judge it so. So when they find entry of feoffee, and re-entry of lessee, this is an evidence for an attornment; yet the finding is not sufficient: so the paying rent to the grantee, is an evidence of an attornment, but not sufficient to find that only. So the finding legatee, continued twenty years in possession, is but an evidence of an assent of executors, but not sufficient for the Court to judge it so. 3. The obligation which usually is induced on him that contracts, for nemo tenetur ex alieno contractu, the heir is charged by obligation of his auncestor, only by concomitant assets. And in the case at Barr, there is no assent of the husband, nor any express or implyed contract or authority given her found, and so no original contract: but here are strong evidences of both sides; for it's not presumable that the husband, in case of cohabitation, will be so unreasonable, as not to allow her to provide for the houshold; and therefore she is for these things presumed to have his assent. But all this is out of the case at Bar, because she lives from him, and her desire to cohabit shall not be prejudicial against the husbands express disassent. It cannot be thought that for every thing in the family she should have an assent, therefore this is good evidence, but no more in case of cohabitation. 1. We all agreed that this is no contract to bind the wife, nor any other. 2. It's agreed that the wife ought to be maintained with necessaries, which all laws agree. Though the civil law allow the wife a separate property of her own estate, yet if she have no portion, she must be maintained by her husband; other laws, if husband will now allow it, restituantur ali-**[443]**-menta ex sententia judicis, and this is more reasonable in our law, which deprives her of all propriety or means, or capacity to relieve her self: but the difference is, that plaintiffs say, by an innate original power, given her by the law, to charge him, which the defendants deny, but that there is other means to have it; and all agreed that where the wife contracts for the necessities of her husband, children, and self, it obligeth him: but this is by the implied assent of the husband in it, not from any original power in her to provide; and this assent must expresly be found; and if the wife, having no mony, do contract for her self, it's the same in case of cohabitation. 3. Though this be a great evidence of the husbands consent, yet this is not of its self, being specially found any consent. But 4. However, this consent is countermandable by the husband, and the wife may lose the benefit of this presumption by her own defalt; and such as hold the contrary must maintain the inherent original intrinsick power in her, independent on the husband, whereby she may charge him without his assent: but I conceive that she hath no such power (though during cohabitation); because by the laws of God, nature, nations of England, and of reason, her will is subject to her husband: and to give her an incontroulable power, is to invert this order, Mich. 37 Ed. 3, Rot. 34 in the Kings Bench, Day and his wife, indicted as accessary by receit to felony, she moved to quash it, because at the time of the indictment she was cooperta viro, and could not contradict him, for which reason it was quasht; and the cui in vita, sheweth this plainly: the contrary hereof were to say cui (not ipsa) but ipse in vita contradicere non potuit. 2. Here is no consent of the husband, but an express prohibition to the contrary. 3. Such as assert this power in her, against the presumption of law, must make it out: the sense of all the books, cited to that purpose, are only, that such cases are presumptions of fact, or of an implyed assent; but no giving her any original power of her self to bind him against his assent. The arguments by reasons, ab inconvenienti, do implie, that the law was where the least inconvenience was, misera servitus ubi jus est vagum, and the inconveniences of both sides are to be weighed; as on this side, what should be said necessary, would be a difficult question: and when such things shall be said necessary, as if she throw away cloaths to day, whither she shall have others to morrow, the rule of necessities is a wild one, quicquid necessitas cogit defendit; and the power, were these things certain, would be inconvenient; for by the same law **[444]** that enables her to contract, or take up necessaries, she may take up mony of usurer; if that fail, she may sell the goods of her husband; if that fail, she may take up rents; for the provision must be as large as the necessity. 2. Somewhere or other there must be a trust, and the law generally looks at the ablest; (as the son is bound

to provide for the father, but no compulsion, till 43 Eliz. 2, nor is he bound by his father's contract, nor the father by his; but yet by the law of God he was bound): and the husband is most likely to supply, having the management of all, and his person being at the stake for all; and he is bound by the most solemn contract that is in the world; and if against this presumption he will be exorbitant, the law hath provided a peculiar judicature for these exorbitances by common law; as by supplicavit in Chancery, if he provide not necessaries for his wives subsistance, Regist. 8, because he doth not bene & honeste tractare; and hereby he is obliged to a reasonable provision, or forfeits his security. 2. The bishops consistory, not induced jure divino, but is a jurisdiction by the common law for these purposes, though the cohertion by excommunication be derived from a separate ecclesiastick authority; and the rules whereby they proceed are according to the civil law: but their original power, as well as that of the admiral, is given by the common law: the consequence of this sentence, is as terrible as any in the law, as a disability to sue, and the imprisonment of his person. An infant may bind himself for conveniences, as well as necessaries for himself and family, which the law hath given him authority for to do, to bind himself, for none have any trust of his personal estate: but here she is to bind another, that hath all the property in her estate; and the coming of goods, bought by her, do only come into the husbands use, fictione juris, but not in reality nor with his consent, and therefore no trover and conversion lyeth for the same argument may be used of other conveniences, for if one deliver goods to a feme covert knowing her to be such, it doth indeed transfer the property to the husband, but its at the tradesmans peril without consent of her husband, (so to an infant knowing him to be so) 21 H. 7, 40, is not at all against this case, but for it there being no delivery, and by this reason the infant may take up any superfluities, which would be a great inconvenience, if thereby he might charge the father in trover. But 2. Admitting that there were such an intrinsick power during cohabitation, yet the finding of necessaries here is defective, it not appearing whither it be absolute or relative, **[445]** 3 Cr. 583, *Mackerell* against *Bachelor*, and *Ive* against *Chester*, 2 Cr. 560, pl. 8, which must appear certainly, the question being, whither necessary or not; because the Court is judge thereof; 13 Ass. 31, it is either of food, cloaths, medicine, or habitation, none of which are found; they have found it necessary and convenient to his degree but not to his estate, which ought to be; but he laid no stress hereon. 3. Admitting all this, yet by her departure the evidence of an obligation ceaseth, because as here found, she went away against the will of her husband, which must be presumed in malam partem; and provision, during cohabitation, may be more convenient, cheap, and advantagious; therefore to allow her to forsake her station, to set up a distinct houshould, is unreasonable. So Baily that hath absented four or five years, shall not be allowed his auncient liberty to charge his master on his sudden retorn, without new reteiner. 4. By her desire to retorn, the husband by ecclesiastick coertion is bound to receive her; and if he do not they may give alimony without separation, as *Seymors case*, Moor 874, pl. 1219, notwithstanding she depart without his assent. 5. This prohibition doth infallibly take away all presumptions of consent, so that she cannot charge him as his contract; and her inherent power cannot be so great, but he may discharge it, quoad any particular person, as 12 Ed. 4, 18, grant to 20 to be exempt from juries, is good; contrà to a whole town, and that would be naught if there be no more in that town then 20. 2 Cr. 596, *Broad* against *Jolly*. Obligation not to use trade in Dale, is good, because it abridgeth not his whole power, and he may have many reasons; as of hard usage, enmity, &c. to forbid some, this is not against our laws but ease for all tradesmen.

Bridgman Chief Justice of C. B. for the defendant, held the prohibition of the husband not material, but agreed he might prohibit this, or that man, but the authority is only presumed; but where the power is intrinsick in her, and created by law, he cannot prohibit, actus legitimi non recipiunt diem nec conditionem; for the jury have found the sale for reasonable price, but having found no contract, but evidence, this prohibition signifieth nothing. 2. Its the phrase of the law in *Forth and Hemblings case*, that she hath no will, so the cui in vita; and that she hath no power, F. N. B. 80, the supplicavit supposeth: if feme as feme of J. S. acknowledge a fine, it bars her not: all agree, that for necessaries for the family, she cannot charge

him, but only for **[446]** her self: her contract is like that of a servant, and the necessaries for her family, and her self, differ not; he is as much bound to defend her, as to preserve her, and yet if he will not bring the action, she hath no remedy for slander or beating, &c. And if the law had made this a good contract, it would as well have enabled the mercer to bring the action against them, declaring specially, without the circumstances in this case, also the same law that would have given her this power to charge him, would have enabled her to retain; and he may hinder her from taking up more clothes, when he hath taken away the former, by keeping her at home, which is no ground of supplicavit, unless he confine her to her chamber, or menace her, de vita vel membro, the inconvenience would be great, which must be provided for in Parliament, where the law is known; but where doubtful, is an evidence the law is otherways. She may as well demand alimony for all the time of her absence, as since her desire to cohabit, according to the rule, that her inherent power is such that she may charge him so, be she good wife or bad, be it her fault or his, still she shall be maintained, though she sell necessaries one day at under rates, she may the next take up more: but if she will not return with the prodigal, it is fit she eat husks with him, and not he demittere auriculas ut iniquæ mentis Ocellas. The law hath left chastity, matrimony, &c. to other laws, meerly because of its decorum. And because to make juries judges hereof, would imbitter their spirits, and they can only find the matter, without giving any correctives or medium of reconciliation, which the bishop may. 2. Here is a congruent, full, and adequate remedy provided by the ecclesiastick law, which is part of the common law, and have the proper conusance of alimony, 24 H. 8, c. 12, this being part of the contract matrimonial made in facie ecclesiæ, where he endows her of all his worldly goods, Lord Zouch and his lady, 1583, he was compelled to allow her. Artic. Cleri, and *Caudries cas.* 5 Co. 9, do but mention some, not all ecclesiastick causes. Its objected, that this is on suit propter sævitiam, where divorce is saught; but not originally, as Register 34. But this is mistaken; for the libel for want of maintenance is propter sævitiam, but the suit doth not always end in separation, although the wife desire it. Where its only privative sævitia, though where its positive it may: hence followeth the error, that one cannot sue originally for alimony, for it may be demanded as the principal suit: and 14 Ed. 4, 10, pl. 8, per Callow, may be as well intended concerning marriage, as of **[447]** it, F. N. B. 44. Prohibition 21. 28 H. 8, 13, for she may sue for her goods in specie on divorce, as well as for the value or her portion in mony. So in many other cases, as on striking clerks, not repairing churches, &c. they give expensæ litis, which is but damages on original suit. 3. The bishop hath a better way to examine these differences in his private audience, betwixt him, his chancellor and register, and endeavoureth reconciliation, and alloweth alimony, according to either of their demerits; all which circumstances are wanting at common law; and the Judge there, pendente lite, will allow her maintenance by sentence, and she may borrow of her friends till examination, which is better than of the mercer. The default of the wife doth not extinct alimony, but doth suspend it, and diminish it; they will allow her, though divorced, Stanf. 140, but it shall be only such as to person attainted in quality of a penitentiary, not according to the degree of her husband. The verdict sheweth how improper the cause is for common law, for they find no cause of departure, nor of the husbands refusal, 2 Inst. 435, *Margaret de Camos case*, placita Parliament, 231, who, without her husbands consent, departed, and married J. S. on writ of dower brought, and her purgation made before the bishop, that she did not commit adultery, yet because she departed, she was barr'd her dower, Mag. Chart. 7. The quarentine, whether allowable at any time, yet she shall not have rationabile estoverium in the mean time, if she depart and come again, Hub. 153. Dy. 76. And her desire to retorn is not sufficient, but she must make satisfaction to the Church, having committed a fault, and ought to give cautionem pignoratitiam, F. N. B. 63 H. or fide jussoria, or juratomina the last, she having none of the other, she must give by purgation; and hereby though she shall not be restored in integrum, yet she shall be restored to the condition of a penitent, and the bishop may the rather be presumed here to do right, because he doth it not in his ordinary course, but by peculiar audience: for authorities he conceived none in authentick times, 11 H. 6, 30, per Martyn, is not against this but for us; if there be any in it, it is only if a feme apprompt. i.e. borow of J. S

mony, which all agree she cannot do, however she employeth it; and though the apprompt. is not said of mony, yet it is so meant, by reason it is said he is bound to repay it, &c. and yet his opinion is good law, that she hath general authority to take up by presumption of law, 2 R. 2. Statham 65. Debt F. 2, which is seldom specially mentioned, which if she exceed, he is not chargeable. For authorities positive with me, there are many, **[448]** besides general rules of law, that she cannot bind him, F. N. B. 120. 1 Ist. 112. And the exception to this rule ought to be proved: and Dy. 234, *Points case*, taketh this pro confesso, which is stronger than an express judgment of a point before doubtful: for the doubt was, whether the payment by the husband of the taylor were not an assent to the mercer, all agreed that without assent he was not chargeable, and that the things were necessary: and this was a special verdict found in turbulent times, which (with all reverence to the persons) are not to weigh with us now, no more than their judging of legacies in action upon the case, or their burning peers on the hand, &c. These were when the Spiritual Courts were down, and when the Judges thought to make a virtue of necessity: and her buying for the family, or for her self, is a presumptive evidence of an authority in fact given by the husband, but no binding evidence; for the husband may shew that he had steward at that time that bought wares for the houshold; and this difference, Dr. & St. 138. 2 R. 2. Statham, Contract Br. 4, 39, & 21 H. 7, 4, compared, doth warrant: but the authority of a servant must be proved at least by good circumstances. The objections, 1. That the husband is bound to maintain his wife; this is not by the common law, but by a superior law of God, nations, &c. also at least not by it, as distinct from the ecclesiastick. And, 2. When the husband goeth beyond sea, and provideth not for his wife, it's a presumptive evidence that he left authority, but no full assent. 3. This necessity is not inevitable, but only suitable to the husbands degree, viz. convenient: and were it so, yet as in case of a child wounded, if servant goeth for a chirurgion, who cureth him, this binds on presumption of contract in fact: so of the wife; for had the husband been at home, and sent to another, and forbid him to have brought, he should not have been bound by the cure of him that he forbid: but yet there is more reason for fathers to provide for their children, than of husband for their wives, because these have remedy in Spiritual Court, the children none before 43 El. And the pawning of ship, Hub. 11, *Bridgmans case*, is by civil law, not by ours: Saver Defalt 37. 1 Inst. 32. An ideot may contract matrimony, but not for goods after office found. Infants are not liable for their schooling, if under age of discretion, nor if above, because put out by their parents or guardians, 1 Inst. 112. 21 Jac. 24. The defects that are alledged in process ecclesiastick have been in all causes from the beginning, and must be amended only by Parliament, 1 Inst. 133. If the defendant **[449]** will lye in prison, or go beyond sea before appearance; or if he appear, he may make away his estate before judgment, and then no remedy before 21 Jac. 24. And as it is not reasonable to presume these, so of the process in the Spiritual Court, these are postulata, which cannot be argued: it's not presumeable that H. will lye in prison, and stand separate from all comforts of life, and company of others, rather then allow his wife. And 21 Jac. 24 only provides for new execution after death of the party, but supposeth it sufficient during his life: so because many have confessed felonies, rather then pay their debts, yet it's not to be presumed all will do so. 4. No action of trover in this case will lye against the husband and wife; it was long questioned, before setled, that trover lay on baylment until Moor 841, *Isaac* against *Clerke*, not setled: and now because the circumstances of the thing delivered are altered, as when H. denyeth goods, he taketh them as his own, which the deliverer was ignorant of, and intended not; but here is no ignorance of the fact, but only of the law, which is not helpt, as cloathing an image, 34 H. 6, 11. 11 H. 4, 31, pl. 57, thinking it only for ornament, and that he should have them again: so where monks had cloathed the son of J. S. in hopes to make him a monk, on the fathers re-taking him, the property of the cloaths is in the son. But admitting trover would lye, she should hereby charge herself as well as him: also after one trover, no other will lye by the same man, but action upon the case he may have in infinitum. The Act of 13 Car. 2 doth suppose that 17 Car. 1 neither had, nor could take away the power of the Ecclesiastick Courts: and we must judge according to the law now, not as it was mis-interpreted before.

36. HALL *against* HAMMOND. *Tuesday, February* 3. Siderf. 104, pl. 12.

A replevin lyeth of the door of a house, Avowry, Fitz. 102, therefore it's not parcel of the freehold. 2 Cr. 442, pl. 16. 2 Cr. 204. 1 Rolls 84.

You stole the shutters of my window, by Jones in arrest of judgment, is not actionable, being as barrs of windows, 1 Cr. and intended as part of the freehold. Twisden would not doubt, were it Thou art a thief, and hast stoln, &c. But though it were per quod he was in danger to lose his goods; and barrs of doors may be taken down, and set up again, yet because they pass with the freehold, it is no felony to steal them: the Court, Windham absente, inclined the words not actionable. Adjornatur.

[450] 37. BRIAN *against* FITZHARRIS. *Ante.* Siderf. 105, pl. 13.

Tr. 14 Car. 2, Rot. 1353.

Error.

Wild in error assigned defect in the count, in that the delivery up of bond, which was one part of the consideration of this assumpsit, doth not appear to be made within the jurisdiction of the Inferiour Court; but this being but inducement, and the forbearance to sue any Jesuit coming from Spain the chief promise and consideration, the Court held that ill enough, but conceived the other well, because, though this promise be not to sue, &c. made within the jurisdiction, yet the breach or performance must also be proved, which cannot be here in Inferiour Court, though promise in B. R. to forbear Jesuit, be good enough. Also if one clamando debitum, not saying within the jurisdiction, bring action upon the case on assumpsit in consideration inde at D. within the jurisdiction, its ill; so in consideration quod H. sursum redderet bond made out, or lands lying out, A. promise within the jurisdiction to pay, &c. it's ill; contrà on promise sursum reddere. Adjornatur.

38. HOOPER *against* MANUCAPTORS OF GIBBON.

Bail.

H. cannot render the principal at the day of the retorn of sc. feci, per Curiam, and the bail, as taken, being named a barber chyrurgeon, he pleaded nul tiel record, and the name of bayl was H. generally in sc. fa. in trespass, it is against him, and on nul tiel record, per Curiam, it's no variance.

39.

Bail.

Nota by Jeakill Secondary, and the clerks, in debt on bond for performance of award or covenants, if mony be awarded or covenanted to be paid of value, they require special bayl; else if it be to do any act that in it self is uncertain, as to have trees, &c. only common bayl is requisite.

[451] 40. BATHURST *against* COXE. In Error, Br. 186.

Mich. 14 Car. 2, Rot. 783.

Leet. 3 Cr. 245, pl. 3.

In debt for fine assessed ad Curiam visus frank. plegii & baronis, for that the defendant put on his hat in the presence and contempt of the lord and court, and said he cared not what he could do, and hindered the business of the court, & male indecore & inciviliter se gessit; for all which one fine was assest generally. The defendant demurred specially for insufficiency of count in the words contempt and

incertainty, for which cause the fine was. But, per Curiam, it is well enough; for though none of the causes alone would be sufficient, yet all are: and to say in Court of Record, that he cared not what they could do in contempt, is finable. 2. It was assigned for cause of demurrer, that it's said such a day the lord was seised, and the defendant resident, and that infra mensem Michaelis he held a court, Kitch. 44, & quod ad tunc & ibidem, the defendant in contempt, &c. which is not sufficient. But, by Jones for the plaintiff, though the steward must enter the certain day, yet he need not plead it. But, by Twisden, they ought to plead it, for continuances cannot be ad proximam Curiam, without day certain, though the holding it within a month be sufficient to maintain custom, or 9 H. 3, 36, or 15. Adjornatur.

41. VERNON *against* ALSOP. *Ante.* Siderf. 105, pl. 14.

Obligation.

The Court held the condition repugnant and void, and the bond single. Judgment for the plaintiff, nisi.

42. ROBINS *against* HAYMAN.

Bayl.

The putting in special or common bayl is in discretion of the Court, and therefore on suggestion that the executor had wasted goods, or that he never administred, or such like, if probably the debt may become his own, the Court will force him to special bayl, by Twisden: the Court ordered reasonable bayl.

[452] 43. COPT *against* COXE AND WHITE ADMINISTRATORS OF C.

Administrators.

In an action upon the case against them, one only is taken by bill of Middlesex and Allen moved to stay pleading till the other be arrested, or come in, 9 Ed. 3, 3, being understood of such as come in by capias on original or utlary, not that appear on bill, &c.

44. HUIS *against* BINKS, ATTORNEY B. R. AND JOBSON ATTORNEY OF C. B.

Priviledge.

Priviledge was prayed by B. of B. R. for both, which is not allowable per Curiam; but they were ordered to plead in chief.

45. THE KING *against* WALLENGER. *Wednesday, Jan.* 4.

Amendment.

In an information of perjury, amendment agreed by rule of Court to be, but was entred only on the original information, not on the plea roll, or the Nisi Prius; and after verdict, per Curiam, being only found the mistake of the clerk in transcribing that record transmitted out of Chancery: Twisden absente, its well. 2. All the interrogatories are confusedly jumbled together; and it appeareth not in which of them the perjury was, and so not material to the issue, 3 Inst. 164. But by Wild for the King, on 5 Eliz. it is necessary to be pertinent to the issue. But by Windham, it need not appear so on the record, but on evidence at the tryal; and when the party is found guilty, it shall be intended pertinent. But at common law, H. may be perjured in any material circumstance, so it were in judicial proceeding, which the Court agreed, as in an affidavit of matter collateral. Adjornatur.

[453] 46. FELGATE *against* MOLE. Siderf. 107, pl. 18.

Mich. 14 Car. 2, Rot. 618.

Trespass.

After judgment against principal, and election made to take execution against the bail, he shall not, as 2 Cr. 320, *Higgins case*, retorn again in their default unto the principal: and in scire facias against principal, he pleaded in bar a fieri facias of part against the bayl. The plaintiff replies nul tiel record of judgment against the bayl. To which the defendant demurred, as being only argumentative, 1 Cr. *Kelland* against *White*, 2 Cr. *Thornie* against *Lassells*. Justification for part, not saying any thing to the rest, it's all void: also by recovery erroniously against bayl, the principal is not reversible, because not dependant on it, as 26 Ed. 3, 75. 7 H. 6, 47. 4 H. 7, 11. Cited in *Druryes case* Wild for the defendant, H. may levy part by fieri facias against bayl and part against principal, & contrà, which Windham and the clerks agreed: but after capias taken against bayl, one cannot resort unto the principal. Also the defendants plea is ill for part only, being levied, he pleaded quod executio non, &c. without speaking any thing, as to the rest not satisfied, which the Court agreed ill. Judgment for the plaintiff, nisi. Wild cyted a case, that after rule of Court to vacate judgment, trespass lyeth against H. that taketh goods in execution, *vide ante.*

47. COO *against* CARTHORN. *Ante.* In Demurrer, Br. 12.

Common. Siderf. 106, pl. 17. 8 H. 6, 7 b. pl. 16, by Martin. 3 Cr. 147, pl. 9, so said. Justification for heriot good, and traversable, 18 Ed. 3, 23, pl. 4, such sale is a good plea without colour, by Fairfax in 12 Ed. 4, 12 b. pl. 3.

In action upon the case for common, the defendant pleaded that he was owner of the soyl, and digged a pit of coals, doing as little damage as could be, and leaving sufficient common. On which the plaintiff demurred, specially as amounting only to the general issue. Jones for the defendant, Aunciently it was usual to move the Court on such matter, but since the Statute of Demurrers, if this be shewd for cause, one may demur. But this is intended of matters of fact, not where mixed with matters of law. As is escape, H. may plead not guilty, or fresh suit, which yet is sufficient to support the issue; so H. may justifie for heriot. But by Lindely for the plaintiff, Sale in market overt is matter of law, whither it alter the property, so severans of nine from the tenth part; yet on demurrer, it was held it was but general issue, 2 Cr. 165, *Jones* against *Wil-***[454]***-liams*, which Windham agreed. And in action upon the case, the plaintiff having averr'd the loss of his common, if the defendant plead any thing cross to it, he must plead not guilty, and so take advantage of it; otherways in debt; which the Court agreed. But by agreement, a full issue was offered to trye the right.

48. *Thursday, Jan.* 5. Dism. Br. 11.

Tythes.

Witherington prayed prohibition to Durham, on suggestion of payment of fish by custom and so of a toll of a mill, which the Court doubted; contrà on custom to be discharged of tythes, that because they will not allow such discharge, but the other custom they will, and so the Court only staid proceedings, till suggestion drawn. Adjornatur.

49. THE KING *against* THURSTON.

Coron.

He was indicted of murder generally of one Rowe in Suffolk; the jury fined a special verdict, that before the indictment in 1659, a writ of cap. ad sat. issued out of the Upper Bench, at the suit of Hains, on which the sheriff made a warrant to Prowd

to arrest the prisoner, who on the 30 of May, 1660, arrested him, and the prisoner going to the goal wounded Rowe, so that he dyed; and if this be murder, then pro Rege; if not, but manslaughter. Jones for the defendant, Had the Act of Judicial Proceedings never been made, this had been void, 9 Ed. 4, 1 b, pl. 2, and not like a King, de facto usurp. in which no Act of Judicial Proceedings were made, only 1 Ed. 4. But this stile and title, the Keepers of the Liberty of England, and Upper Bench, the law takes no notice of. But the greater question is, 2. Whither the Act of Oblivion by relation to the 25 April, which was the first day of the Parliament, makes this process good; and he conceived not, being different from the ordinary case of relations of Acts to the first day of the Parliament, the Parliament of 12 Car. 2 having not all the circumstances of a Parliament, and so the subsequent confirmation takes notice of: for had not the King come and assented to confirm it, it had been no Parliament, and so cannot relate further then the Kings assent, of which the Court cannot take notice. But as the Act for publick thanks expresseth that the King took not on him the publick exercise of his Government, till 30 May, and in this only as Prisot **[455]** in H. 6 time, as Judges; and being in Parliament also; this proces shall not be aided by assisting the authority of that which was no legal power; for this could be no malice against the law in the prisoner. Twisden doubted, whither process be confirmed as to collateral Acts, and also whether it extend to other then process executed, not executory. Windham conceived this process dependant; and killing was surely an offence before the Parliament; and its not like the taking away the life of an innocent man, which Foster agreed. If one were burnt in the hand in the time of usurpers, its sufficient to debar him the second time of his clergy now. Adjornatur. *Post.* 456, pl. 51.

50. THE QUEEN MOTHER *against* ———. *Ante.*

Common.

It was prayed by her counsel, that the defendants might not have time to plead on the distringas awarded for damages, as 1 Cr. 281, *Gibbons case,* which by Jones for the defendant, was the first president and much doubted how it should be proceeded on, for the first enquest is only of office without privity of the defendants; and it hath been admitted the tenants may plead, but the time hath been uncertainly ruled in 12 Jac. 2 Inst. In *Malloryes case* it was conceived in Star-Chamber, that process against the vills should be by original; also on the first enquest it doth not appear which are the next vills concerned, and 22 Car. 1, this Court was in doubt whither they ought not to award scire facias, and did award it: but by Glyn pro Rege had the distringas as scire facias in *Monsons case* conteined a scire facias in it self, they might plead; but by Windham, Either the distringas ought to contein scire facias or a scire facias ought to be awarded before the distringas; and its the default of the plaintiff it was not, which Twisden agreed, so Foster; and by Keeling as amicus Curiæ the distringas is no judgment but a summons, as distress infinite at common law; and in *Gibbons case* the parties were received to plead. Adjornatur.

[456] 51. *Ante* 454, pl. 49.

Coron.

Keeling agreed a man shall not be hanged by relation, but here is none, the process being awarded in (59) and executed 30 May 60, and made good by the Act of Judicial Process, made before the King came into London by commissioners which was a mistake and so both sides waived arguments.

52. HOOPER *against* MANUCAPTORS OF GIBBON. *Ante.*

Bayl.

Jones moved that the Court would not give judgment, because the bail had rendred the principal on the day of the second scire facias H. 4 Jac. *Pledger* or *Fletcher*

against *Muffer* Tr. 16 Car. 1, B. R. *Owen* against *Griffith* of scire feci retorned which in these cases was adjudged sufficient; so if he be entred received the same day, though at the Judges chamber after the rising of the Court, its good, because it cannot appear he was received after the Courts rising; but by Windham it cannot be on the day of retorn, though before the sheriff hath actually made his retorn; and this is the pleading of the render that such a day ante retornum, &c. and the sheriff often keepeth his retorn long after the day, which Foster agreed; also after nul tiel record the bail cannot take advantage of this render. Judgment for the plaintiff, nisi.

53. DORMER *against* AYLMER AND WRIGHT, MANUCAPTORS OF HAMOND.

Bayl.

On original recognizance by bail to maintain writ of error, which is of a certain sum, and is as recognisance in C. B. or Chancery, no capias can be taken out on it (as where the sum is, as in B. R. incertain, it may), but they ought to have an action thereon; and therefore he prayed supersedeas, this being to prosecute in the Exchequer Chamber: but by Windham, A capias lyeth on recognisance in Chancery: and by Jeakell, Secondary, Capias hath always been awarded on such recognisance to prosecute error; to which the Court inclined: but advised to search presidents. Adjornatur.

[457] 54. BUXTON *against* BATEMAN. *Ante.* In Chattels Br. 11.

Church.

It was said that after verdict, the not saying ad messuagium pertinent. is not material, being only an easement; Yelverton, *Woodlyes case*, as way, or watercourse; contra if it were an interest. 2. Without this evidence, the action would be against the plaintiff, and therefore he should make this using to repair part of his count; and there is no difference betwixt prohibition and action upon the case, both taking away the jurisdiction ecclesiastick, being only by reason of temporal loss; and this is primæ impressionis; and it may be as well hereafter demanded, whither it is necessary in evidence, or not, and so men shall not know what to advise; the constant rule of law being, that it must be shewd in the count. And Windham held this defect ill on demurrer, but not now after verdict; and the difference betwixt prohibition and action upon the case is evident, the prohibition being to take the jurisdiction ad aliud examen, out of the Ordinary, which must shew special temporal cause. 2. Twisden ad idem: For the repairs, the party hath no interest, but only as founder, of which the other is an evidence; and had it never been repaired, the party shall not thereby lose his seat. Mallet agreed, when the seat is in the isle, but otherways when its in the body of the church. Foster held the verdict hath not helpt, this being default, not of form: but all agreed it had been ill on demurrer, so the first exception: but now judgment for the plaintiff.

55. VINCENT *against* SAYWELL. *Friday, Febr.* 6.

Visne.

In indebitatus assumpsit for non-payment of mony in London, lent at Cumberland, to retorn. Allen moved to charge the venue on the common affidavit, but the Court refused it; the action being brought for non-payment, though proof of the condition on which it was delivered lay of both sides.

[458] 56. DR. WITHERINGTONS CASE. *Ante.*

Recognisance which is a judgment by consent may be tret hors des rolls.
So 50 Ed. 3, 18 b. pl. 11.

He being restored, on hearing the cause by referrees of the King, Allen moved to withdraw the record and proceedings, having been so orderd by delegates of the King, as being scandalous, which Windham agreed; contra by Twisden, It cannot be without Act of Parliament, though all parties consented; and so it is impossible any should have damage thereby, which Foster agreed: but a vacat may be entred on it, which the rest agreed.

57. TOWNSENDS CASE. Siderf. 107, pl. 20.

Apprentice.

Serjeant Holloway prayed mandamus to enfranchise an apprentice presented by his master, according to the custom, at the end of seven years at Court-day, before Mayor and Bailiffs of Oxon, they having refused to make him free, which the Court conceived without president; though hereby they might engross the freedom: as barrester, if the Bench refuse to call him, in inn of Court, hath no remedy; so there is no remedy to elect mayor, &c. contra to swear one elected Secondary to the Clerk of the Crown. Waterhouse remembred one president of mandamus to enfranchise the son of a freeman in Norwich; sed adjornatur.

58. THE KING *against* WILLIAMS.

Bastard. 2 Inst. 381. March, 11, pl. 28.

Bramston moved to quash an order made by the justices of London, for keeping of a bastard child born in Slinfold in Sussex, and there the reputed father hath given security to keep him, and by Twisden, 18 Eliz. 3, other then the two next justices cannot make any order, there being no remedy before the statute, and London may send the child into Sussex. Windham contra; that the justices of peace, in case of exigence, might provide for them, and not the Spiritual Court; and 18 Eliz. 3 was only made to order and regulate the manner, which may be extended by equity unto any justices into whatsoever place he removeth, which the Court agreed: and the party having removed into London, with the child, the order is sufficient though it were to pay 15l. Arrears of 3s. per week, orderd in Sussex, and to give security to pay for the future what the two next justices think fit; here being not only a contest betwixt the **[459]** parish and the defendant; as to bastard, but for his misdemeanor, in refusing necessary maintenance, for that cause the Court remanded him, and confirmed the order.

59. SHEPHERD *against* WAKEMAN. *Ante.*

Slander.

The communication of marriage is laid apud. E. and the writing no where, but the publication is said ad tunc & ibidem; which by Windham, is well enough: the writing by whom, or where, is not material; but the publication per quod she lost marriage, which Foster agreed. And by Twisden, In action upon the case for selling horse, 1 Jan. at A. & quod postea, he affirmed it to be his, whereas he was the horse of J. S. which after verdict, was held well enough without time or place, and shall be intended all one day. Judgment for the plaintiff.

60. WIN *against* LLOYD. *Ante.*

Error.

Finch assigned error to reverse a common recovery in the Great Sessions of Beaumorris, wherein on removing the record, cum omnibus ea tangentibus, it appears

in the quod ei deforceat, in nature of writ of entry at the common law, the commission to take warrant of attorny of vouchee is teste before any appearance of the party himself, and that the caption of warrant of attorny to take warranty of Win, is teste before the commission; Win vouched over the common vouchee, and so a writ of seisin awarded and executed were ill: 1. That this recovery against vouchee by attorny is error, and no intendment can be of any personal appearance, because the person is said to be infirm. And that this commission is void, appears in that it recites (although teste before) the summons and voucher; but he agreed that such commissions may issue before the return of the summons, *Littletons case* 5 Co. 47 b. 1 Cr. 11, *Arundels case;* as dedimus betwixt teste and return of writ of covenant; but had the teste been before the writ of covenant, it had been void; so in Dy. 225. Mich. *Bacons case.* But were the warrant good, yet, 2. The caption of it is ill, being dated before the commission it self; nor can this be ayded by intendment, however great favour be to be had of common recovery, yet magis amica veritas. 1. Because the writ of error commands to send up the record, cum omnibus ea tangentibus, which are returned as all. 2. It appears by the record, that the **[460]** plea was betwixt the same parties to the writ, the same attornies, &c. and therefore were there any other, the party should have alledged diminution, 1 Cr. 327, *Johnson* against *Davies.* After verdict in ejectment, variance betwixt count and writ was supplyed, as if no original had been: but this the Court might safely intend, that the writ was lost, but not so in our case; for if there be a better warrant, its against the record it self, Mich. 14 Car. B. R. *Harbert* against *Binion,* depend from 14 Jac. 2 Cr. 392. Error to reverse a fine levied in Montgomery, the ded. potestat. was dated 2 Jac. and the writ of covenant was 7 Jac. which was agreed error, unless the Court would intend another concord (as one taken at the Bar) which was held by Berkly and another well enough; but contrà by Jones and Bramston, Dy. 330, not entring warrant of attorny on the rolls of attornies is error; and the Court must as well intend this, as that there was another concord, 5 Co. 54 b. *Gages case* is false reported. And in *Sir Nich. Chamberlans case* it was held, that the fine was not amendable, but reversed. Williams for the defendant, H. Win brother and heir of Robert, vouchee in the recovery, and not only the proceeding in order to the recovery, but the recovery it self is certified, wherein Robert is said to appear, and make attorny, as the usual form generally, and the warrant entred on the roll, after the recovery. As to the error, its as the rest, only assigned in the proceedings in order to the recovery, and contrary to the body of the record of the recovery it self, and therefore such averment of date, before the summons, is not to be received, no more then to say there were no such Judges as those before whom the recovery was suffered 3 Cr. 531, *Huberts case,* Yelverton 33, *Arundels case.* It could not be intended that dedimus was taken before R. Knight, and caption before R. gent. But if this averment be admitted, yet all the parts of the recovery necessary are substantially good, and the misproceeding or misentry thereof will not vitiate that the dedimus is teste before the summons, is not sufficient to reverse the recovery, being no part of it, or not so substantial as that disorder in it should reverse the judgment, but is jeofail within 27 Eliz. 5, and this is the common practice in all Courts at common law; no fine or recovery was by dedimus, but by 15 Ed. 2, p. 81. Stat. Carlile, 2 Inst. 512, introduced, which statute was made in favor of the parties that levied fines, and they might trust any other persons, as well as abbot or knight, &c. and the Court may refuse the caption by vertue hereof, at discretion, and this **[461]** is only an accident, 5 Co. *Teyes case,* and *Dormers case* not there recited: on recapitulation of all the parts of fine; and the Chief Justice of C. B. 2 Inst. 512. 1 H. 7. 9 Dy. 224, may out of term, without it, take a fine; and its but only ad informand. conscientiam judicis; and on general commission to take fines, the Judge may take any fine, without particular commission; and these objections had been most proper below, when the recovery on such averments might have been said, but shall not now be reverst for it. 2. Though it were an essential part, yet this misentry is amendable by 27 Eliz. c. 9, which helps all misentries of warrant of attorny, like jeoffail, Venire Facias 1 Cr. 38. Teste before the return of the original, and more usual to amend it, then teste of original, which is frequent, as *Gages case* cited 3 Cr. Also the constant practice is to enter recoveries thus, and greater mistakes then these have passed without any scruple, as 5 Co. 40, Dormers 4 Ed. 3, 62, as an advowson

demanded by real writ, held well enough'; so common recovery against infant by attorny, 22 H. 6, 31. Dy. 363. 1 Cr. 307, its well enough; yet the infant cannot neither make, nor be an attorny: so 3 Cr. *Holland* against *Jackson*, and 2 Cr. 77, *The Earl of Bedfords case*, the Court would not hear variance betwixt caption, and body of a fine; so 3 Cr. 255, *Argentons case*. The same exception to a fine; as here to a recovery, and overruled: and the course of proceeding and entries is at Grand Sessions in N. Wales, as here, that Judges may take fines in their chambers without any dedimus: but though the dedimus and warrant taken by virtue of it, be void yet the general warrant of attorny entred in the end of the roll of the recovery, is sufficient: for the party notwithstanding dedimus taken out, may waive it, and appear in person; and so it may reasonably be intended here, the rather if the warrant on the dedimus be void or inconsistent: so is *Arundels case*, Yelverton 33 expresly: the Court to support recoveries, 3 Cr. 389, *Martin* against *Leaver*, will intend sometimes against grammatical construction of the fine 2 Cr. *Champernoons case:* the caption is no part of the recovery, but penally required by statute. Twisden agreed, the dedimus is no part of the fine, but the warrant of attorny is part of the recovery: but the date of it, by Windham, is not material. Adjornatur.

[462] 61. GOODIER *against* CLERK. *Ante. Saturday, Febr.* 2. Siderf. 102, pl. 8.

Leases.

Windham for the plaintiff, according to the latter judgment (against the former, and contrà to which he had argued before) that the lease for 100 years habendum from the death of William without issue male living, the words may serve to either sense; and that which guids, is the intent of the parties on the settlement, which is the rule in all doubtful constructions: and here it was to provide for issue female, on failer of issue male, as is usual in London. And this way hath been found out, because on limitation to the 1, 2, 3 and 4 son, remainder in trustees for 100 years, the son tenant in tayl may defeat all; therefore is it usual to begin with such a lease, which by a subsequent conveyance, cannot be altered by any issue: and if no intent appears, it shall be intended strongest against grantor, and so shall rather begin late, then never. Lease to begin on death of J. S. without issue, that must begin on the death: but here the habendum being from the death of baron & feme, without issue of their bodies, it may begin when issue fail; the rather, because collateral line is to take, and the benefit of the assurance, which was to William, and the party to it, and so the trust goeth along with the remainder, as was held in equity, after portions paid, in the case of *Bret* against *Bridman*. The plaintiff, as executor, sued in Chancery for breach of covenant made to Knightly to repay money by an agreement for marriage portion, on death of the wife, within two years, without issue of her body: she dyed, having issue, which dyed within the time without issue, adjudged the father should have nothing back again by four Judges, and this cause was carried on the same point, but on different intent. So the case in 1 Leond. 285, pl. 387, if H. dyed, having no issue, then, &c. he had issue, which after dyed without issue, and adjudged the lease should then begin.

2. Twisden ad idem, Its as good as gift in tayl, remainder for years: but such lease, *Darrants case*, cannot be made after the gift in tayl, nor can this lease be dockt by recovery against tenant in tayl, being precedent interest, as *Coupledicks case:* but this future interest by 21 H. 8, c. 15, cannot falsify such recovery, being neither termor, fermor, or lessee; nor did the statute intend such interests **[463]** by reason of the proviso that tyes it to particular interests; but if he could generally, yet when he cometh to falsifie, if it be aver'd this interest was intended to defeat recovery by tenant in tail, he shall not be admitted to falsifie. 2. The words habendum after the death of William and Margaret without issue male of their bodies, meant issue in legal sense, and the best construction shall be for the lessee, in doubtful cases, as in the case of Dy. 261, for every word must have some sense, and the trust is limited to the heirs of William, L. Co. 113, *case*, which must be such heirs to which the gift was made. He relyed on Leonard, which he much commended, and he that hath such lease on death of A. who hath no issue at the time, is no forrein possibility; and

the case of *Bret and Bridman* was a plain bargain on marriage portion, and not like this case. Mallet for the defendant, Foster for the plaintiff, the lease is not precedent to the assurance by fine, but indorsed on it, and so on the first covenant to levy it, and so the intent appears to be, that it should begin only on failure of issue, the most advantagious for the lessee being to be presumed, where the intent is not contrà to law, and especially here, the provision being of the wives lands, and so concluded the lease good, and a reasonable intendment in beginning. Judgment for the plaintiff, nisi.

61. NEVE *against* MANUCAPTORS OF BRION.

Bayl.

In scire facias after imparlance, one pleaded that there was another not named, which per Curiam is ill after imparlance; respond. ouster awarded.

62. GAVELL *against* TASKER.

Trades.

In trespass for taking four carts; the defendant justifies by a by-law of the city, that what cart soever should be found working contra to the order of common council (that they should not work without licence from the Company of Woodmongers) that then they may take and detein them, untill they shall conform to the government of woodmongers. On which the plaintiff demurred as unreasonable, in the restraint of any to let out their carts, or use them for their own private goods. Also 2. This is till he conform to the order, not till he be delivered by course of law. 3. This by-law is the worse, because made by common council on behalf of woodmongers. 4. This by-law is to take and seise such as they find working; and here the seisure is laid after the day of working. The Court conceived **[464]** the common council may depute woodmongers to make such by-law for the good of the city. Adjornatur.

63. KING *against* TAYLOR. *Ante.*

Slander.

By Windham, If H. writes a letter to thieves, whereby I am civilly used, an action upon the case lieth, which Twisden agreed, a fortiori, here being a counterfeiting of the plaintiffs name, and special damages laid. Judgment for the plaintiff. Nisi.

64. GIBS *against* TAYLOR.

Legacy.

In debt on bond, condition to save harmless from all damage that may hap to the plaintiff by non-payment of legacies, being executors of J. S. The plaintiff alledged damage in suit by legatee in Chancery; to which the defendant demurred. Judgment for the plaintiff, nisi.

65. CHORLS *against* CALVERT. *Ante.*

Trespass.

In action of assault, battery, and wounding against 10, who justifie, and issue on replication de injuria sua propria, the jury may find 2, 3, 5, or more, or fewer of them, guilty, well enough: also the defendant shall not take advantage of his defective bar, were it so, the whole being put in issue by the replication, but by Windham, the quoad residuum transgr. & insult. Not guilty, goeth to the whole, as well the wounding, as the rest, to which he pleaded quod molliter manus imposuit, especially the replication putting all in issue; which the jury find quoad some, that

it was for cause, and that the rest did it not for cause; which is well. Twisden ad idem, The quæ est eadem transgressio doth not help the defect in not answering the wounding; for the Court seeth its not the same: but by the replication the cause was only in question, which they plead for their molliter manus imposuit. Foster ad idem, The verdict finding only, as *Frestons case*, Hub. the substance of the declaration, the defendant for his ill plea shall not have benefit of it. Judgment for the plaintiff affirmed.

[465] 67. BATHIRST *against* COXE. *Ante.* In Error Br. 186.

Leet.

In debt for fine in court leet, for contempt, in putting on his hat, and saying, he cared not what the court could do, and that he was thereby hinderd in his proceedings, which the Court ruled good cause of action. 2. The Court said not in what capacity the defendant was fined, the court being leet, and court baron: but per Curiam, this shall be intended in that capacity which is able to do it. 3. There is no day of the holding of the court, but only infra mensem Paschæ generally, but it being that 8 die Oct. the lord was seised, and the defendant a resiant, quod ad istum eund. diem, scil. 8 die Oct. ad Curiam visus fr. plegij tent. infra mensem Michaelis, &c. The defendant comperuit, & quod isto eodem die, he committed the contempt, this, per Curiam, is well enough, præter Twisden: but all agreed, that day is necessary; tournum de hoc is the name of the court of frank pledge held infra mensem Paschæ, as St. Michaelis Court is of that after Michaelmas. Judgment for the plaintiff.

68. GLASCOCK *against* MORGAN. *Ante.*

Mich. 14 Car. 2, Dett. Br. 49, Rot. 518.

Execution.

In debt on a judgment, the defendant pleaded an elegit of part entred on the roll, and no lands are found, but the jury find goods, which are thereon delivered, which is pleaded in bar to the whole judgment. To which the plaintiff demurred, as insufficient, though he suppose no other execution could have been, yet the party may have a new original action on the judgment. Jones for the defendant, 15 H. 7, 15, an elegit entred on record, makes the party remedyless, 19 H. 6, 4, by Newton, though nothing be found on it, and the election is not as to what shall be the event, as Hub. 2, 57, but of the manner of proceeding, not of the land, L. 5 Ed. 4, 41, pl. 3. 36 Ed. 3, 24, pl. 48, adjudged the same, and that one cannot have debt, Dy. 299, pl. it is in the point, that he shall have no other remedy, whatever 2 Cr. 338 is; the like opinion of Coke, though the fruit of elegit be not had: therefore the safest way was not to enter the prayer of the party on record, till it be seen what may be had. Allen for the plaintiff, The consequence hereof would be to leave the heir or executor of him that recovers, without **[466]** remedy, if the elegit be discontinued; and here the execution is not executory, but executed, and hath but the effect of a fieri facias and none of the cases like this. And the Court concluded that this is no election being of nothing.

69. OATS *against* THORNILL.

Obligation.

Debt on bond, condition to make all such linnen as the defendant should want during his living single 11 H. 4, 25. 16 H. 7, 9, whereby, by Jones for the defendant, she, the plaintiff, is bound to find the linnen. And the defendant pleaded, that she being required, did not make such a suit of linnen: to which the plaintiff demurred. Windham conceived, the intent must guid contracts, and here it appears the plaintiff is sempster, and its her proper trade to make linnen, and therefore, as

tayler, she is not bound to find the linnen, which Twisden agreed; but in action against shoomaker for not making shoos, or goldsmith, for making bason, they must find the materials, contrà of taylor, &c. for such person cannot give in evidence in action upon the case, for not paying him for making his suit, that he found the cloaths and materials. Judgment for the plaintiff.

70. MILLS *against* CARPENTER. *Monday, Febr.* 9.

Error.

Error of a judgment, the plaintiff assigned varians to reverse the judgment for his own expedition, the writ of certiorari being betwixt *Carpenter* against *Mills* chandler, and the record is Mills inholder, which being a trespass, is material per Curiam, and not like the scire facias against bail, by name of H. chandler, &c. and the conusans was H. generally, judgment reversed: but per Curiam, no record is hereby removed.

[467] 71. BURREL *against* PEACOCK.

Jurisdiction.

In an action upon the case upon indebitatus within Inferior Court, on sale of wares (out of Inferior Court;) after verdict Windham held it well enough; sed Curia contrà, unless the promise had been actually within inferior jurisdiction, but general indebitatus there is a promise only in law, and not supported by verdict, as the other is. Adjornatur.

72. FRENCH *against* PIERCE.

Apprentice.

In debt on bond on oyer demanded, the condition was, that if an apprentice turned over, should wast the goods of his master, the defendant would pay what the master was damnified, and pleaded nul dammage. The plaintiff sets forth breach in wasting goods, but sets forth no notice given to the defendant; wherefore the defendant demurred, because this is obligation of A. for a third person, and it cannot be presumed the apprentice will give notice of his own wasting, which is to accuse himself. Allen for the plaintiff, None is necessary, because both parties are in equal capacity to take notice: also when any person doth undertake for a third person, he must answer for him at his peril, which the Court agreed, because the imbezilment is not in the conusance of the plaintiff: but by Twisden, the particular of the goods wasted ought to be set forth, and not to say to such a value, or at least the kind, with one of a sort, with, &c. Sed Curia contrà. Adjornatur. 471, pl. 84.

73. CORPORATION OF SOUTHAMPTON *against* RICHARDS. *Ante.*

Obligation.

Allen for the plaintiff, that goods and obligation of felo de se pass by grant of omnia bona felonum; but by particular persons grant of bona & chatalla obligations do not pass; but contrà by the Kings grant, this passeth an inheritance out of the King, which was in him by his prerogative, there being no other description of such grant, credita being a word not heard of in such grants: but the Court doubted it, and adjornatur.

[468] 74. BOWLER *against* MARSHALL.

Jurisdiction.

Action upon the case quod cum indebitatus fuit in 40l. infrà jurisd. of the Marshalsea, for meat, drink and lodging, &c. not shewing where, promisit infrà jurisd. solvere, &c. After verdict for the plaintiff, and judgment, the general error

was assigned: and per Curiam, had the esculenta, &c. been laid expresly at York, the action would not have laid, nor shall it now be presumed, by reason of general indebitatus to be within the jurisdiction: but by Windham, if it be not pleaded after verdict, the Court may presume it; but per Curiam, this hath been introduced there only since the new patent, 6 Car. 1, thereof made. Adjornatur.

75. FITZ-HARRIS *against* BRIAN. *Ante.*

Assumpsit.

The consideration being mutual promises said to be made within the jurisdiction, so the performance of either is not material, by Windham and Curiam; but if any be broken, a new action must be brought on the breach, and its not inquirable in the Inferior Court in action upon the case for non-payment, according to the promise made to the plaintiff in consideration of another made by him, not to sue any of the Colledge of Jesuits, and that he would surrender up bond made to him by them, which Foster and Twisden conceived no distinct thing, and but all one promise of actual delivery, not as quod non molestaret & quod sursum redderet, &c. only promissory. Adjornatur.

76. SMITH *against* CONYERS. *Ante.*

Rent.

In action of covenant on articles of agreement to pay annual rent ad separales festos, during continuance of residue of lease made by J. S. to the defendant and plaintiff joyntly, not shewing what certainty that the term conteined, nor how many days were arrear, but only assigned breach for non-payment of 20l. annually ad separales festos. On judgment upon nihil dicit this incertainty was assigned by Allen for the defendant for error, but by Turner for the plaintiff, it appears the plaintiff and defendant had a joynt lease which is certain enough, the lease being in the defendants custody; nor by Windham is the term material, be it for life or years: nor what days were arrear, for it shall be intended every day during the residue of the term were arrear **[469]** to the quitting of the plaintiffs interest, and recovery here may be pleaded in bar of any action brought for arrears during the term, and its as well as if breach had been quod non solvit ad aliqem inde diem, which the rest agreed. Sed adjornatur.

77. BOOTH *against* LEACH. *Ante.*

1 Roll. 43.

Thou art a trayterly rogue, implyeth no act, and so not actionable, by Allen, no more then to say You are inclined to be a traytor, in error of judgment in C. B. Curia contra, that it implieth an act, and is all one with trayterous rogue, which is adjudged actionable. 3 Cr. 171, *Ward* against *Thorn.* Judgment for the plaintiff. Nisi.

78. MOULD *against* WALLIS. *Ante.* In departure Br. 10.

Infant.

In action of covenant of apprentiship, the defendant pleaded infancy: the plaintiff replies by custom of London; to which the defendant demurred. Windham conceived it no departure, being no new matter varying from the count, but that being supposal, and always general, this special matter is a good support; and it would be too prolix for to set forth the particular custom; as if alien plead as to action, I may shew that he is made denizen; and Godbolt 122, pl. 143, & 18 R. 2, are express in the point. Twisden contra, that it is a departure, as wheresoever the count is general, it cannot be made good by any particular manner, as count on statute that giveth a penalty, the defendant pleaded it is repealed; the plaintiff sets forth, confirmed by another Act, its good; contra if I count on temporary statute, and the defendant shew

it expired, the plaintiff shew it confirm'd by the new statute, its a departure; so 6 Car. *Butler* against *College of Physitians*, by all the justices; so feoffment generally pleaded may be made good by lease and release: but in trespass, if H. justifie by lease of abbe for 60 years, he cannot rejoyn that its good for 20, Pl. Com. 105, by the Act of Dissolution 31 H. 8. So Hut. 63, in action on 5 Eliz., the defendant pleaded the proviso is that none that hath 20l. per annum, can be bound in corporation. The plaintiff shews he had not 20l. which per Curiam, is a departure. So in trespass, H. justifies by custom to devise, the plaintiff shews he was an infant, it cannot be made good by new custom. Foster held its no departure, the gift of the action being laid in London, the title is the same still, only the person ena-**[470]**-bled, 3 Cr. 653, pl. 12, *Walker* against *Nicholson*, Winch. 63. But by Allen for the defendant, *The Abbot of Buckfaces case* is express, that it is a departure, it being in an action against H. as baily generally; the defendant pleads he was receivor; the plaintiff replies, that the tenants of the mannor have used to elect tenant, which shall be baily to collect the lords rents, and adjudged a departure. Adjornatur.

79. TOUNSENDS CASE. *Tuesday, Febr.* 10.

Apprentice.

The Court conceived that a mandamus ought to issue to swear him according to a president, 13 Car. 1, in Norwich, where every one by custom is a lawful freeman, that hath served seven years; and notwithstanding they refused to swear him, for which cause a mandamus was granted.

80. THE KING AND JUSTICES OF SOMERSETSHIRE *against* UPHAM.

Peace.

The Court award procedendo on indictment of barretry, though filed, having been filed the same day that the certiorari was retorned; which the Court conceived an irregular surprise, notwithstanding the bar; and the clerks affirm, that after filing none could issue.

81. BAKER *against* WESTCROFT. *Ante.*

Maintenance. Costs Br. 23.

In action on the Statute of Maintenance Stroud, on 8 Eliz. 2, prayed costs, which by 18 Eliz. 5 is not taken away on nonsuit of the plaintiff, as to the party grieved. Jones for the plaintiff, The action is tam quam, and not special action upon the case on statute by party grieved alone. Windham conceived in this action costs are to be allowed; contra in information. Adjornatur.

82. SIR JOHN CUTLER *against* STAMP.

Bail.

In action of covenant damages assigned to 30,000l. only for vexation that the party should not be baild, the defendant therefore prayed that the plaintiff should file his bill before bail be put in, that so he might pay the Kings fine of damage clere, viz. 12d. in the pound to the prothonotary accordingly; but by Jeakell, on filing of the bill, such bail as is in before is accepted, be it common or other, **[471]** and by Allen for the plaintiff, its against the rule of the Court to file a bill before bail put in: but per Curiam, this is a great abuse to put such a great sum into the writ, though being in covenant no fine is due, nor in debt, if the party be committed, and we will force the plaintiff to take reasonable bail, according to discretion: and if the plaintiff after declare on a less sum they will lay him by the heels: and the plaintiff ought to swear the probable cause of action to be of such value.

83. EDEN *against* SPILLER AND COLE.

Rent.

In scire facias on reconusance in Chancery to keep covenants specified in certain indentures set forth, which was a devise by S. to E. and redemised by E. to S. rendring rent at Lincolns Inn. The defendant pleaded performance. The plaintiff sheweth, that rent due at Mich. last is arrear, and so breach; which by Baldwin, in arrest of judgment, is not sufficient; the condition being to perform payments in both indentures, and breach is assigned only in ultima mentionat', and either in severalty shall not be intended condition; sed Curia contra; either of them being supplied by the nature of the covenants. 3. The issue in Chancery was on non-payment at Lincolns-Inn Hall generally, and plaintiff suggesting that Lincolns-Inn was in the parish of St. Andrews Holborn, prayed venire facias of the parish, which is awarded quod venire facias duodecim generally, without any place, which is ill, as Rast. Entr. 267, Co. Entries 60. Sed Curia contra: in Inferior Courts it must appear to be awarded within Inferior Courts, but not so in superiors: but the entry may be particular, or generally, ideo venit inde jurata, &c. and the venue cannot be of the Inns of Court, but if any where it should be of Holborn, and shall be so intended, the action being laid in Middlesex. Judgment for the plaintiff.

84. FRENCH AND PIERCE. *Ante*, 467, pl. 72.

Apprentice.

Twisden agreed with the other Judges, that no particulars need be shewed, as in debt against executors, they plead fully administred. The plaintiff may suggest that he hath wasted diversa bona, without shewing what. Judgment for the plaintiff.

[472] 85. ANGEL *against* SHAPERTON. Abridgment Br. 25.

Damages. Siderf. 108, pl. 22.

Windham conceived the Court may increase damage, *Davies* against *Folial*, without any mention of maihm, within the count especially: but by Twisden, this is intended on trial at Barr, or when certified by the Judge of Nisi Prius before whom it is tryed, not else. But Latch. 223, *Hooper* against *Pope*, is without special declaration. But Foster, before whom the cause was tryed, conceived the damages given 10l. against a boatswain for shooting off a canon without order to be enough, therefore the Court would not increase them, there being no malice or wilful negligence proved.

86. BEAD AND THE KING *against* HEAL AND MICHEL. *Ante*.

Force.

Winnington moved to quash an indictment of forcible entry, being quod disseisivit lessee for years, which per Curiam is void. Quasht.

87. GIBBON *against* SHEPHERD.

Bail.

Allen prayed the plaintiff may file his declaration, as of this, which was filed as of Michaelmas term, when bayl was put in, the cause of action declared on, being after the arrest, and tender of amends was after Michaelmas, and before Hillary term, before receit of declaration; but being, as this case is, after the declaration, is ill, being not according to the statute 21 Jac. 16, Trespass, §. The arrest was in August, teste the last day of former term; the declaration is of involuntary trespass done in September, which the defendant could not know till the declaration came in, which was not till

Hillary term, but relates to Michaelmas. He agreed, had there been any precedent cause, the subsequent may be by the bayl used for aggravation; but no advantage shall thereby be for original matter subsequent, when none is precedent. But by Windham, though this be an abuse of the attorney in suing out the latitat, yet the Court will not file the declaration of Hillary term, because the defendant had neglected to tender amends sooner, which the Court agreed; but ordered the attorney to attend to clear the abuse. Allen affirmed he had been counsel in a cause wherein bayl **[473]** were discharged, because no cause of action appeared, but only subsequent to the arrest against his client.

88. THE KING *against* HUBBARD.

Trades.

Indictment on 5 Eliz. 4, for using the trade of a currier, not saying it was a trade at the time of the statute, nor that he had not served in any art, mystery, or manual occupation, but only that he had not served as a currier, for seven years; both which the Court conceived ill, and quasht.

89. NEAL *against* DENNIS. *Ante.* In Conusance, Br. 7.

When cause of action appears on the declaration, 6 H. 7, 9, conusance is not demandable after imparlance from one day to another, though in the same term, by Windham. Also the prescription alledged tenere placita is not sufficient to demand conusance from other Courts, but the bishop ought to make title for cognitionem placitorum by special patent. Twisd. ad idem, and cited cases, 4 Car. 1, where Brampston, demanded for the town of Colchester, and denied, because the warrant was left at the attorneys chamber. Hitcham was denied conusance, because his warrant was in English, as here it was: but were the form good, yet the matter is ill; for as *Done* against *Rogers* in trover for oats, the defendant pleaded conversion was at Chester, yet could not have conusance, nor can it be demanded in any transitory action: and 9 Co. Abbott of Strata Marcella, if the conusance be claimed by prescription, allowance must be shewed in eyre, or here in B. R. vouching the roll and allowance in C. B. is no allowance here. Also habere cognitionem is not sufficient, without it be coram quibuscunque justitiariis, 8 H. 6, 21. 9 H. 6, 35, in which case its good only as to C. B. but if in quibuscunque curiis, or coram nobis, it reacheth to B. R. Also after continuance by the Court, conusance may be demanded, but never after continuance by prayer of the party, 25 H. 6, 54, any may prescribe tenere placita, as many Inferior Courts in debt or detinue, 9 H. 7, 11. 15 H. 7, 16. 16 H. 7, 16. Conusance is demandable after the first day, because no certain day is in the writ, not because they are transitory; respond' ouster awarded, Foster absente.

[474] 90. THE KING *against* SPEARING. *Wednesday, Febr.* 11.

Poor.

Ayres moved for another certiorari to remove an order of justices and overseers on 43 El. 2, for placing an apprentice with a draper in another corporation, which the Court doubted they could not, but granted another certiorari to try it.

91.

Poor.

An indictment for erecting a cottage contra formam statuti, not saying contra pacem, was quasht per Curiam ex motione Rich. but it needed not be said ad sess. pacis domini Regis, but only ad general. sess. pro comitat. tent. &c.

92. BARRINGTON *against* VENABLES.

Bail.

Pococke, bayl for the defendant, prayed to be discharged on a letter of the plaintiff to the defendant, that he should mannage his business with his best advantage with his bayl, who resolved to take him; which the Court conceived a knavish practice to take the bayl without the principal, yet would not discharge the bayl: but the Court allowed him to plead to a scire facias, and to remove the record after nul tiel record pleaded, and left him to bring his action for the fraudulent writing the letter.

93. BAKER *against* WESTCOMB. *Ante.*

Costs.

The Court conceived costs ought to be paid in action tam quam on the Statute of Maintenance, as the Secondary had informed the course of C. B. was.

[475] 94. GLASBROOKE *against* GIBS.

Condition.

The defendant joynt merchant entred judgment to the plaintiff, defeasanced to save harmless from all damage of goods in schedule annexed, which were parcel of the brewhouse and joynt stock, and after acknowledgeth several judgments to several persons: this, per Curiam, is no damage to the plaintiff his companion, till execution sued out against the stock.

95.

Enquest.

Nota pro regula per touts les clerks & le Court, that if the sheriff return but 40s. which is the usual issues on distringas juratores, the Court on prayer of the party, cannot cause him to return greater, though jurors be in a far country, and will not appear thereon, but can only make rule, that good issues be returned. But by Twisden, the plaintiff ought to bring a writ against the sheriff, on averment, that he might have levied greater issues, and thereon the Court may increase them.

[477] DE TERMINO PASCHÆ, 15 CAR. II. B. R. DIE SATURNIJ, MAIJ 6, ANNO 1663.

Foster Chief Justice; Mallet, Twisden, Windham.

1.

Bail.

The Court refused to file proceedings against bayl on motion of Mr. Needham an attorney, four terms after scire facias brought against him on judgment removed into the Exchequer for error, because notwithstanding the transmission, the attorney might have filed the scire facias, whereupon the Court ordered a new scire facias, the course having been both ways at the discretion of the Court.

2. PIERSALL *against* SMYTH. In Error, Br. 117.

Abatement. Siderf. 131, pl. 2.

On affidavit, affirming the defendant dead after trial, and before day in Bank. Bertue moved to stay judgment, which the Court did, till further motion by the

plaintiff. But by Windham, the plaintiff may enter it at his peril: Foster contra. Twisden held it in discretion of the Court, according to the manner of the suggestion, whether as ami-[478]-cus Curiæ, or by bare affirmation of the attorney, or as here. Adjornatur.

3. SLYDER *against* EDWARDS.

Trover.

Trover pro uno pullo, which, by Williams, in arrest of judgment is incertain, as *Ellis* against *Yarwood*. And though it were farther said coloris baij (intending a colt) yet per Curiam, that signifieth nothing; yet Windham doubted; staid quousque.

4. TURNER *against* FELGATE. *Ante.*

Trespass.

Judgment had in scire facias, and execution, and the money levied, but after it was by the Secondary reported unduly obtained, there being no capias against the principal filed, whereon the judgment being vacat by rule of Court, Trin. 1656, Rot. 130, or 138, the defendant brought trespass, q. vi & armis against the plaintiff, as assistant of the sheriff, in shewing him the goods, and recovered Hill. 1658, (which, by Twisden and Windham was a hard judgment, and contra to his) and was satisfied; and notwithstanding that, causeth an entry on the roll that he should have restitution on the judgment vacat; and he now prayeth to be restored to the same mony, which the plaintiff by a due scire facias after recovered again, which the Court conceived a practice. Adjornatur.

5.

Bail.

Nota per Curiam, when bayl is put in de bene esse (as bayl taken in a Judges chamber is) the plaintiff cannot sue the sheriffs bond till it be refused or set aside, but he ought to except against it in the Judges chamber.

6. LADY HOWEL ALIAS SMYTH *against* SMYTH.

Process.

Although the Court will give no relief on an order made at the Assizes, unless made an order of this Court, yet if it be grounded on agreement, and verdict had there in pursuance, they will grant a new trial if the plaintiff refuse to stand to it, or else (as here) will stay the judgment till performance.

[479] 7. THE KING *against* THE INHABITANTS OF THE FOREST OF DEAN.

Common.

After mony levied by distringas containing fieri facias grounded on W. 2, cap. 46, for throwing down inclosures, and inquisition taken by the sheriff, Jones prayed that the mony might be brought into Court, and remain; and that he might have time to plead, which the Court granted.

8. COLE *against* BESTON. In Error, Br. 117.

Abatement.

In scire facias against executors, q. executionem non; they alledged the defendant in the first action died before the day of the judgment, and that there was a writ of error pendant, and that assigned for error; and the plaintiff would not proceed by

scire facias ad audiend. Errores after the assignment, therefore Stroud sen. moved to stay proceedings in the scire facias quare executionem non, which the Court granted, notwithstanding Jones for the plaintiff alledged that the defendant dyed after the judgment, and so the writ of error was abated. But per Curiam, they will not try such assignment of error in fact by affidavit, and so the writ of error being supersedeas to sue any scire facias quare executionem non: the Court stayed it till the trial of the error.

9. FANE *against* PENNOIR & ALIOS. *Thursday, May* 7.

Admiral.

Powis prayed prohibition to the Admiralty, the libel appearing to be of contract super altum mare vel saltem in partibus transmarinis infra jurisdict. Curiæ. 2. The contract is by Fane for himself only, and after his death the plaintiff continued the suit against the administrators of the defendant, which is not warranted unless the administrators were bound: but per Curiam, this is the only cause of appeal; but for the other cause awarded prohibition, nisi.

[480] 10. BAKER *against* BERISFORD. *Ante.*

Leases.

Issue being on the value paid by the administrators that it was less than the lease was worth which he had made, being supported by evidence that twenty acres of meadow, contained in the lease, was worth 40s. whereas those twenty acres were not contained in the lease. Allen for the plaintiff, after verdict for the defendant prayed new trial on affidavit they were not comprised, and that counsel was surprised; which the Court refused; but staid entry of judgment till another cause the plaintiff had against the same defendant were tryed.

11. BURGESS ADMINISTRATOR (DE BONIS NON OF GAYSELL DEAD INTESTATE) *against* CLAYTON.

Executors.

In debt on bond, the plaintiff saith that the executors (naming them) of G. were dead, (not saying intestate) for which cause Baldwin moved in arrest of judgment; because if any executor made his executor, the plaintiff is not sufficiently entitled. Sed non allocatur. But per Curiam, the defendant ought to shew there were executors. Judgment for the plaintiff.

12. THE KING *against* SMEETHWICKE.

Poor.

Jones moved for alias certiorari (after procedendo awarded before) to remove indictment at common law in London for taking an inmate, which was framed because London is not within the statute: and by Windham, in this place the inmate may be a common nusance. Mr. Recorder opposed it, alledging the inmate to be a woman of ill fame, and much clamor'd on; and the Old Baily had adjorn'd this matter to a private sessions in the Guildhall, as is usual, when the business is much of felons, whom they try first, and there they may sit in term time. Twisden agreed with Windham, that time and circumstance may make a nusance; and per Curiam, procedendo awarded, and the certiorari denied.

[481] 13. ROGERS AND ——— *against* HARDING.

Tythes.

Winnington prayed a consultation, the suggestion for the prohibition, being that the party was cited out of the county where he lived, which is not within 23 H. 8, the cause of action being local for tythes within the diocess: and 1 Cr. 97, *Smyth* against *Poyndrell*, this need not be pleaded; but the Court may award consultation on motion, which the Court agreed; and that the cause cannot come into the Arches, unless per saltum. And by Twisden, If the prohibition carry a wound in it self, the defendant may demur, and so the consultation is the judgment of the Court. Sed adjornatur.

14. PHILIPS *against* WHITEHEAD.

Lieu.

In action upon the case on quantum meruit, for nursing child, in Inferiour Court of Marshalsey: the count was that the def. was indebted infra jurisd. Curiæ pro nutriendo infantem filium prædict. def. not said where, the defendant promised infra, &c. Symson assigned this for error; and Twisden doubted on this indebitatus. Windham held it well enough, and that this sheweth that the debt ariseth within the jurisdiction, although created by law. 2. For nursing is sufficient, without shewing how or wherewith, as indebitatus pro diversis mercimoniis. Foster agreed; and that there being no other place mentioned, it cannot be intended in any other place. But by Twisden, Infra jurisdict. Curiæ will never hedge in any thing into Inferiour Court, without expressing it to be done therein; for the particular grants thereof being de causis emergentibus, i.e. actually; and in all Inferiour Courts, they must set forth their jurisdiction particularly: but per Curiam, the presidents are all contrà. Adjornatur.

15. INTER BARTLET AND DAWSON.

Mandamus.

D. being turn'd out of the Corporation of Richmondshire in Yorkshire by the commissioners, and B. placed in his room, after D. on mandamus directed to the commissioners and corporation, was restored; and now Williams prayed, as to D. a supersedeas, because the writ was executed by the corporation only, without the commissioners, but some of the commissioners joyn'd in the retorn: also **[482]** the commissioners power is determined; and so by Allen, no new mandamus can be granted to them: and if no retorn be entred, it cannot now be made by them; yet the Court granted a new mandamus to the corporation.

16. MANBY AND RICHARDSON *against* SCOT IN THE EXCHEQUER CHAMBER. *Ante. Saturday, May* 9. In Contract Br. 19.

Baron & feme. Sinderf. 109, pl. 1. Bart. Distinct. 158.

Foster Ch. J. B. R. for the defendant, that the law of reason, whereby the wife is to be provided for, is not the wit or judgment of any particular, but that act and experience which is acquired by long study, as the Lord Coke; and wives are in the same obedience to husbands, as children to parents, and for this cause were on their marriage freed from their obedience as children; they are in equal authority over the family, but betwixt them he is superior, as first made, and made for God, she made for him, and so less perfect, Numbers. She (as good authors warrant) is bound to follow her husband, although she be never so rich or honourable, and he a vagabond; and if she cannot vow to bind him, much less can she sue him: and a covenant betwixt baron & feme before marriage, that she shall not be subject to him, is void, and contrary to the law of God and nature, and publick honesty. She wants will, as infants, and ideots want judgment, which is the reason of the cui in vita: so 4 Co.

Force against *Hemling*, 5 Co. *Hemsteads case*, *Sir H. Comptons case*, Goldsb. cometh not to this, in regard his seeing her wear cloaths, bought by her, doth implye his assent. In *Sir Marmaduke Langdales case*, a prohibition was awarded to the High Commissioners, because alimony was the proper suit before the Ordinary, and marriage was her own act, as well as his; and although to assent, or not, was in her own election, yet when she doth assent to marriage, she inclusivè agrees to all the incidents thereof, also at the time of this action women were relievable other where, viz. in Chancery, 4 H. 3. 9 Sept. Rot. Clauso, shew the auncient way of suit for alimony in the Spiritual Court: as to the verdict, it was found, that 49l. for which the wares were sold, was a reasonable price, whereas the count is of things of the value of 91l. Also what the wares were in particular, is not mentioned as they are in *Sir H. Comptons case:* also its not said of what trade the plaintiff is; also necessarium est quod non potest aliter se habere, ba. elementa. And in all the cases cited some particulars are **[483]** mentioned. Also no trover will lye, here being a free delivery on a consideration against the express prohibition of the husband, and so cannot charge him. So 11 H. 4, 31, pl. 57, no remedy for the cloaths which one envesteth anothers wife, taken away from her husband withal. And nil capit per billam awarded after on motion of Baldwin in B. R.

17. BENSKIN *against* FRENCH. HILL. 14 CAR. 2. *Monday, May* 11.

Escape. Siderf. 132, pl. 2.

In action upon the case, the plaintiff counted on taking of one J. P. by A. on alias capias, Dy. 118, and having of her in the house of the defendant. The defendant in consideration A. the bailiff would permit her to remain there until the next morning, promised to deliver her again the next morning into his custody, which by Wild for the defendant, in arrest of judgment, is against law, supposing an escape to be permitted. Jones for the plaintiff, The assent of the plaintiff to this agreement doth make the promise sufficient, although it be an escape: so whither it be intended that the bailiff should keep her in custody, or let her escape, its good enough; especially by Allen, being a promise made to the bailiff on the behalf of the plaintiff; and if it had been an insufficient consideration, (which was scand at the trial) it might have amounted to non assumpsit, and therefore after verdict, this shall not be intended an escape, but that according to law, she remained in the house in custody of the bailiff. Twisden cited the case where Sir John Lenthall suffered one by assent to go out of prison, and the plaintiff brought the action, and held it would not lye; but this case may be other, no escape being here supposed: and by Windham, By law the bailiffs ought not to hurry any immediately away to the prison, and he may call any other persons in aid, and so may commit the prisoner to them: and per Curiam for ought appears, here the bailiff was present all the while and so no escape, in whose house soever the prisoner be; Hutt. And the promise to deliver her in custody, is no more then that he would see the party should not escape thence; and if she did escape, it should have been found specially. Judgment for the plaintiff. Nisi.

[484] 18. NOYS *against* DOWNING.

Perjury.

In an information of perjury, Glyn moved for to stay judgment, or have new tryal after two verdicts, on affidavit of one of the witnesses for the plaintiff, that he was tampered withal by the plaintiff, (who was convicted of felony) and profer'd the money into Court: but by Wild for the plaintiff, There is no indictment found against the plaintiff, and therefore no reason to stay; although, as *Portingtons case* on conviction of perjury, there be no remedy after execution done; nor, by Twisden, was it ever done, except in one trial betwixt *Lucas and* ——— by the procurement of Braughton, then Secondary. Judgment for the plaintiff.

19. ARCHER BAILIFF OF LANCASTER, GRILE *against* DISNY.

Execution.

The Court awarded tipstaff against him, on suggestion that execution was done on several actions split for one debt in Inferior Court after prohibition, notwithstanding each sum was for several parcels, distinctly, delivered at several times, on several contracts created by law: but, per Curiam, Had the contract been intire, as to deliver several parcels, one is delivered at one, another at another time: also an attachment in court baron is but as a capias in manus, they may be seised into the lords protection, but must be left with the party, and cannot presently be condemned as forfeited. Also where the contracts are several yet when stated by account, the whole debt is intire, as here the parties had done. Also by Windham, An attachment may be awarded the first dash, without prohibition to Inferior Court on affidavit of such splitting, where the count awarded the bailiff to custody, till security put in to answer interrogatories.

[485] 20. HARVIE *against* MARTYN.

Slander.

Of a master of a ship; the defendant, without other colloquium of his profession, said of the plaintiff, Thou art a cheating knave, and a cheating rogue, and thou hast cheated my son in law B. of a cable rope, belonging to the bark. It was further said, that he got his living by carrying outward and homeward. Jones conceived the words not actionable, without shewing the plaintiff was master of the same bark to which the rope belonged: so to say of Reader, that he cheated the defendant of Reads, which might be out of his profession. Twisden held the words ought to be applied to his profession; for the plaintiff might cheat him at cards of the cable. Windham conceived the words actionable. Adjornatur in arrest of judgment.

21.

Nota, On motion of Mr. Day for new tryal, for want of witnesses material to prove the custom of the mannor of Beeling to cut trees, the Court refused it, being of things lying in publick notice of the country: but if it were a tryal on a deed, or such particular wherein any material witnesses is wanting, they will grant a new tryal, per Curiam.

22. GLANVELL *against* GULLISON. Siderf. 132, pl. 5.

Slander. 1 Roll. 69.

The plaintiff counted he was a faithful subject, and the defendant said he was a rebel against the King, which, by Siderf. in arrest of judgment, is not actionable, in regard he may be so by standing a commission of rebellion in Chancery, as 3 Cr. 621, *Wells* against *Hemersham*, which Windham agreed; and that there is no difference betwixt rebels generally said, and rebel against the King: yet, by Twisden, Action quod crimen rebellionis imposuit lyeth, but here the Court thought it did not. Sed adjornatur.

23. BUTCHER *against* ERSEFIELD.

Nonsuit.

Nota, per Curiam, after issue, the plaintiff cannot discontinue, without assent of the defendant.

[486] 24. GARTH *against* MOIS. *Tuesday, May* 12. Siderf. 133, pl. 6.

Assurances.

In evidence to a jury, it was held by the Court, that a voluntary conveyance executed is not fraudulent, because voluntary; but it's great evidence of fraud against

an after-conveyance made bona fide, because the statute avoids such deeds as are bona fide, and on consideration, if made ea intentione, to defraud purchasors: and therefore this fraud must be found by the jury.

25. WILLIAMS *against* HULET. *Wednesday, May* 13.

Deeds. 6 Co. 45, *Higgins case.* 26 Ed. 3, 17, seu 71. Debt, Fitz. 181. Siderf. 131, pl. 1.

Nota per Curiam, when the plaintiff counted on bond, it ought to remain in Court, unless the defendant (as here) after oyer demanded, suffer it to be delivered out, then on non est factum, the Court will not order it to remain there on prayer of the defendant, although anciently it hath been so: wherefore, per Curiam, the bond was re-delivered to the party, out of the hands of Barwell, clerk of the rules.

26. PRODGER *against* LANGHAM. In Demise, Br. 10.

[See *Clarke* v. *Willott*, 1872, L. R. 7 Ex. 317; *Halifax Joint Stock Banking Company* v. *Gledhill* [1891], 1 Ch. 31.]

Assurances. Siderf. 133, pl. 7.

In evidence to a jury, lease was made by bond in trust to the use of his daughter, if marriage be had with A. if not to raise 2000l. for her if she married with consent of J. S. if J. S. were living at the time of the marriage, per Curiam, so 46 Ed. 3, 5 b. pl. 15. J. S. hath time during his life to consent, and they held a living of J. S. with the feme and her husband, the plaintiff, after in friendly manner, although he dissented at first, is good evidence of an assent. 2. They allowed proof, that the plaintiff said to the defendant, he had a titile (when he durst not shew it, being a malignant); and the defendant in those times said, if he shewed any he would lay him by the heels, but not as binding. 3. The lease was in trust for 2000l. when she married with assent and approbation, and in the mean time for her maintenance, and so those were trustees for her presently, and she being no party to the conveyance to the defendant, she was relieved against non-claim on fine within the Act 14 Car. 2, cap. 25, of Judi-**[487]**-cial Proceedings. 4. This lease for maintenance of his daughter, is a voluntary conveyance; but if it were for raising a portion for such person as she shall marry, after marriage this is a conveyance for valuable consideration, by Windham & Curiam: also a fraudulent conveyance may become a good one; as if the feoffee doth convey it over for value before the feoffor conveyeth it, the feoffee of the feoffee shall hold it against feoffee of the feoffor: so action upon the case lyeth on promise to give 100l. cuicunque maritaret filiam. And the case, P. 3 Jac. *Ribbon* against ——— was reversed, for not saying quod fidem adhibens promissioni maritavit, &c.

27. THE KING *against* PAGET. *Thursday, May* 14. Siderf. 134, pl. 8.

Attorney.

Per Curiam on information against an officer (although 7 H. 6, 38, appearances generally in criminal causes be entred by attorney) no process as in ordinary cases by distringas shall issue; and such process being awarded, it was improvidè, and against such the course is, that the information be read to him as præsente, and in his default judgment shall be against him as on default, and not by nihil dicit, as against prisoner in custodia.

28. BONITHON *against* KENDALL.

Slander.

She was the woman that had a base child, and that it was at L. and a red-headed boy, after verdict without special damage, not actionable per Curiam, without alledging it was likely to be a charge to the parish.

29. THE KING *against* GOUER.

Nota per Curiam, that an informer (on conviction of the prisoner of extortion, or other penal law) may have the third part of the fine the Court set on him, according to the Kings Privy Seal to that purpose; and here had so of 10l. set on a bayliff for 3l. taken for execution done to the person of J. S.

[488] 30. FELGATE *against* MOLE. *Ante.*

Execution.

The plaintiff having recovered against the defendant, took out execution against Turner the bail, which by rule of Court, Pasch. 1656, was vacated, but no restitution awarded; but the bail brought trespass, which was a hard judgment per Curiam, and after such recovery now prayed restitution, without acquainting the Court with the other recovery, and hereon had taken the plaintiff now in execution, who now prayeth a supersedeas, which the Court granted, and conceived no entry that the party be restored, ought to be (on vacat award) without privity of the Court.

31. FLOWER *against* MAHEW. *Ante.*

Trover.

In trover pro una magna salsura, Anglicè a salting-trough, which being after a verdict, is but false Latin, and aided, being in declaration, by Guider for the plaintiff, who moved for judgment according to *Osborns case.* Twisden conceived this Anglicè is idle, the other Latin word having a proper signification, as pro uno equo, Anglice an oxe: and this is the rather naught, because damages are particularly given for this salsura, which the Court agreed, and awarded nil capiat per billam.

32. EUSTER *against* GROVE. *Friday, May* 15.

Amendment. 2 Cr. 232, pl. 5.

Symson prayed an amendment after verdict, and judgment in trover, the judgment being quod recuperet part, and that the defendant, as to the part whereof he was found not guilty, should be acquitted, but no eat inde sine die entred, which being in another term, the Court inclined it were not amendable. Sed adjornatur.

[489] 33. PARRE *against* EVANS. *Ante.*

Admiral.

After sentence twelve years, on appeal, the plaintiff prayed a prohibition, being bail to the defendant in the Admiralty Court, the defendant being dead, and so if it be granted the defendant in the prohibition is without remedy, and the libel is never express, that the contract was out of the jurisdiction, but that it was super altum mare vel saltem in partibus transmarinis. 2. Wild for the plaintiff alledged, that this bayl was only to abide the award of that Court, which was discharged by the death of the defendant, and so the proceedings of that Court against the bayl on his recognizance, without any new process, is void, although this recognizance be not under hand and seal, but by way of acknowledgment, as fide-jussor, which per Curiam, they have no power to take by our law, although by their law they may levy thereon the condemnation in the principal suit, not the penalty of the recognizance, but if they should, the only remedy against it is by appeal, not by prohibition, wherefore the Court denied it. *Post*, 500, pl. 56.

34. FERMER *against* BENNIT.

Prohibition. 2 Bulstr. 150. Chattels, Br. 11.

Baldwin prayed prohibition to the Ecclesiastical Court of Peterborough, in libel for a pue in navi ecclesiæ, suggesting custom to repair, which the Court granted.

35. THE KING *against* HAUGHTON.

Baron & feme.

Powis moved to quash an order of sessions of Bucks, made for alimony to his son's wife, the son being alive, and so bound to maintain her; which order was made by consent of the parties for the womans relief on 43 El. 2, but it doth not appear she was poor, or likely to be chargeable to the parish, as it ought, per Curiam: but the payment to be made monthly is well enough; but for the other cause, it was quasht per Curiam.

[490] 36. THE KING *against* ARCHER. *Ante.*

Imprisonment.

Crofts prayed to charge the defendant as in custodia, being committed for a contempt, which the Court granted.

37. BICK *against* EDWARDS.

Common.

Action upon the case by commoner for restraining his common, which he claims by custom to tenement for all cattle levant and couchant, not saying the cattle were levant and couchant on the tenement, to which he claimed it as appendant. After verdict, Williams moved this exception in arrest of judgment; but the Court thought it well enough, as *Stone and Mussendens case*, where it was held on demurrer to be naught, but after verdict it's well enough: but by Williams this case differs, in that the plaintiff hath prescribed only for beasts levant and couchant, and therefore ought to averr the beasts he put into the common, that were restrained, were such. Sed adjornatur.

38. SMYTH *against* CONYERS. *Ante.*

Covenant.

Error of judgment in action of covenant to enjoy lease for remainder of term to come, in consideration whereof the defendant covenants to pay an annual rent at several feasts, during the said lease, and the breach is assigned in non-payment of the annual rent ad separalia festa, during the residue of the said term; which, by Allen for the defendant, is incertain, and no sufficient ground for the jury on this writ of enquiry to give damage, not shewing how many rent days incurred, nor for what time certain the lease was. Jones for the plaintiff, The certainty of days past is not necessary, especially in the negative covenant, in which its sufficient to pursue the general words, and the rest may be given in evidence: and this breach goeth to all the time past, and may be pleaded so in bar of any future action, which the Court agreed: and be the term in being, or at an end, yet the defendant appears to have broken it sufficiently, and the damage may be given in evidence for how many days arrear; and here it will be intended the defendant paid it at no day. Judgment affirmed, nisi.

[491] 39. VANGANGHELL *against* BROWNWICKE.

Account.

In account against a bayliff for a necklace of pearl. The defendant pleads ne unque bayliff, and before auditors pleads in discharge, that he delivered them over by appointment to a goldsmith on agreement to sell, or deliver. To which the plaintiff pleaded non deliberavit. To which the defendant demurred; which had been well, if the delivery over had not been alledged to be by agreement; but for that cause the demurrer was held frivolous: also by agreement that bayliff might sell them, or deliver them to the goldsmith, and he saith he delivered them over by appointment; the plaintiff traverseth that he did not deliver by appointment: to which the defendant demurred, and per Curiam well, because the appointment is not traversable, the bayliff having original power to agree. But the Court ordered an amendment by consent.

40. FITZ-WILLIAM *against* LEWIS. *Ante.*

Bankrupt.

In audita querela, the plaintiff counted that Sir H. B. to whom he was indebted, became a bankrupt, and that certain creditors had his debt assigned to them, and that one of them accepted part of his debt in satisfaction of the whole; for which cause, not shewing what was the debts of the creditors, that so his payment might appear proportionable to the debts, the defendant demurred: sed per Curiam, it's well enough, especially being an action by one that is a debtor; and the very assignment is a sufficient bar against the parties; and if there were surplusage, the defendant hath remedy in Chancery. Judgment for the plaintiff.

41. THE KING *against* ———.

Church.

Marshall prayed certiorari to remove indictment at sessions at Hartford of the defendant, quod non reverenter & modeste se gessit during divine service, which although punishable by ecclesiastick censures, yet the Court conceived it a proper cause within cognisance of the justices of peace, and refused to grant it.

[492] 42.

Tythes. March, 21, pl. 49.

In action of debt for tythe, the plaintiff counted that the defendant was occupier of 20 acres, & quod varijs granis seminavit prædict. 30 and that tythe were payable of the said 30 acres: and also that in another year, the defendant sowed prædict. 30 acres iterum, which, by Conyers, in arrest of judgment, its ill, the years being several, and the allegations so; which Foster agreed, sed Curia contrà: and that 30 is but surplusage & prædict. is sufficient; and the count that the defendant was occupier, need not be iterated in every several year for the same thing; but the count being quod ad huc possidet, it goeth to the whole. Judgment for the plaintiff, nisi.

43. WISEMAN *against* COTTON. *Ante. Saturday, May* 16. Siderf. 135, pl. 10.

Dyers Reading 15, pl. 24. See 12 Car. 2, cap. 3, the Statute of Wards and Liveries doth particularly enable such to devise, else they could not. 12 Ed. 4, 9 b. pl. 22, by Littleton.

Allen for the plaintiff, that the Act of 2 Ed. 6, that takes away the custom of gavelkind, takes away not only discents, but the right of devising, notwithstanding this hath been alledged to be a collateral quality, by the express words of the Act,

which takes away the custom of gavelkind, and that the lands shall in no ways hereafter be departible. 2. That they shall from hence forth, to all intents, constructions, and purposes, be as lands at common law, which cannot be satisfied by taking away discents only, without taking away all other incidents. 3. The Act goeth yet further, as if the lands had never been of the nature gavelkind, in which case they could not be so devised. 4. Any usage or custom to the contrary notwithstanding, which takes away all incident customs. 2. By the intent of the Act, which cannot be restrained only to the first part of the Act of Lands discendable, for then all the words of the Act will not be operative, which is necessary in the best construction of Acts of Parliament. 2. Generally clauses are not to be referred to what is particularly provided for before, as this of discents is. 3. It could not be the intent of the Act, that all the customs of Kent collateral should remain, and only that of discent be taken away; vide the enumeration of them, Lamb. Perambulat. 541. 4. Here is no lands particularly mentioned, but only all the lands of such persons; so that if these collateral customs should remain, in 100 years hence none can tell that these lands were the lands of such persons, and so it will retorn again to gavelkind, these collateral customs **[493]** seldom hapning; and therefore should be taken away with the principal custom of discent. 3. The custom of devising, is of the same nature (as the other collateral customs) only annexed to gavelkiend, as found by the jury; but yet all are incident to the custom of gavelkind, and derative out of it, and dye with it, vide librum de Consuet' Cantiæ, 2 Inst. 13 Ed. 1, called the Statute de Consuet' Cantiæ, which begins, These, &c. are the customs which the gavelkind men in Kent claim, P. 4 Ed. 1, C. B. Rot. 2. There is a record, Margery uxor Godfry petit versus Dagnam medietatem of such lands; the defendant pleaded that the land is gavelkind, and that the custom is, that on fornication widow should lose her dower. The plaintiff replies, she was never convicted according to the custom of gavelkind by hue and cry, when she is parturiendo. The defendant denied the custom alledged by her, and the jury find that she committed fornication, and was convicted, and that it was not necessary (as she alledged) that she should be taken by hue and cry when she is parturiendo, wherefore judgment was against her for the tenant; whereby it appears, that had not these lands been alledged to be gavelkind, this custom could not be pleaded, and that being taken away, both respectu tenuræ & naturæ, the rest fall. 4. There needs no special prescription, 19 Ed. 3, Ayd. 144 (as is alledged) to any of these particular customs, 16 Ed. 3, Ayd. 129. Rast. Entr. Dower in demand. § 6, as where the lands are not gavelkind, there is as process, Rast. § 1, 2, & Dower Rast. § 7. Its agreed that the gavelkind in Ireland and Wales is different from those of Kent, and of different introductions, and so that they have not these collateral customs, is no argument against these of Kent. And 2 Ed. 4, 19. 5 Ed. 4, 8, shews, that all these customs are alike, and to be pleaded alike, but not by a tempore quo non extat memoria, but only that the custom of Kent is this or thus. Lands aunciently of the tenure of knights service in Kent, are not gavelkind, yet the inferior tenants of such may hold by this custom; and should their lands come to the lord by cessavit, disclaymer, escheat, &c. it ceaseth to be of the nature of gavelkind, being of the same nature with the demeans, although Lamb. Peramb. 545, its a quære, and none of these collateral customs do after remain; so when gavelkind comes to the Crown, they cease to be so, and the Queen shall not be endowed of the moiety, although feme of patentee shall; for by regranting by the King, they remain as in their original. 5. The jury find the lands in gavelkiend in the King generally devisable by custom, which cannot be now pleaded by the custom of Kent **[494]** only they cannot, for that would extend to knights service also; nor by the custom of gavelkiend in Kent, because that is taken away, M. 21 Car. uxor Car. Brook demand the third part of this mannor, as at common law, M. 16 Jac. Rot. 2353. Bulstrod and Mary, uxor Car. Brooke demand the moiety of lands, to which the tenant pleaded, the lands were not gavelkind, and issue thereon found pro tenente, that the lands were not so, whereon she lost her dower; thus by reasonable construction and all the forms of pleading, this custom is only dependant on that of discents, and so taken away with it.

(2) Wild, Kings Serjeant Recorder of London, for the defendant, The mischief intended to be prevented by the Act was, the decaying of great families, 1 Inst. 140, by this custom, and is of the same nature with 31 H. 8, 8. 34 H. 8, 16, & Lamb. in

his Peramb. in his exposition of the word gavelkind, looketh only at the partibility and descent among males, 14 H. 4, 18. 1 Ed. 4, 6, which ariseth out of the nature of the land, but the other customs are collateral, and only annexed to the lands in Kent 1 Cr. 561, and 1 Inst. 166. And in other countries, as Philpot villare Anglic. in Holland, Saxony, &c. are distinct without these customs to devise, &c. And should these become by this Act, as lands at common law, all the devises since that time would be void, because the Statute of Wills was before this Act, and so reacht not them: also the intent of the procurers of this Act, could not be so much to lose all their customs of tryal, alienation without licence, keeping after felony committed by auncester, &c. but only to keep their estates intire in one body: also common right being within the custom of Kent, the adverse party that would set up an Act to destroy them, must shew presidents of dower brought of the third part, as at common law, of lands in soccage there. Windham conceived there are divers customs in Kent, although the most notorious be gavelkind, viz. the partibility; and all the customs of Kent are of equal distinct authority, as laws of another county confirmed to them, being saved to them by the Conqueror, and the doubt is only, whither the Act intended to alter only the custom of discents, or all other customs of Kent. Also Kent doth not prescribe in any of these customs, but only that the custom is thus; but for discents, one need not alledge that it is the custom, but that the lands in demand are gavelkind; whence the Court will take notice that they are partible; and although the pleading be, that such lands are of the custom of gavelkind, and partible, yet its not necessary to **[495]** shew they are partible. Foster directed the parties to get a new explanation by Parliament for the difficulty and consequence of it. Adjornatur.

44. GWIN *against* GWIN. Siderf. 138, pl. 11.

Wales.

Williams except to the removal of writ of right. 1. The writ of error being to remove a plaint in quod ei deforceat, which is not sufficient without saying that protestation was therein entred in the Great Sessions in Wales, to prosecute in nature of writ of right at common law, 1 Cr. 310, *Gwin* against *Gwin* 1 Cr. 178, according to the record though the book be not so. 1 Cr. 262, *Cuffin* against *Vaugham*. And thus are all the presidents 1 Cr. 444. Windham conceive it not necessary, but may be both ways. 2. The error was of a plaint in that sessions by writ, which is a contradiction, which the Court agreed, had the plaintiff rested there; but when it goeth farther of plaint of quod ei deforciat its well enough. 3. The writ of error specifieth not the time and place of the plaint in the Inferior Court which per Curiam is not necessary. 4. Its directed to the justices of our Great Sessions, and the retorn is only by one justice, which was mistaken, and the writ directed to the justice: the error assigned by Baldwin for the plaintiff in the writ of error. 1. In the judgment, which was, that he should hold the land to him and his heirs, and that the plaintiff hath magis jus habendi quam tenens tenendi tenementa, by which it appears the plaintiff was out of possession, and then the judgment ought to be quod recuperet sesinam, Rast. Entr. 368, 246. Co. Entr. 182, so in a formedon 1 Cr. 310, *Gwin* against *Gwin*, where the judgment is for the tenant, as *Penrins case*, its always quod teneat. Windham conceived this to be error, which the Court agreed. Adjornatur.

45. NEWMAN *against* THE INHABITANTS OF STAFFORD.

Fresh suit. Siderf. 139, pl. 12. March, 10, pl. 28.

In action on the Statute of Hue and Cry, by special verdict it was found, that the oath was made duly, and an action brought by original within 20 days according to the statute of 27 Eliz. 13, and that being discontinued by charge of Government, the plaintiff brought another after the 20 days, and within the year without any continuance or new oath made, which per Curiam is void, and so by Wild hath it been ruled, last Hartford Assizes by Bridgman C. Justice **[496]** of the C. B. But per Curiam, the party might make a new oath. Adjornatur.

46. GAVELL *against* TASKER. *Ante.*

London. March, 15, pl. 34.

Jones relied on the exception, that this by-law was contrary to law, as restraining any private persons to work with their own carts, with their own goods, sed non allocatur, for it must be intended of common working carts. 2. Its said they took the carts by virtue of the by-law, which must be intended working, wherefore they encline for the defendant. Adjornatur.

47. GLASCOCKE *against* MORGAN. *Ante.* Debt, Br. 49.

Execution.

Baldwin for the plaintiff, held the plea in barr ill, and that debt may be brought on the same judgment, notwithstanding elegit sued forth, and only goods taken thereon short of the value of the debt. 1. Because it's the proper and chief office of an elegit to extend lands and goods; and a term may be as well extended by fieri facias, and the election is of the lands, not of the writ upon W. 2, cap. 18, and therefore 15 H. 7, 15. 30 Ed. 3, 24. 21 H. 7, 19. L. 5 Ed. 4, 21, have been denied to be law, Hub. 57, and the difference is where only goods are taken, and where lands for every elegit includes a fieri facias, 17 Ed. 4, 4, is express, that one may resort to the execution, when nothing is done on the elegit. And 2, though such an elegit entred on the roll, might have been pleaded in barr of a new prayer of execution on the roll, yet it's not pleadable here in barr, being as 2 Cr. 338, *Cowly* against *Lydgate*, Godbolt 257, but a partial satisfaction only, and this was the reason of the statute of 21 Jac. which giveth new execution on eviction or determination on the same reason, 21 Jac. 24, for real satisfaction of debts, in Dyer 298, pl. there were lands extended. Wild for the defendant agreed, that when lands are taken it is a bar, and so when only goods are taken; for this election is not of the lands, but of the manner of execution de breve de fieri facias, or quod vicecomes liberet de terris, &c. Also if this might have been done (as L. Co. 81, on the Statute of Merton) it would have been done before now: but Process, F. 52, is express, that after entry of elegit no other execution can be taken: also this statute giveth a different manner of execution from the common law, for herein the beasts of plow are excepted. Windham much favoured the lord Hub. 58, his **[497]** opinion, 30 Ed. 3, 24. Stath. Execution 14, but against that volly of judgments against it, could not embrace it, but held no action of debt lyeth, those ancient judgments having been pursued and remembred in all times downward. And L. 5 Ed. 4, 41, is a great authority express; and Coke 2 Inst. 395 cites all these books, and concurs with them, and so hath been the uniform opinion: and the writ prayed 17 Ed. 4, 4, was never entred on record, being never retorn'd, and so new execution might be taken by scire facias, which yet being within the year was needless, for on continuance the scire facias might have been taken out presently. Twisden held the action lay, and that the best exposition of the statute is to advance justice and right, and to help men to their debts, and not for a trap to catch men: also the statute mentions no elegit, as a distinct writ of execution, but sit in electione, whether he will have land and goods, or only the goods & quoad the goods; this statute is but in nature of a fieri facias, and therefore this statute is said to be the first that subjects the lands, and on this reason a capias is suable after fieri facias, if no satisfaction be had: also the statute did imitate the common law, (as the statute merchant excepted lands descending to infants) and therefore excepted the beasts of the plow, as they were at common law. Foster remembred the transactions of *Foster and Jacksons case*, and inclined the action lay, debts being to be satisfied before deadly sin, as was there said, and execution is the life of the law, of which the Judges ought to be very tender. Adjornatur.

48. THE CORPORATION OF SOUTHAMPTON *against* RICHARDS. *Ante.*

Monday, May 18. Siderf. 142, pl. 17.

Coron.

Allen for the plaintiff prayed nil capiat per billam, the action being in the debet, upon bond of felo de se, whereof as bona they have patent, whereas it should be only in the detinet, which the Court granted, and that it be specially entred.

[498] 49. CLERKE *against* NEWMAN.

Hil. 14 & 15 Car. 2, Rot. 661.

Trover. Siderf. 139, pl. 19.

Trover de trecentis (not saying ponderibus, or any Anglicè) & duobus quarteriis unius centensæ prunorum, Anglicè pruans, which, by Jones, in arrest of judgment, is void, and not only insensible, as the case de duodenis fili, but like the case of trecentis ponderibus lupulorum, which was void, for the incertainty of what kind of weight; but if it had been trecentis pondis, it had been well enough. Windham conceived the case at Bar like the case of *Pargiter* against *Cressey* of duodenis fili, which the Court agreed. 2. Of 96 yard of panni-lanei, Anglice, dowlas, & alij panni-lanei, like the case of *Staunton* against *Lufton*, repl. de centum ovibus, agnis & matricibus, which was held ill. Windham conceived it well enough: sed Curia dubitavit. Adjornatur.

50. THE KING *against* THE INHABITANTS OF YARNTON. *Ante.*

Ways. Siderf. 140, pl. 14.

In information for not repairing a way, and verdict for the defendants. Williams moved for repleader, the issue being, that they ought not to repair, which (the lands being laid in their own parish) is contrary to law. The Court held the issue ill; but a tryal having been thereon, its well enough, as in the case of *Camberwell* 22 Car. 1 in B. R. remembred by Twisden. 2. The verdict finds the defendant ought not to repair, but do not find who ought, which the Court doubted, but if it had been found that the defendant ought to repair, it had been well. Adjornatur.

51. THE KING *against* HUBBARD, &c.

Peace.

Indictment of a riot, quod juratores onerati & jurati, dicunt pro domino Rege (not saying) super sacramentum, which per Curiam is ill, præter Windham, who held it well enough. Twisden remembred a case hung long, and at last quasht, being quod onerati & jurati super sacram dicunt, without any dash.

[499] 52. DORRINGTON *against* SLIPER.

Lieu.

In action upon the case upon indebitatus in the Palace Court for oats sold, not saying where, which by Stroud was assigned for error, after judgment for the plaintiff, sed non allocatur. 2. Both parties were not of the houshold, which per Curiam is needless, when they try by vertue of their new patent; contrà where only as a Palace Court. As to the first exception, Foster and Twisden conceived they ought to shew where the sale was; Windham contrà, and that the defendant could not be said to be indebted within the jurisdiction, unless the sale were there.

53. HEN *against* HANSON. Siderf. 141, pl. 16.

Hill. 14 & 15 Car. 2, Rot. 822.

Rent. 3 Cr. 606.

In action of covenant for rent arrear on lease for years. The defendant pleaded general release, of all demands (which was made by award on collateral difference betwixt them) made after the covenant, and before the rent due in bar: to which the plaintiff demurred; and Poultnee for the plaintiff, assigned the reason to be because the cause of the release was particular and collateral, 2 Cr. *Clun* against *Fisher*: *Enion* against *Bridges*, Yelverton 117. Jones for the defendant, that it is a good bar, whatever the intent of the release were, Lit. 118, sect. 510 & 513, this being a word of the largest extent; by such words one may discharge common, or rentcharge, which is a present duty: nor is there any difference betwixt rent of inheritance, and rent reserved on lease for years; for this is an interest assignable. And 2 Cr. 486, *Wotton* against *Bye*, is expresly so adjudged, in case of release by assignor of term, reserving rent; which differeth not from the reason of this case in Moor 544, pl. 723. *Harding* against *Collings*, 3 Cr. 606. One made a lease for years, rendant rent, lessee assigns over his term, and after lessor release to lessee all demands, which doth not discharge the growing rent, because now the properest remedy for the rent is against the assignee; and hereby is implyed, that had the release been to the assignee, it had discharged the rent. Foster conceived that this is a good bar in debt, but not in covenant, 2 Cr. 107. 5 Jac. *Hancock* against *Field*. Also per Curiam, no tenure nor inheritance is hereby granted, but fealty, wast, and other incidents still re-**[500]**-main: also by Allen for the plaintiff, when annuity is arrear, and such general release of all demands is given, it doth not bar the growing duties: the Court doubted. Adjornatur.

54. PEACOCK *against* BURREL. *Ante*.

Lieu.

Indebitatus within jurisdiction of Marshalsey for wares sold, not shewing where, which was assigned for error; but by Wild for the defendant, if no other place be mentioned, it cannot be otherways intended, but to be within the jurisdiction; contrà where any other place is mentioned, as in consideration H. would go from Newcastle to Nants in France. Windham agreed the action well laid, Foster & Twisden contrà; the law makes the debt only on the sale, and the jury must enquire of the sale, which, in regard no place is alledged, may be in any forreign country, and nothing shall be presumed in Inferior Courts, but must be expressed. Wild conceived the place of the sale not traversable, and therefore ad tunc & ibidem is not material, but yet if the sale were not within the jurisdiction, the plaintiff would be perjured in swearing his plea. Adjornatur.

55. TREMAIN *against* SANDS.

Ejectment.

Nota per Curiam in evidence to a jury, that an ejectment will not lye of a free-warren, therefore quoad that the defendant was directed to be found not-guilty.

56. EVANS *against* PARRE. *Ante* 489, pl. 33.

Admiral.

Powis prayed prohibition to the Admiralty, suggesting de novo quoad the bail only, who was not medled with till of late, and of their recognizance the Admiralty hath no jurisdiction, 4 Inst. 134, being no Court of Record, and so its not proper to appeal but to have a prohibition: but by Windham, this is intended of recognizance that binds lands, but without stipulation in nature of fide-jussor, they cannot maintain

any jurisdiction at all, which the Court agreed, as in the Spiritual Court, and all Courts, is usual: Twisden absente. Adjornatur.

[501] 57. DAVENPORT *against* STARESMOORE.

Executors.

D. executrix of D. in consideration that the testator would give further day unto 10 November next following, to be paid unto such a person, and in such a place as the testator of the plaintiff should appoint in London, promised that then he would pay to him, not saying where. The plaintiff averr'd that although his testator had forborn, yet the defendant had not paid, &c. The defendant pleaded that he paid it to such persons as the testator did appoint, &c. which by Allen for the plaintiff, after verdict, is well enough, the forbearance being the consideration, and the appointment in L. is superfluous and needed not be averr'd in action upon the case; but only that the defendant had not paid to the testator in his life-time, nor to her after his death; Windham conceived he ought to aver the appointment; contrà by Foster, if issue were only non assumpsit, but being on non solvit ad diem on performance pleaded by the defendant, its doubtful. Adjornatur.

58. THE KING *against* LEVERINGTON.

Trade. March. 124, pl. 204.

Jones excepted to an indictment for exercising the trade of goldsmith, not having served according to the statute, it being in the body, quod juratores pro domino Rege ad inquirendum ad largum pro corpore comitatus, which per Curiam, is well enough. But 2. Not concluding contrà pacem, but only contrà formam statuti, it was quasht.

59. ROGERS *against* WESCOT. *Ante.*

Prohibition.

Winnington prayed a consultation, because it appears by the prohibition it self, that it was void by motion without pleading, 1 Cr. 69, *Smyth* against *Poyndrel*, and it was granted per Curiam.

[502] 60. MORGAN *against* SLOPER, &C. MANUCAPTORS OF GOODWIN.

Bayl.

Nota per Curiam, after the declaration once accepted, the bayl cannot be excepted against for insufficiency, which the clerks agreed, unless some practise be used, as here, by one Dr. Cruso, whom the plaintiff thought able, but was not.

61. WILLIAMS, &C. *against* HALL, &C. *Wednesday, May* 20.

Ejectment.

On trial at Bar, the defendants refused to confess lease, entry & ouster, per quod the plaintiff was nonsuited; for which cause Wild, the Kings Serjeant moved, that in regard the plaintiff was to pay costs, and that the default was the defendants, that the plaintiff might have an attachment against the defendant, according to the course of the C. B. which the Court granted, as the usual course here. *Post.*

62. FRYER *against* COMBE.

Entry.

In evidence to a jury, it was offered as evidence of an entry, a note thereof, subscribed by the person that entred, and the witnesses thereto, who were dead, and

their hands only proved, and that it was done by direction of Hyde, Justice of the C. B. who testified it, which after some doubt the Court would not admit, without proving actual entry, especially being to avoid a fine; but they admitted what Hyde said, as a good enducement to the jury, but no convincing evidence.

63. BROWN *against* SPENCE IN EJECTMENT.

Incumbent.

In evidence to a jury, it was held per Curiam, that reading the articles in the church porch is sufficient (the divine service being there) by reason of denial of the key of the church by the defendant. 2. Lessee at will of disseisee by attorning, as *Locker* against *Polvert*, to disseisor, doth determine the will, and his continuance in possession after, doth make him trespasser by Windham, sed Curia contrà; but all agreed that a special action upon the case will lye against him for keeping possession, per quod the plaintiff lost **[503]** the profits, &c. and if such person be any ways concerned in the controversie, it's a disablement to be a witness, so much as to prove induction and reading the articles. Quære if reading the articles at a reputative hamlet church, that is belonging to the principal, be sufficient within the statute, the principal church being shut against him. 3. The plaintiff produces an institution of the bishop, which recited only that there was a judgment and a writ to him, which per Curiam, is not sufficient, without producing a copy of the judgment, or award of execution, no more then the case of *Pinder* against *Wright* on diem clausit extremum, the writ being lost, although there was an enquisition, and such like papers, it was held insufficient on demurrer, as Twisden cited; yet if fieri facias (which the sheriff is no more bound to retorn than this writ to the bishop) be lost, the Court will, and frequently doth admit the warrant of the sheriff as evidence to prove such writ. 4. It was held, per Curiam, that admission and institution by the bishop on writ, without any judgment, is all a nullity, and makes no plenarty. 5. The King cannot usurp without special mention of his intention to be so in his presentation, not when the presentation recites it is by title. 6. When possession hath gone by mean conveyances, although anciently it be lodged in the Crown, it need not be shewed how it came out per Curiam contrà Maynard, who held, that pleading being the rule of evidence, the party ought to shew some record how it came out of the King: also Maynard held, that when the King recites any special title, he cannot usurp, but when the patent is seu alio quocunque modo ei spectant', he may usurp, sed Curia contra. 7. By 13 Eliz. 12 an allowance by the bishop of any diocess is sufficient, although his allowance be only to preach within his diocess, the statute not requiring any licence by the bishop of the diocess where the church is. 8. If the bishop collates on a presentation of the King by a mistaken title, it is void only eis quorum interest, *Rud* against *Evesque Carleol*, in Hutt. 10. In ejectment, prior possession is a good title against the King's presentation, but in quare impedit the incumbent ought (although defendant) to make a title against the Kings presentation without title, as 7 H. 4, 31. But if the incumbent be in by entry of his own head, without any presentation, it's not sufficient in either.

[504] 64. THE CORPORATION OF SOUTHAMPTON *against* RICHARDS.
Ante. Friday, May 22.

Coron.

Godard moved for the defendant for costs, the plaintiff having abated his own action, which (being on demurrer) the Court on 23 H. 8, 15, § 1, n. 7, denied, as not within the statute, which extends only to nonsuits and defaults, which the clerks agreed to be the course: also the plaintiff discontinued by leave of the Court, &c.

65. BAKER *against* BERISFORD. *Ante.*

Rent.

In debt for rent, the defendant pleaded payment of part in barr, and concludes in abatement quod billa cassetur. The plaintiff replys, Quod non solvit, and tenders issue thereon: to which the defendant demurred, and the plaintiff joyns in the demurrer; and, per Curiam, this is a plea in barr; and although the conclusion be quod billa cassetur, yet it's peremptory after issue tendered. 2. By the defendants demurrer, he agrees that nothing was paid. Judgment for the plaintiff, nisi.

66. HATHWAY *against* GLASCOCKE.

Trover.

Trover de uno pare igneorum ferreorum, Angl. a pair of andirons, in arrest of judgment, the Court conceived it well enough. And so 2 de uno pecio ferri, Angl. an iron crow, held well enough.

67.

Verdict.

The Court refused to insert deed into special verdict, for fear of attainting the jury, although Archer, the Justice of Assize, certified it was given in evidence, but it was left out of the notes of the clerk of Assize, and there was no agreement appeared at the trial to draw up whatsoever might bring the point in controversie to the Court, ex motione Stroud jun.

[505] 68. SPARKE *against* SIR HUGH MIDDLETON.

Proof. March. 83, pl. 136. Stiles 449, pl. 1000.

Mr. Aylet having been counsel for the defendant, desired to be excused to be sworn on the general oath, as witness for the plaintiff, to give the whole truth, in evidence, which the Court after some dispute granted; and that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since by other persons, and the particulars to which he was to be sworn were particularly proposed, viz. what he knew concerning a will in question that Poyns Gorge made; and the Court only put the question, whether he knew of his own knowledge.

67. WISEMAN *against* COTTON. *Ante. Saturday, May* 23. In Custom, Br. 44.

Rents.

Windham conceived before, that this special custom of gavelkind was but one of the customs used in Kent, who kept their lands and customs free, and have them as the common law of the country, and that this to devise was another. But now he held this custom to devise dependant on that of gavelkind, which comprehends all the customs of Kent; although in common parlance and strictness it signifieth only the departibility; and all manner of pleading is, that the custom of gavelkind talis est, &c. And had this Act of 2 Ed. 6 been general, that all the lands of the tenure, or nature of gavelkind, shall be disgaveld, it had swept away all other incident customs: but the Act doth after restrain the penning to the particular custom of being departed, or departible; it takes away that only which he grounded on the rule, 8 Co. 154. Quando actus continet generalem clausulam, & post descendit ad specialia, as 2 Inst. 287, the exposition shall be according to the special clauses. 2. Had the Parliament intended to take away the whole bundle of customs, they would have had some other general words, as all other customs, whereas this is only of the custom in the singular number. I agree the tenancy of that nature is changed by escheat, where the

seigniory is of the nature of knights service, but I do not conceive the nature or customs are gone by coming into the hands of the King. 3. This was the custom that was looked on as most mischievous, and they that with their bows in their hands endeavour, and would have ventured their blood [506] to maintain their customs, cannot be intended to be petitioners to have them abolished, as a benefit to them. And 31 H. 8, cap. 3, mentions no other custom than this; and 25 H. 8 a. Private Act; and this of 2 Ed. 6 points principally at this, as the only custom that is deciphered, by general pleading the lands are gavelkind, as 1 Cr. 561, Laundre, & 5 Ed. 48, & 2 Ed. 4, 18, are misprinted doubtless; for they may alledge any other customs, as of dower, tenancy by courtesie, &c. and so conclude for the defendant, that the lands remain still devisable, and only this single custom is taken away.

2. Twisden (of the county of Kent) ad idem; but held this custom part of the soccage lands in Kent, and gavelkind another part, as appears by the etymology of the word from (gave all kine, i.e. among all males, L. Co. 140, and Cowel's Interpreter) others from gaffall, i.e. tributum, and so gaffall kind signifieth such lands as pay rent, i.e. soccage lands, and fix the custom to the lands; but *none make this a custom*, to which all the other customs are incident. 2. If the customs be incident to the lands, as gavelkind, then all gavelkind must have this custom, which they have not 26 H. 8, 4. Baron Hendon, that broacht this custom of devising, doth not fix it there. 3. The pleading gavelkind sheweth it discendable, but all other customs as tenancy by curtesie, &c. must be prescribed for as aunciently used: and learned men in all ages having thus understood, 5 Ed. 4, 8, and 2 Ed. 4, 19, its sufficient for us to ground our opinions on, although the books be misprinted; and there is no gavelkind but is departible, and so it need not be particularly pleaded: and for these reasons I conceive, these several customs incident to the soccage lands in Kent, as opposite to knights service, Old Mag. Chart. 140, and Lamb. Peramb. 541, gavelkind is sometime taken for gens born in K. villinage, F. 46. 18 H. 6, cap. 3, also F. N. B. 198 must be understood, that of such lands in gavelkind, as is devisable, an ex gravi querela lyeth: and F. 144 is not any authority against this: also if lands of this nature discend to the King, they remain of the nature of gavelkind, as Pl. Com. 247, grounded on 35 H. 6, 18, by Moil, which opinion is mistaken by South, but not so when the King purchaseth lands, he is thereby seised jure Coronæ, and the eldest only shall have it, but admitting this custom incident to gavelkind, yet this Act 2 Ed. 6 hath altered only this particular of discents, as the only mischief, of which Coke, who read 30 Eliz. could not but know, by the relation of some of those gentlemen, who procured this Act, of which 31 H. 8, cap. 3 [507] was a leading way: also to all intents and purposes must be expounded only in point of discent, as 7 Ed. 6, cap. 1, on which Pl. Com. in *Stradling* against *Morgans case* resolved that notwithstanding the generalty of the words any receiver, yet they expound it only according to the particular mischief, which was default of payment by the Kings receiver. Mallet ad idem; so Foster Chief Justice, and that all Acts, restraining of the common law, are taken strictly in the point of restraint. Judgment for the defendant.

70. BROOM *against* CUNNINGHAM.

Assumpsit.

In special action upon the case, the plaintiff counted on discourse betwixt the plaintiff and the defendant, concerning the Rectory of P. and of a lease made thereof by Poulton to the defendant, and agreement betwixt them concerning reparations the defendant was to make on the premises, and a judgment had by one Hull, under whom the plaintiff claims one moiety of the mannor and rectory, whereupon the plaintiff and the defendant agreed the defendant should enjoy, discharged of rent, till he were satisfied for his mony so to be laid out, and the plaintiff assigned breach, in that such a day rent was arrear, and all the disbursements before satisfied; for which cause the defendant demurred, the agreement being to allow quod expenderet, the count only quod expendisset, which, per Curiam, is well enough.

Judgment for the plaintiff.

71. PLAYER *against* PETIT.

Trades.

On habeas corpus cum causa, Wild prayed a procedendo the prisoner being sued in London in debt, on by-law against the defendant, for taking forreigner in the trade of an upholsterer, who had never been apprentice to any, nor served as such to the defendant; which the Court conceived grantable, although the by-law did also inflict imprisonment on conviction by two witnesses, or confession, which quoad that, is void: also this law was made by the mayor, aldermen, and common counsel, and they were to have shares in the penalty on recovery, and the suit was before the mayor and aldermen, which per Curiam is well enough. 3. The by-law was, that on confession or recovery on tryal, the mayor, &c. may commit such persons, which had the habeas corpus been brought before any judgment, all had been void, but now recovery shall be in-[508]-tended by judgment, one being but convicted by verdict. Adjornatur.

72. BULSTRODE *against* HALL. *Monday, May* 25.

Sewers.

In evidence to a jury, Windham conceived one cannot prescribe for the Kings inheritance, viz. for lands betwixt the high and low-water-mark, or infra fluxum & refluxum, as he said had been held on special verdict in the Exchequer, contra for goods wreck, &c. Twisden doubted on *Constables case*, 5 Co. 107, but, *Glyn* against *Maynard*, held they might prescribe.

73. PITS *against* VINER.

Ejectment.

Wild prayed an alias distringas, the plaintiff being non-suited at the assize for default in the warrant of the justices to try the cause, viz. for not confessing lease, entry & ouster, &c. And that the non-suit might not be recorded, which the Court granted on *Aquila Wicks's case*, 1 Cr. 203, pl.

74. THE KING *against* MAYO. Siderf. 144, pl. 26.

Slander.

Per Curiam to say to justices in session, that though I cannot have justice here, I will have it elsewhere (certified by the justices to be contemptuously) is a contempt, and the fine of 5l. well imposed therefore. Twisden doubted the words were no more, then that he would appeal; but on paying his fine in Court, the Court discharged him.

75. SHEPHERD *against* LLOYD.

Trover.

On judgment by default, error was assigned in trover of twenty pieces sive parcellis ligni, which per Curiam is well enough, as Pophams case trover of twenty trees, which cannot be now intended such as are growing, and piece and parcel is synonimous; contra of a parcel of wares that is uncertain; but parcel of cloath is well enough. Judgment affirmed, nisi.

[509] 76. BAKER *against* BERISFORD. *Ante.*

Mich. 14 Car. 2, Rot. 1430.

Rent.

In debt for rent, the plaintiff counted on custom of mannor, that moiety of rent on lease of copyholder shall go to the wife, and moiety to the son, if he dye seised of the

remainder, and that she claims moiety as free bench. The defendant pleaded payment of a lesser sum in satisfaction of the rent. The plaintiff offers issue thereon: to which the defendant demurred; which, per Curiam is frivolous: but the point intended was, whether tenants in common may sever in debt for rent, which the Court conceived they might, especially on such particular custom. Judgment for the plaintiff.

77. QUEENS COLLEDGE.

Trover.

In trover for a horse, the defendant justifies, ut bona waiviata, by patent, not shewing it forth, nor shewing that any felony was committed, which, per Curiam, he ought to do, as by Foster in the time of Queen Eliz. hath been adjudged. Judgment for the plaintiff, nisi.

78. PEESLEY *against* FRIEND. *Tuesday, May* 26.

Administrator.

The act of the Court, without shewing the letters of administration under seal, is a sufficient title for the administrator to claim goods by, as well as for any third person, per Curiam, as in *The Lord Manchesters case.*

79. KNAP *against* BLUMFIELD.

Disseisor.

In evidence to a jury, it was held, 1. That entry of J. S. on the land, (after lease made by him in reversion) shall not be intended by disseisin, being so only at the will of him in reversion: but if it were by disseisin, then a release made after to the lessee is no enlargement of his estate.

[510] 80. LEAKINS *against* CLIZARD. *Wednesday, May* 27. In Disceit, Br. 24.

Market overt. Siderf. 146, pl. 3.

Jones moved in arrest of judgment in action upon the case, the count being of a communication to sell a house, and that the defendant affirmed the rent thereof to be 42l. per annum, fraudulenter, not saying sciens it was less. To which the plaintiff fidem adhibens, as *Young* against *Harvy*, Yelvert. 20, and Mich. 40 Eliz. pl. 31, bought the house, which was but 36l. per annum, which, without any special warranty, is not actionable. Windham conceived the action lay with this difference, that it is of a thing valuable; contra of jewels, &c. for therein perjury cannot be assigned, to which the Court inclined. Adjornatur.

81. BULSTRODE *against* HALL.

Trials.

Finch Solicitor, moved that trial begun termino Paschæ, and adjorned, for a view might be finished in Trinity term, which Windham conceived he must; so Foster: contra by Twisden, yet concessum est.

82. HEN *against* HAMSON. *Ante.*

Rents. Bridgman 124, in *Mittons cas.* its held such release is a good barr. So it is of rent-charge, although nothing be arrear. 20 Ass. 5.

Poultnee for the plaintiff on demurrer, conceived a general release of all demands, made in pursuance of an award of particular differences, is no barr of covenant to pay

rent, because till the rent day, 1 Inst. 510, it's not demandable, as *Althams case*. Also this differs from *Wotton* against *Bye*, 2 Cr. 483, which is of a release by grantee; but this is made by him in reversion of rent incident thereto, and done to another intent, 2 Cr. 170, *Hancock* against *Field*, which ought to guide; and 2 Cr. *Clun* against *Fisher*, is, that such release after Mich. and within ten days, of rent payable within ten days, is held no barr; and according Hedley 15, in annuity. Jones for the defendant after oyer, that the arbitrement being of several differences, his intent cannot be intended otherways, but that this rent was in controversie, unless he had particularly averr'd the contrary. 2. There is no difference betwixt a rent of inheritance, and a rent incident to a reversion: and although such release barrs not the King, as 6 H. 7, 15, yet a common **[511]** person it doth: and 14 H. 8, 9, per Pollard, by such release the use of a rent is gone; this release doth not increase the lessees estate, but only dischargeth the rent, and the fealty and other services remain. And although it be not demandable, yet it may as well be discharged as a common, of which one cannot be disseised, unless he will. Windham conceived this release barrs not the rent, as Poultnee had argued in both points with the same difference, this rent being part of the reversion, and within the Statute of Donis, and not like the cases of common or rents in gross. And this word demand hath been always restrained since Littletons time, as Moor 34, it barrs not future covenant. 2. These words in company with others must be restrained by them, as Dy. Power given to executors to dispose, let, set, &c. doth not impower them to sell. 2. Twisden contra; and that no difference is betwixt this and Littleton, § 510, for the rent betwixt lord and tenant is always in demand; and so betwixt lessee and H. in reversion: and this 20 Ass. 5. 14 H. 8, 9, is ruled, although no rent be arrear at the time of the release. 3. This word is put in to the rest to inlarge them, not to be restrained by them. 3. Mallet agreed with Windham, that it's not released: 4. So Foster; and that if demand should be extended in the largest sense, it would discharge the reversion it self, which is a continual demand on the lessee. 2. The intent, as in 2 Cr. *Hancock* against *Field*, in covenant to repair, must guide; which as there, so here, cannot be collected to discharge the rent. Twisden agreed that it could pass no interest, only operate by way of extinguishment. Windham also, that a seigniory in gross might be discharged by such release. Judgment for the plaintiff, nisi.

83. HOOKE *against* SWAINE. Siderf. 151, pl. 19.

Rent.

In consideration of marriage had with the defendants daughter, he covenants to grant to the plaintiff 20l. a year, which Powis for the plaintiff, as 21 Co. 24, *Baldwins case*, 8 Co. 83, 85, conceived an estate for life in the plaintiff, which the counsel for the defendant agreed in case of grant; but on bare covenant, as this case is, to grant, which being for affection to the daughter, would be more beneficial to the husband than her: and this may be as well intended as a lease for years is satisfied with two years. Twisden conceived such reservation of 20l. annuity per annum, **[512]** is for life of the parties; so here in covenant, according to common parlance, and the consideration is intended to continue, unless the contrary appear, to which the Court inclined. Adjornatur.

84. HALL *against* CRESSWELL. *Ante.*

Covenant.

In debt on bond, the condition was to perform all covenants in lease made by her husband of a warren, rendring so many conies; one whereof was, to do no act to disturb the lessee: she after taketh another husband, who entred on the plaintiff, and cut the nets (no title being shewed by which he entred) for which cause the defendant demurred. Judgment for the plaintiff, nisi.

85. MOULD *against* WALLIS. *Ante.* Departure, Br. 10.

Trades. Siderf. 142, pl. 19.

The Court gave leave to the plaintiff (notwithstanding the opinion of the Court) to discontinue his action; and rather then hang up longer, being de novo, and counted on the custom of London, that an infant may bind himself apprentice.

86. WHITEHEAD *against* BROWN. *Ante.*

Hill. 14 & 15 Car. 2, Rot. 238.

Lieu.

Action upon the case, quod cum indebitatus fuit infra jurisdict. Curiæ pro nutriendo (not saying where) a child of the defendants, the defendant promised within the said jurisdiction: it was assigned for error, that no place of the nursing was mentioned. Adjornatur.

87. FOSTER *against* HALLIMAN. Debt, Br. 79.

Assumpsit. 1 Roll. 20, § 14.

In action upon the case on promise by the defendant, that if the plaintiff and J. S. do agree of a price, he would pay on communication of the sale of a horse, of which the defendant having notice, promisit, &c. to which promise the plaintiff fidem adhibens, did agree, &c. After verdict in the Palace Court, it was assigned for error, that here is no sufficient consideration, no mention being made that the agreement for the price was ad specialem instantiam of the defendant: but the Court inclined it was well enough; but the promise being on record, that if the plaintiff and J. S. do a-**[513]**-gree for the horse that he should be paid, which being a voluntary leaving the sale to the plaintiff, it's no sufficient consideration. Adjornatur.

88. PRISLAND *against* COOPER.

Deeds.

In action of covenant, the defendant demands no oyer, but pleads quod in articulis illis ulterius continetur, &c. which, per Curiam, as *Smith* against *Sir John Boucher*, Hutt. is ill, and his shewing the counterpart is not sufficient; but the whole indenture ought to be in Court. Judgment for the plaintiff, nisi.

89. Error, Br. 13.

Error.

Error to remove a judgment coram justiciariis nostris de Banco, and the record is coram Archer & Atkins Justices of the C. B. which, by Jones, is ill: and the writ ought to be specially to Archer and Atkins Justices in C. B. they being Judges in the change of Government: and so by Jones for the plaintiff, when judgment had in the Upper Bench is pleaded, they never say in Curia nostra; but per Curiam, it's well enough. Adjornatur.

90. DORRINGTON *against* SLIPPER.

Lieu.

Error of judgment in Palace Court in an indebitatus infra for wares venditis et deliberatis, not saying where: the defendant promised to pay infra jurisd. which, per Curiam, is error, the debt arising on the delivery, which must shew place certain. Judgment reversed, nisi.

91. PHILIPS *against* SLIPPER.

Tr. 14 Car. 2 Rot.

Lieu.

In an action upon the case upon indebitatus in the Palace Court, and promise there to pay pro diversis mercimonijs ante tunc venditis, after judgment, the not shewing where the sale was, assigned for error. Adjornatur.

[514] 92. THE KING *against* THE INHABITANTS OF YARNTON. *Ante. Saturday, May* 30.

Variance.

The issue being by special agreement, and that the plaintiff should refund money disbursed by the defendants in repairs of the high-way, by order of the Court, the Court conceived the verdict well enough, although it be not found who ought to repair. Judgment for the defendant.

93. LORD STANFORD *against* NEEDHAM. Siderf. 143, pl. 20.

Slander. March, 155, pl. 224.

In action upon the case on 2 R. 2, de Scandalis Magnatum, after judgment, Wild moved that no writ of error should be allowed in the Exchequer Chamber, which was granted: and per Curiam, it lyeth not, nor is this action within the Statute of Limitation, as was resolved in *The Lord Sayes case.*

94. THE KING *against* JUDAICUM MAYES. Siderf. 143, pl. 23.

Merchants.

On habeas corpus, the retorn was only of commitment by the secretary, till His Majesties further pleasure be known: but now the Attorny General informed the Court, that by the custom of Portugal, all traders thence to Brazele, in retorn ought to touch at Lysbon, and the prisoner had come immediately from thence to England, where the embassador complaining at counsel, the prisoner submitted to pay all the duties, and now refused; and the embassador having gone without libelling in the Admiralty, the Kings Counsel conceived it a matter of State, and the King would send him into Portugal: and in *Plagues case*, Moor, a prohibition was for the like cause refused, the Court would not let him go, without sufficient security to answer information in this Court for cheating the King, in regard the King of Portugal intends to reprise it, and defalke it out of the Queens portion. Adjornatur.

[515] 95. FEN *against* DRIVER. *Ante.*

Action upon the case.

Action upon the case for impounding the plaintiffs horses, per quod he could not have in certain loads of hay out of the field. After judgment by default, and writ of enquiry unfiled, the defendant mended, by adding a new defendant, whereby the defendant could not assign that as error, Fitz. 40, which he had done, judgment finally being (as by the course of the Court it may) before the filing the writ of enquiry. Adjornatur.

96. PARRE *against* EVANS. *Ante.*

Admiral.

Per Curiam, all the security in the Court of Admiralty is by bond to the party, not by recognovit se debere to the King: but by Wild, this stipulation is only an entry that the party acknowledgeth to owe 1000l. &c. without seal, or any person certain to whom, which is contrary to the auncient course; which was not of sum certain, but only to perform the award of the Court on condemnation of the party. Adjornatur.

97. BAKER *against* BERISFORD. *Ante.*

Rents. March, 88, pl. 141.

A baker possessed of a term, dyed intestate, J. his administrator leased to Berisford the defendant, wherein were covenants to repair, &c. The plaintiff, as executor of J. brings his action, averring payment of debts by the administrator to the value of the lease; on which the defendant took issue, and verdict for the defendant, which Allen moved to set aside, the jury being induced thereto by the information of Snow, one of the tales, whose evidence lead the first verdict also, and a party concernd, which was not regarded. And though the Judge that tryed the cause declared himself not satisfied with the verdict, yet they granted no new tryal. Wherefore Allen moved in arrest of judgment, that the rent reserved on this lease by the administrator, doth not go with the reversion to the administrator, de bonis non of A. and so the issue is imperfect; and there ought to be a repleader, as was Rolls opinion, when he left the Bench. 2. The issue on the value, must be intended to go only to the term, and not to the value of all: for so if one possessed of a term worth 1000l. and goods of 10l. and the administrator pay 999l. no appropriation of the [516] term shall be made, which is unreasonable. Wild for the defendant, When the administrator hath paid but part of the value of the term which he made (although it be more than the goods) yet there can be no appropriation of the term. Twisden conceived, that on lease by the husband of part of the term, of which he is possessed jure uxoris, the rent shall go with the reversion, and not to the executors of the husband. Adjornatur.

98. PRICARD *against* LAURENCE. In Dures Br. 1.

Dures.

In issue on bond made per minas vitæ & mutilat' membrorum, the jury find that it was per metum imprisonamenti, which, by Coleman, in debt, is sufficient to avoid the bond; minas being the principal, as the tenure, Yelverton 148. Twisden conceived this had been naught in trespass of goods, and that the special manner of dures ought to be pleaded: the Court inclined that here the dures ought to be specially pleaded; but the verdict being, that the plaintiff threatned quod imprisonaret deft. & crimen feloniæ ei imponeret, nisi, which, per Curiam, is ill, being no more then by law, he may charge him with. Adjornatur.

99. GLANVILL *against* GULLEN. *Ante.*

Slander.

Jones for the plaintiff, conceived the words actionable, as M. 32, 33 Eliz. *Pool* against *Nichols* adjudged that to say, H. is a rebel against the Queen, B. R. Rot. Curia contrà, sed adjornatur.

100.

Mony.

In action upon the case; pro quantum meruit pro mille mensuris (vini Rhenish) Anglicè gallons of such a value, which, per Curiam, is well enough; contra in trover. Judgment for the plaintiff.

101.

Slander.

In action upon the case for words spoken at several times, part actionable, and part not; the jury find intire damages, (which was moved in arrest of judgment) and Jones for the plaintiff, prayed venire facias de novo on this insufficiency of the verdict, to which the Court, Twisden absente, inclined. Adjornatur.

[517] 102. HOOKE *against* SWAIN. *Ante.*

Rents.

In action of covenant, which was for payment of the sum of 20l. per annum by quarterly payments, on marriage agreement: the defendant pleaded payment for one year, and for the rest demanded judgment si, &c. the Court conceived the duty to be during life of the grantee: and had it been to pay rent, it had been clear so; but being only of the sum, &c. Adjornatur.

103. THE KING *against* THE JUSTICES OF SOMERSETSHIRE. *Ante.*

Trades.

Foster moved to continue a procedendo (which after certiorari filed per Curiam, is regularly, granted) and to supersede a certiorari on order of sessions to place an apprentice with a draper, in the Corporation of Axam, in regard he fermed lands in the same parish, which, per Curiam they may, but not unless he be a fermer. Also its ordinary on void procedendo, or after its determined, to grant a new certiorari; but contra of new habeas corpus after a procedendo. Adjornatur.

104. DR. KINGS CASE OF COLEMANSTREET.

Church.

On mandamus directed to him to swear the churchwarden, reciting one before sworn; Winnington on 15 Car. 1, Rot. 44, *Warners case* moved that he might be excused, in regard if he should swear him, another being peaceably in, his superior will punish him: but per Curiam, they cannot punish for obeying the Kings writ; and this being a contest betwixt the parishioners about the custom, Windham conceived the official may as well swear the last, as well as the bishop may admit several, to the intent the parties may be both made capable to try the right, which the Court agreed, and granted a mandamus. Nisi.

105. THE KING *against* PARSONS.

Bastard.

Allen moved to quash an order made by the sessions for keeping a bastard child, which was made on appeal from order made by the two next justices, in which the security by the statute is lyable to perform the order of the sessions, although the former order be quasht, which order, being that the party shall abide the order of the two [518] next justices de novo; he conceived it illegal, the party having appeal'd from them: but the Court held it well enough, and that the party pay the mony till the order be quasht, and they would not hear any exception, till the party appear in person.

106. LEAKINS *against* CLIZARD. *Ante.*

Market overt.

Winnington moved for judgment in action upon the case, for fasly affirming rent of houses to be more then it really was, on communication of the annual rent of certain houses, which the plaintiff intended to purchase; had it been of rent-charge, the action would doubtless lye; and here its said falso and fraudulenter: and by Allen this differs not from the common case of affirming goods found that were rotten: but by Wild for the defendant, there is no averment that the defendant sciens that the rent was less; and per Curiam it cannot be said fraudulent, unless it were sciens, &c. Adjornatur.

[519] DE TERMINO TRINITATIS, 15 CAR. II. B. R. DIE VENERIS, JUNIJ 19, ANNO 1663.

Foster, Chief Justice; Mallet, by reason of age, was discharged last Tuesday.
Twisden, Windham.

1. FOSTER LESSE OF COXE *against* NORTLIFF.

Baron & feme. Britton 259 b. must try marriage in Court Christian first.

In ejectment, the solicitor moved for the defendant to be admitted defendant, and to stay a trial, both parties claiming as husband to the same woman, who is actually the wife now of N. the defendant, (and there was a suit pro jactitatione matrimonij by the wife in the Spiritual Court, as soon as any claim was made by the plaintiff). Jones opposed it in regard the marriage was not immediately sued for in the Spiritual Court, but only the scandal, which can be no cause to stay the suit at law: but per Curiam, the first point of this motion being to be made defendant, the rest is improper till pleading. But, by Twisden, this is no cause to stay the trial. Adjornatur.

[520] 2. *Ante.*

Admiral.

Brown on 13 R. 2, cap. 5, and on 15 R. 2, cap. that all things arising within the body of the county, shall be tryed at common law, and not by the Admiral, prayed a prohibition, those statutes being made to that intent, to restrain the Admiral from all jurisdiction on the land, and confine him to matters only done on the sea, and are declaratory of the common law: and the surmise that things were on the land, is sufficient for a prohibition, notwithstanding the allegation in the libel be, that it was done on the high sea. Wild the Kings Serjeant, for the defendant, agreed all said, but nothing to this case, which was, Ell master of a ship takes up of Parker at Lysbon mony, and pawns the ship, Ell dyeth in the voyage, Evans succeeds, and Tate received the freight, and so by the law of the Admiral was lyable to the debt: and at common law Parker is remediless, there being no remedy but against the person by action upon the case, declaring on the custom of merchants, nor that neither. Sed Twisden held he may have such an action upon the case: and supposing there be no remedy at common law, yet if the contract were made on the land beyond sea, the Admiral can give no remedy, which Windham agreed. *Tate* against *Tinker* in evidence to a jury at Guild-hall; impawning of goods allowable by the civil law, is no ground of altering property at common law, but it is good evidence of such a custom of merchants. The Court directed issue on the fact, whether the contract were on sea or land. *Post.*

3. MR. PRIN'S CASE.

Mandamus.

On mandamus to the commissioners of Corporation of Bath, to restore him to recordship there, or shew cause: they return that they judge it fitting, expedient, and for the publick good that he be not restored. Adjornatur.

[521] 4. THE KING *against* STAFFORD.

Sewers. Sinderf. 145, pl. 1.

Powis excepted to the decree of the commissioners of sewers, made for repairs of breaches by mills, and that he shall keep them flap-wise; and it doth not appear he had any estate in the mills. 2. They order, that in case of disobedience to their decree, compulsion by distress and imprisonment without bayl, which, Callis Reading 133, is against law, unless on any contempt done in open Court. 3. They order the holes of the gates to be made narrower then they were, which they cannot do on view, but must impanel a jury, in regard they might be anciently so broad; and here doth not appear any jury impanell'd. 4. It doth not appear, but that these are ancient mills, as 10 Co. 138, and so not alterable. The Court conceived the imprisonment to be void; but the other things shall be intended well enough till the contrary appears. Adjornatur.

5. THE KING *against* NEEDHAM. Siderf. 145, pl. 2.

Coron.

Foster and Windham held this Court undoubtedly may commit a pickpoquet, taken here in the hall, to Newgate immediately: but, by Glyn, its not so proper, in regard of the transferring of recognizance to Inferiour Court (which is done to the Assizes only, in regard the parties there are never present in this Court). Twisden conceived the properest way to be, to send for a justice of peace of Middlesex, and he to send him by mittimus: but they committed him to the Sheriff of Middlesex, who carried him to Newgate immediately.

6. DR. KING'S CASE, ARCHDEACON OF LONDON. *Ante.*

Church.

A mandamus was awarded to swear the second church-warden, without any clause to amove the former, and he shall not be compelled to obey any part, unless the whole writ may be performed; and so it was set aside.

[522] 7. BROWN *against* WHITE. *Ante. Saturday, June* 20.

Lieu.

In action upon the case upon indebitatus infrà jurisd. of the Marshalsey, pro nutriendo filium, not shewing where, which, per Curiam præter Windham, is ill, the indebitatus appearing to be for a particular cause, viz. pro nutriendo, and therefore it ought to appear, that it was within the jurisdiction, and is not like the common case of general indebitatus. Sed Adjornatur.

8. EVERARD *against* PORY.

Churchwardens.

Jones moved for prohibition to the Spiritual Court, in a suit against a churchwarden for breach of his oath in 1640, in the execution of his office, and taking away a table

of fees hung up in the church, whereby the duties were altered. On suggestion that the plaintiff had there pleaded the Act of Oblivion, and notwithstanding sentence was passed there against him, per Curiam; if this be no perjury, it's pardoned; and whether it be or not, is to be determined at common law: but *Pridle and Nappers case* is, that its only a promissory oath, and no perjury.

9. LEAKINS *against* CLIZARD. *Ante.* Disceit, Br. 24.

Market overt.

Winnington moved for judgment, this being of a certain thing which lyeth in the certain knowledge of the defendant, it's actionable without any special covenant or warranty, as 42 Ass. 8. 4 Co. 18 b. and this is laid to be fraudulenter. Jones agreed the rule, but not as applicable to this case: for to affirm property of goods in his own possession is actionable, because the purchaser cannot take notice that the property was in any other: but here the purchaser ought to take notice at his peril, the thing being certain, and as equal in the conusance of the one as the other. And in 33 Eliz. it was adjudged that no action could lye on false affirmation that J. S. had offered him 100l. for goods: and so on the daily sale of horses, affirming them to be good, found, &c. no action lyeth without special warranty: and the consequence hereof is a boundless inconvenience; for by the same reason the purchaser may affirm lands did not contain so many acres as is expressed, and the fraudulenter intendens to deceive the **[523]** plaintiff is insignificant, for intent is not triable, but it was farther, fraudulenter asseruit. Windham conceived this case within the difference put by Jones, and not like the case put by him 33 Eliz. nor like things of incertain value, which are not actionable. And by Twisden, Had it been laid quod sciens that the houses had been of less value in rent, he did falsly affirm it more, &c. it had been clearly actionable; and the jury having found the fraudulenter, it is equivalent with a sciens. As on sale of an horse, *Harding* against *Freeman*, 1653, one affirmed the horse to be his, and brought up by him of a colt, intendens fraudulenter to deceive the plaintiff, which being found, judgment was for the plaintiff. So where one fraudulenter affirmed he had power to sell goods of J. S. which being found at the trial, in which it's necessary that the fraud be given in evidence, it was adjudged actionable: so here; Foster ad idem: if one affirm his particular to be true, he is bound to make it so, especially laying the action that he fraudulenter & animo fallendi did affirm it true. Judgment for the plaintiff.

10.

Prohibition.

Richardson moved for a prohibition to the Consistory Court of Exeter, in suit for pension due by prescription, which, by Jones is not within the Statute of Circumspecte Agatis, as 2 Inst. 493, & Prescript. F. 91. Windham on this very point remembred a case before my Lord Coventry, ruled according to this difference, but he always thought the party had election of Court, as F. N. B. Consultation: and this case is betwixt churchwardens of several parishes which are not a corporation to this purpose: but by Windham, This makes the case against the plaintiff in the prohibition, for this may be well by constitution, and is in proper conusance of the Ordinary. And in the former case it was ruled that the vicar must sue in the Spiritual Court for indowment with such an annuity. The Court doubted the former point, but upon the last they refused any prohibition.

11. CLERK *against* NEWTON.

Trover.

Trover de trecentum uvarum, with an Angl. currans, which, per Curiam, is well enough after verdict; as 100 weight of goods, or centum ponderibus. 2. Centum & duobus quarteriis, unius centenæ, uvarum passarum, Angl. raisons, which 1 Cr. 33, is held well enough with Angl. pound weight. And this word centenæ (although

no particu-[524]-lar damages be found) goeth to three parts of four of the charge. Adjornatur.

12. WAREHAM. *Ante.*

Slander.

On insufficient damages found for words, part whereof are actionable, and part not, Jones prayed venire facias de novo, which the Court conceived fitting, although the inconvenience would then be, that in trover, as in the case before, where any part is insufficiently found, such venire facias would be taken. Adjornatur.

13. PRICE *against* ROBERTS.

Wales.

Williams moved for a prohibition to the marches of Wales, suggesting that on English bill against executors, on penal bond for 30l. for payment of 15l. they gave 15l. debt, and 15l. damages against them, to be levied de bonis propriis, which he conceived was illegal, although within their instructions, as *Sir H. Williams's case*, 1 Cr. The Court conceived these proceedings (had they been against the party himself) void, and not grantable by the King, no more then grant to Oxon, to have conusance according to the civil law, which had been void without Act of Parliament. The Court stayed proceedings till the Attorney General be informed, &c.

14. THE KING *against* VAUGHAN. *Monday, June* 22

Force.

Coleman excepted to an indictment of forcible entry, being quod per sacramentum duodecem prob. et legalium hominum de corpore comitatus, yet it begun ad sessionem (general. pacis tent. in comitat. pro comitatu prædict.) 2. It said not onerati et jurati pro domino Rege, &c. And so it may be but a petit jury. Windham absente. *Post* 525, pl. 17. Adjornatur.

[525] 15. HENACRE AND BETS *against* ———.

Slander.

Your daughters are whores, and play the whore for their silk gowns, and are J. S's whores, with special damage. Scrogs moved in arrest of judgment, that the persons are incertain of whom the words are spoken, in regard she might have more daughters: so *Slocombs case*, 1 Cr. & Tr. 14 Jac. Rot. 41. Bulstr. part 3. Barwell contrà, as *Wiseman's case*, 2 Cr. the Court will not now intend she had other daughters: and, per Curiam, it could not be better laid, the innuendo being of the plaintiffs; and when words are spoken in the plural number, all may bring actions; but when they are in the singular number, as Your son is a thief, it hath been a doubt long controverted for the incertainty; but they must have several actions, and cannot joyn. Judgment for the plaintiff, nisi.

16. THE KING *against* PRITCHARD.

Trial.

Nota per Curiam, as course on the Crown side, that till the King make default in trial where the King is party, &c. the party cannot stir or hasten the cause, nor after his default without leave of the Court, or licence of the Attorney General: and this in an information of perjury in casu *Gerrard* against *Phitton*, wherein the King's Serjeant moved the defendant might not hasten the King till all the defendants had pleaded, but the Court refused such order; but conceived that although the suits be several, yet the King may have a joynt venire facias.

17. THE KING *against* VAUGHAN. *Ante* 514, pl. 14. *Tuesday, June* 23.

Force.

Coleman excepted secondly, that the entry is said with force into one messuage, and the detainer is said to be de tenementis prædictis, which, by Windham, being a relative thing, is well enough, which the Court agreed; and inclined the first to be well enough, being only the title of the inquisition. But 3. It was quod expulit de tenement. existent (not saying ad tunc) liberum tenement', &c. quasht.

[526] 18. SERJEANT KEELING.

Judges.

My Lord Chancellor Hide made a speech to him, that the Kings pleasure was to call him to be a Judge in this High Court of Law; not in the usual circumstance of death or vacancy, but in the place of one living, who was dispenced with, viz. Mallet, on his petition, by continuance of his salary under the Great Seal, not by writ of ease. This is the great gift of God unto Kings to judge the people; and the King cannot delegate a greater part of his prerogative, then this taking a subject to himself in commission to judge his fellows: and the judgment being Gods, he is to take heed (and as incomparable Grotius) there is no more misbecoming thing to a Christian man, then seeking to be thus like God; to dispose of the blood of subjects: but I absolve you, Mr. Serjeant, from any thing of this kind, in that you could have no thoughts of it, till I brought the Kings pleasure to you; and then you received it only with such alacrity, as was fit for his service. This the King did in sight of your great ability and suffrings, and assurance of constancy in his service, of which he had had some experience before hand; and therefore the people will have great cause to thank His Majesty. Your experience here is particular, having been a child of this Court, educated under an experienced father; the iniquity of the times have introduced many presidents on, otherways men that might have been of great ability, as burning of peers in the hand, and therefore you must look beyond them: this is the highest Court, and wherein the manners of men may be best reformed; you are the Kings inquisitors to punish all horrid misdemeanors, as duels, debauchery, &c. for which I have sometimes been reproved by the King. I know you are willing to punish, but the current may be too hard for you, in regard such crimes may be gotten into great company, too hard for the jurisdiction of this Court; but the King hath specially commanded me to tell you, he will assist you with his authority to punish such transgressors. I need not put you in mind of those you leave behind you at the Bar, nor from whence you come, the omission of discipline in the inns of Court, being the greatest wound to the law; and these Courts ought to exact from them all reverence and respect, and decency; His Majesties surprising persons (as he hath done you) with such honour, is a sufficient evidence of His Majesties clemency, in that he hath done it from his coming in, unto this day, without the least reward **[527]** what ever, which I can witness with a very good conscience: and if this cannot introduce a love and veneration in the people of the Government, nothing but a desolation can be expected, and doubtless the calling so intire a Judge hither, will be a great support to the Government.

KEELING.

Although I cannot but retorn hearty thanks for so great favors, yet when I look on this Supream Court, and its jurisdiction, I am much daunted; especially when I consider the ability of the learned person I succeed; my twenty years silence may have contributed to my inability, although not to hinder my industry. I acknowledge the effluxes of His Majesties favour to be only by your Lordships goodness, from which I beg that His Majesty may know with how much gratitude and humility I receive this favour. And for fidelity and industry, they shall not be wanting.

Then he came into Court, and kneeling at the inner table, took the oaths of supremacy and allegiance, and of a Judge, well and truly to serve the King in that office, and truly to counsel the King, and suffer nothing that may be to his hurt, without making it known to him, &c. Then his patent was delivered; and then he went to his seat.

19. THE KING *against* JOHNSON.

Way.

Jones excepted to a presentment in court-leet at Stepney, in that it doth not appear the way is out of repair, nor that the defendant ought to repair, it being a common footway, which the Court quasht, without any certificate of amendment, contrà of an indictment.

20. ——— *against* STANE.

Bayl.

Nota pro regula, although it appear on the body of the record, that the cause of action requireth special bail, yet without marking the roll, common bail may be put in, but for special cause, the Court on motion may alter it.

[528] 21. DRAKE *against* BEER. Siderf. 151, pl. 18.

Lieu.

Debt in Inferior Court for rent reserved, payable within the jurisdiction for lands out, is erronious per Curiam; as when any part of their inquiry is out of their jurisdiction, and the case of *Hall and Arnold* was reversed. Polyxphen agreed this in case of an assignee of reversion, but not so betwixt lessee and lessor, as here, and 1 Cr. 143, *Long* against *Nethercot*, is in case of an assignee of reversion. Windham doubted, in regard its not sufficient that one may plead a plea that is out, which may be done in any case, which Keeling agreed; and this is like severl counties, in which case, on the personal contract, the action may be brought in either. Twisden agreed this of counties; but in Inferior Courts, the whole must appear to arise within the jurisdiction. Foster doubted an nil debet pleaded on *Ireland* against *Blackwell's case.* Adjornatur.

22. NELSON, &c. EXECUTORS OF THE LORD VAUX *against* POCKLETON.

Hill. 14, 15 Car. 2, Rot. 1104.

Assumpsit. March, 5, pl. 10.

In covenant for non-payment of money, on surrender of a tenant right, made by the Lord Vaux to the use of the defendant, and tendred by the Lord Vaux or his executors, &c. The defendant pleaded nul surrender: the plaintiff sheweth one made to J. S. to the use of the defendant, of which the defendant had no notice till after the death of the covenantor. For which cause Newdigate for the defendant, after judgment for the plaintiff, conceived this error, on the reason of 3 Cr. 825, *Stutfields case*, it being in the election of the defendant, whither he will accept it, or not; Windham according: that averment must be expresly made of notice to the defendant, and not only so, but of his acceptance, or assent, or tender to him. Twisden remembred a case about twelve years since, that where one was to be bound to J. S. he delivered bond to A. and his use, and held void unless A. tendred the bond to J. S. But the Court inclined the executors may tender, as this case is, the surrender wanting nothing but delivery of the deed: and it being averr'd that they did so, they had performed the covenant, but an accord was offer'd. Adjornatur.

[529] 23. SMYTH *against* SMITH. *Thursday, June* 25.

Dower. 3 Cr. 472, pl. 35. Sinderf. 147, pl. 5. March, 7, pl. 16.

Error of a judgment in dower, in that the proclamation § 1, is said to be at H. in the spring, and it doth not appear that that is within the parish of W. H. where the demand is: but by Weston for the defendant, This is cause why no grand cape should issue by 31 Eliz. 3, but is no cause of error. 2. That judgment was ideo consideratum est, and doth not say per Curiam, which being in Durham, which hath jura regalia, its well enough; contrà of other Inferior Courts, as Ely or such like, that are no County Palatines and Twisden cited judgment reversed accordingly. So *Thin* against *Thin*. Judgment affirmed. Nisi.

24. JONES *against* CLEMENT.

Wales.

Powis prayed a prohibition to the marches of Wales on, 11 Co. 5 b. *Haydons case;* dammages in joynt action of trespass against several were assessed, so much for one, and so much for another, which being done by the Court, in place of the jury, and also not given jointly, is ill. Twisden doubted whither they can hold trespass by English bill, although it be said they may hold debt: Windham conceived, that unless pleas had been aunciently used there, they had no power by 27 H. 8, and that is but in such manner as aunciently used, which could not be by English bill: but by Keeling, They never proceed any other way but by English bill. Foster would first see their instructions, before he would give opinion: all granted, the King by patent cannot erect a Court of Equity; but in regard these were troublesom places, causes were referd aunciently to the brest of the lord marcher, which proceedings were after confirmed by the statute: all things staid till the instructions come in.

[530] 25. HOLDY *against* HODGES.

Siderf. 147, pl. 6.

In ejectment of lands in the parish of Long-hope; the defendant pleaded that they are part, and held of the manor of Long-hope, which is ancient demean; and on issue thereon the book of Doomsday was brought in, by which it appeared that the manor of Hope is the land of the of William de Baderon, who held of the King, which, by Twisden and Keeling, doth not maintain the issue, as 3 H. 6, 8, unless the defendant had pleaded farther, that the lands are as well known by the name of Hope as Long-hope. Windham conceived the Court ex officio may examine that, and so it be the same manor it's well enough; the trial being by the Court, and the book good evidence. Foster conceived this book the trial, as the certificate of marriage by the bishop, &c. and so is 49 Ed. 3, 23, and therefore the Court cannot take notice they are the same. Respond' ouster awarded.

26. MORE *against* HAMOND.

Error.

Wild assigned for error on judgment in Palace Court in trover, that one Tanner served on the writ of enquiry on precept of the sheriff, whereas only Stannard was retorned by venire facias; and Stannard served on the jury in the issue, which being in an Inferiour Court, is not helpt by any Statute of Jeoffails, which the Court agreed. Judgment reverst.

27. COOKS *against* BELLAMY. In Devise, Br. 6.

Devise.

In ejectment by special verdict it was found, that Bower, who was lessee for 1000 years, deviseth to A. for life, remainder to P. M. in tayl, during the residue of the years, and dyeth, making A. executor. P. M. by indenture leaseth to D. for 500 years, all the estate he hath in the land, whose administrator B. is lessor of the plaintiff; after which the feme executrix marrieth unto the defendant, and then she assents to this legacy, having entred generally before, and then she dyeth, and by Powis this is good by estopel; and the difference is betwixt a deed poll and an indenture, for in that case it had been void, as 10 Co. 47, *Lampets case*, and 4 Co. but in this good, especially against all but those that have right: and had the legatee in tayl been li-**[531]**-ving, he could not have entred contrary to his grant, no more shall his executor here; and for the interest, it's such as may be released to him in reversion or remainder, or he may barr it by estople, as 18 Ed. 3, 47. 1 Inst. 47 b. grant of lands, and after purchasing them, is stronger then this, 10 Co. 50 a. *Grants case*, which is but of a bare possibility, and here is a kind of interest; also no title is found for the defendant, but only that he was administrator of the executors of P. M. The Court agreed, that if the devise recite the estate of the devisor, and their intent, that then there can be no estople. Twisden excepted to the verdict, which found that the testator gave the lands in question in Ascrit, by the name of all his lands in Ascough, which he doubted was ill; contrà of a feoffment. Windham contrà, that it is well enough. Adjornatur.

28. THE KING *against* WRIGHT. Siderf. 148, pl. 8.

Perjury.

In an information of perjury, Coleman moved for judgment, the recital of the record in the C. B. of the action, and issue, &c. where the precept was quod ven. fac. hic, is well enough. 2. The jurata was in Curia domini Regis, which may be intended as well in C. B. as B. R. And if this be after verdict, as it may be intended, it's but jeoffail; if not, it's but miscontinuance, and at worst its but error of record in C. B. which ought to have been taken notice of at the trial. Twisden, The recital cannot vary from the record below, whether it be good or bad: but however by Windham and Keeling, the defendant being convicted, cannot take any advantage of it, no more then the sheriff on escape. Judgment pro Rege, nisi.

29. COLEMAN *against* POLLARD. In Devise, Br. 1.

Devise. Siderf. 148, pl. 9.

In ejectment by special verdict, it was found that A. was seised, and devised to B. his heir when at fourteen years of age, for ever, and if he dye before the age of 21, and without issue then living, then to C. which Pl. Com. 289. 2 R. 3, 18 is an absolute fee in B. the devise for ever being void, and the other part but a limitation, which on the accomplishing of the age of 21 is gone, and (and shall not be taken for or) and Moor 13, this shall give no estate to C. by implication, there being an express limitation before, 2 Cr. 695, and this is but a contingent at the best, which is destroyed by the feoffment of B. as Dy. 330, & 354, at 21 years of age, *Soul* **[532]** against *Gerrard*, or was expounded for and, according to the intent, by Twisden; but whether it shall be so expounded here, or for and, he doubted: the Court conceived not, by reason of the word then living, &c. Judgment for the plaintiff, nisi. That it's an absolute fee, and the contingent destroyed.

30. BULSTRODE *against* HALL. *Ante. Friday, June* 26. Siderf. 148, pl. 60.

Sewers.

In evidence to a jury, it was said by Glyn for the defendant, and agreed, that to the low-water mark, wast may be parcel of a manor, but of common right it is the Kings.

31.

Peace.

Twisden second Judge, gave the charge to the grand jury of Middlesex, sedente Curia, Gentlemen of this county, which hath a greater priviledge than any other, receiving your charge immediately from this Court, which is a pattern to all others, and so should you in your vigilancy in the punishment of vices here, being a greater confluence of wicked men than in other places. For particulars, 1. High treason, so called, as being against the King, and also because all the politick members are hereby affected, and whosoever doth compass or imagine the death or deposition of the King, either in his natural or politick capacity, which are inseparably united, and hurt done to one, is so to the other, it's treason. And if any go about to raise war, under what pretense soever of reformation, it's as well treason as actual war, and the support of the Kings person is the fundamental law of the kingdom. All such as counterfeit his seal, or adulterate his coyn; or if any indeavour to absolve any subject of his allegiance, which is as natural as a son to a father; or such as seek to reconcile them to any forreign power. Also 2. Petit treason, so called, for that it carrieth a rebellion with it. 3. Of all felonies, murders and manslaughters, more especially of duels, now so frequent, which, unless looked after, will bring us to the same danger as in France, that we cannot walk late at night. Of all buggery, witchcraft, poysoning, &c. 4. Of all robberies, which are now grown into a kind of corporation; these you must present. In Alfred's time one might have left his purse on a tree, or on the road, and found it the next day. Also burglaries, which now go in companies enough to surprise a little village: these are capital offences, and there-**[533]**-fore strictly to be enquired. 5. There are others, that like gangreens, if in time not prevented, will soon overturn the State: this is a Court which is to correct ill manners, and therefore you that are the eyes of the kingdom must search and find all debaucheries, which are now done in the face of the sun; you may not discover what is revealed to you, and what you do is the act of you all, and therefore you may safely deal with any offenders; especially you should look to stealers of children, which is not made felony, in regard none could think men would be so vile; as buggery was not capital till H. 8, his time, for the same reason these children at best live in perpetual slavery. Also of all that libel against any particular persons: and such as enter with force, by what title soever; and of all batteries and injuries to men: also in Courts of Justice, all corruption, as well in the highest as the lowest ministers: and all extortion in officers, receiving more then they ought, or before due; or when they ought to have nothing. Of all perjuries and subordinations, which are now common: as also some persons that will not swear at all; on the first our lives and fortunes depend; you are inquisitors to find out these vices, and to present them. Of all maintainers and buyers of titles, and of forgeries, which thirty years since was rare: and of all frauds and deceits in bargaining and selling with false weights; or such as by combination endeavour to inhance the price of victuals, and in particular such butchers as are common grasiers, which is a great oppression, and in all particular persons whatsoever; also all forestallers, which is now common, these lye out five or ten miles off the city: also regrators, buying by poulterers, as of carriers, before they unlade to sell again. Also of all common cheats, and such as live by their wits. Of all defects in officers, constables, and how they punish vagabonds, and watch duly, and enquire after such as lodge rogues in barns, and present all, that they may be punisht. Of all inmates, and offences in high-ways; and of the number of horses in wagons; of all incroachments made into the streets by shops; after hostlers and horsmeat: of all nusances and bridges, and alehouses, and offences there, and whether they be supernumerous, or in inconvenient places, in which cases licence cannot support them. So of gaming-

houses, as Spearings in Bell-yard, near an inns of Court, whereby the youth are withdrawn: of all taverns, which in Jones's time were but two in Holborn: of all tipling and disorders. Also of all that use any other than the Book of Common Prayer, or refuse that, or speak ill of it. Of all such as refuse to come to **[534]** church; the statute of 12d. a Sunday would reach Quakers, and all. You must present no man out of malice, nor spare them for favour.

32. THE KING *against* SPEARING. *Ante. Saturday, June* 27.

Bastard.

The defendant consented in Court of Record to keep a bastard child, if after he neglect, an attachment lieth. Also by Keeling, if certiorari go to remove any record, if no prosecution be, nor the party cannot get it retornd within four terms, a procedendo shall be awarded, and after that no new certiorari ought to be granted: but if it be, and the record be retorned and filed, no procedendo can after be awarded. Adjornatur.

33. GWIN *against* ———.

Assumpsit.

Williams moved to insert particulars for better caution in indebitatus pro diversis bonis & catallis 8l. which the Court granted; and had it been pro mercimonijs & merchandisis, it had been good.

34. THE KING *against* COSTING. *Ante.*

Bastard. Siderf. 149, pl. 14.

The party being present in Court, Baldwin excepted to an order of justices, being not made the next sessions after that of the justices on which the party gave security to obey the order of the next sessions: but, per Curiam, the order of the first justices is good enough, which Jones for the defendant agreed: but there being no appeal by the party, the sessions on confirming the first order, cannot order new security: but by Wild for the King, the first was quasht, and so by 3 Car. cap. 4, the sessions have the same power that any two justices out of sessions. But, by Twisden, hereby they cannot require security till default be made in performance of their order; but if they might, they may refer the value of it to the discretion of any other justices; and the order may be good, although as to the security it may be void, those being distinct clauses; but contrà where in the body of an order is to perform several things; yet *Slaters case*, 1 Cr. 470, it may be good as to one, and void as to another. Keeling held the order perfect, and the ac etiam also, that the reputed father of the bastard should put in security, **[535]** such as, &c. is nugatory. The Court confirmed the order. *Post.*

35. COLLINGWOOD *against* PACE. *Ante.* In Denizen, Br. 7.

Alien.

In the Exchequer Chamber, Witherington Serjeant for the plaintiff, R. alien had issue R. N. J. and G. aliens, R. had issue daughters alien, J. was after naturalized by Parliament, after 7 Jac. G. was naturalized, and had issue the lessor of the plaintiff born in England, the defendant claimed by escheat: the only question is, whether G. shall be heir unto J. Earl of Holderness, his elder brother, which he conceived he should on the foundations of natural and civil blood, the last being the line and support of the former, which Pl. Com. 304 is the foundation of all laws; the brothers may be auncester to each other, and so as in cosinage 15, & Kell. 59, need not name the father in a mortdancestre, 28 H. 6, 34, they shall not joyn battel: and Stamf. 57, the one shall have appeal of the death, as of his auncester: and although they derive

no blood from each other, yet they are of the same blood. It's petit treason for the son attainted to kill the father, 3 H. 6, 55. Denizen, Br. 1. Feme of alien shall not be endowed; but this is grounded only on our particular laws: for by the law of nations they are in equal ability to take by discent, as others, Dy. 224, having the same natural blood, they shall be sworn in leet, 14 H. 4, 19. 1 Leonard, 47, that a confirmation to an alien binds the King, the alien having a good estate of freehold, till office found. 2. For the civil blood, they have the benefit of the same parent the Parliament; which had it said, that G. should have been heir to J. S. and J. to G. there had been no question in this case, and in saying, they shall be as natural subjects, it doth tantamount natural, being to be intended natura generis, and as large as if born in England, which, as the Statute of Uses, doth extend as far as if he were a subject born, as that doth to enable trespass, as if the party were in possession. So 20 H. 8, cap. 6, of persons deraign'd, that they shall be as able as if never professed, doth enable them to take by discent: and these are not bare terms of similitude, but of identity, as count in formedon of discent, ut filio, &c. or the word talia in pleading or office, unless it refer to other things in certain. This naturalization is the same with that of the Duke of Lynox, and he died without issue (and his heir now enjoyeth the lands) Dy. *Grays case*, act that one shall be heir to his father, he shall also be **[536]** heir to his uncle, so large is the exposition of these statutes, as 3 H. 6, 55, to make such natural blood inheritable, creando infunditur & infundendo creatur; and the lord by escheat hath given his assent inclusively in this act, without which, Stamf. 95, alien cannot be made inheritable, Grotius 161, de Jure Belli, cap. 10. As to the impedimentum paternal, it holds only where the sons must claim under them; and the personal blood remains, so that covenant to stand seised by one to the other, were good; or if one be kill'd, the other shall have appeal, Dr. & St. 81. So in any case where the father need not be mentioned, as here he need not. In the case of *Edwards* against *Rogers*, it was adjudged, after long depending, that the fine of such father (although he were named in the discent) doth not barr the son, claiming from his cosin; that he hath no disability of blood, but only of policy, is demonstrated in that his issue born in England shall inherit, and yet he hath no other blood then that of his father; and it's as reasonable that an alien may have collateral, as that he may have lineal heir. In the case of Stephenson in the Dutchy Chamber, it was held that 25 Ed. 3 shall be taken distributivè: so that issue of Polish feme by English merchant in Poland, was by all the justices, as Yelverton reports, held inheritable.

2. Maynard for the defendant, John purchases the lands in question, and dyed without issue, the point is only, three brothers aliens, the eldest hath issue born in England, the youngest is naturalized and purchaseth lands, and then the second is so; then the youngest dyeth, and whither the brother, or the son of the alien shall have the lands, is the question. He agreed, 1 Inst. 8, in case of attainder, they may inherit; also that Parliament may enact, that J. S. shall be heir to the remotest stranger, but this must be by special words, which are wanting here: for their naturalizing them doth not ipso facto make them inheritable to each other, more then if they had been subjects born: for this is the foundation of all; and the civil blood is but creatura humana and a superstructure on the former, and so must have some common fountain, whereby they are enabled to claim by discent, for in discents, the law hath regard to some subjectum commune, from which they both derive, they cannot be brothers, nor derive jus sanguinis fraterni, without a common father. And Cooks opinion, 1 Inst. 8, is founded on a collection of almost all the books, that speak of this subject; aliens are not persons disabled, but persons not existing: and this is the reason that the fathers, **[537]** being alien, will not hinder the discent to a son: all that have possibility to inherit each other, are linked by aliquod commune vinculum, which is not ipse sanguinis, but jus duplicatum thereof. And in the computation here on gift in frank-marriage, the stock must begin at the father, as to all things else, they shall administer one to another: but in discents, is aliquid sacrum; and to make them capable immediately from each other, is to make a new auncestor, that as to him, had no right to have such discent made from him. The objection that the law regards only the first purchase, and the last seisin, is but petitio principij; for it's not sufficient to say quod discendit jus ut fratri, but ut fratri & hæredi; and in the last word lyeth the weight of the pleading, which taketh in as well the civil, as natural blood. So in

case of bastardy, the discent ut fratri & hæredi is not traversable, but the bastardy must be specially pleaded, as a particular reply to the hæredi, and because its to draw the tryal to another jurisdiction: there are many ways of being cosens, therefore must every one shew coment; contrà of brothers, they can be but one way; but coment heir (which may be various) is here shewed. It might be a quære if the elder brother purchase lands, which by his death discend to the uncle, and the father is attainted, and then hath another, whither hereby the lands shall be revest, is a question. Cooks opinion may well ballance the case, 2 Cr. 502, of *Dixon*, and there had the father not been denizen, the case had been like this, by the eldest brothers fine, in the life-time of his father, tenant in tayl, surviving the father, the younger son, *Bradstock* against *Scobell*, on the reason of the statute, that in formedon he must claim as heir, is bar'd. The pedegree and degrees of consanguinity, as they are in fact, are the lines which draw the discent from one to the other, and is the measure of it. 2. All the words of the Act are fulfilled, in supposing the naturalized to be a subject born; it differs but as manus expansa & contracta. There are indeed general words, that his heirs (wheresoever born shall inherit) which may possibly take in any alien heir; but as to the person naturalized, there is nothing more. Moor. By being made a corporation to purchase lands of 100l. he may purchase lands of 1000l. So here, he being denizen for a minute, or to one intent, is so to all. And doubtless, this Act never intended to make new ancestors, unless he had been named as an alien, that had alien brothers, or alien father, but it only takes off his personal disability. I hold, that if one that is no merchant have issue beyond **[538]** sea, its alien, especially if he went contrà prohib. Regis. Also I affirm, that feme of an alien is dowable by 2 H. 5, cap. expresly, see L. Co. 31, contrà; the Parliament takes notice, that there might be collateral heirs in the notion, so prayed, judgment for the defendant. Adjornatur.

36. BOUCHER *against* ———. *Monday, June* 29.

Prohibition.

A prohibition was prayed to the Ecclesiastick Court, suggesting that he was chosen by the Prebend of S. and his lessees, and B. claiming by the dean and chapter came to the place where the official used to sit, animo sedendi, and was disturbed in denyal of the keys, by the official of the lessee. The Court conceived this a temporal act, punishable by action upon the case: but unque accouple, or nient sa feme, when by such tryal the party may be lyable to adultery, is tryable in the Spiritual Court; and the Court denyed a prohibition.

37. THE KING *against* BURGES. *Ante.*

Force. March, 6, pl. 12. Siderf. 149, pl. 11.

In indictment of forcible entry removed hither by certiorari, the defendant by protestation denying the force, for plea against restitution, alledged the statute of 31 Eliz. cap. 11, and the party indicted may traverse any allegation of seisin for years, or of estate continuing, 2 Cr. 52, *Lodge* against *Fine*. Winnington pro Rege excepted, that such person being lessee for life, hath not shewed coment when his estate began, which is necessary, when the title depends thereon, for which cause the King demurred: but, by Jones for the defendant, its needless to set forth any title, for so any possession, be it by right, or by wrong, have been three years, its sufficient within the statute; the Court inclined that this is well enough: but by Keeling, its not said that the party indicted was possessed three years, but that his Mr. J. B. a mere stranger, was possessed, by whose authority he entred, and although that he may be servant, or other, acting under the party himself, yet this three years possession is taken strictly. Windham conceived this would let in the same mischief that was intended to be prevented, if such plea should not be admitted. And by Twisden, for a forcible entry by my servants, there can be no others indicted but they that were there, and so the chief person concern'd **[539]** may be left out by fraud. Foster agreed the possession of the servant to be the masters; but this Act shall not be

expounded in favor of force; also by Keeling, the statute only secureth forcible deteiners by such as have been in possession three years, but not in favor of forcible entries. Adjornatur.

38. PRINS CASE. *Ante.*

Mandamus.

Powis excepted to the retorn of his mandamus, 1. Because the commissioners have no power to act by the Statute of Corporations, in that it appears not that the commissions issued out before the twentieth of February, and the date ought for this cause to have been special, because this commission is but a bare authority, as an award by arbitrators: so commission that issueth to enquire of what lands J. S. (attainted with forfeiture from 1 May) hath, must shew the certain day, and so Pl. Com. 479 & 485, *Lovells case* wherever any express commission is given, they must; contrà of an escheator, or commission given by law, that need not be precisely pleaded. Also if the commission do not thus shew its date, the party is remedyless, for here is no false retorn, and so no action upon the case lyeth: and if it, being defective, be taken for a good retorn, the Court cannot restore him; so if he were turned out the last of February. 2. There is no cause retorned why he was turn'd out, which ought to be at common law: and so likewise on this statute the commissioners being made hereby Judges, which is always ex causis, and cannot be without premises, the commissioners may hereby remove for other causes then at common law, but they must shew some, or else this inconvenience would follow, that the Kings best friends may be turn'd out, and their private friends induced. Also these commissioners are without appeal, and therefore it was never the meaning of the statute that they should turn out without cause. That which is retorn'd, that the commissioners judge it not expedient for publick safety that he be continued, therefore they turnd him out, this is but a judgment on effects without cause, for they ought to shew, for what cause it was so dangerous: also it doth not appear that the party was ever summoned, which is necessary by this statute 11 Co. 98, *Bags case.* Else no question can ever arise, for decision whereof, the statute is made: also it cannot appear how they are affected, unless they be summoned: this from the preamble. 3. From the body of the Act, its against natural equity to judge without hearing and summons: and **[540]** hearing the parties, is implyed in the commission, as the making a Judge, constituimus te judicem, in which is implyed that they should judge according to right, which they cannot do without hearing, the statute 11 H. 7, cap. 3. 4 Inst. 40, 41. 2 Inst. 51, is like this in penning, whereby Emson and Dudly proceeded, without hearing parties; but there is a remark on it, and such an arbitrary power would make the statute void. Every recorder having a freehold, cannot by Magna Charta be turned out by any Act of Parliament, without hearing 42 Ed. 3, cap. 3, especially where words are dubious, such exposition shall be made, as may stand with Magna Charta, and the contrary is against natural equity, L. 5 Ed. 4. 40 Hub. 87, and like a power given to hang or execute men, as they shall think fit, which is but only a greater penalty, and alters not the sense of the word, or meaning of the statute. This is like the Statute of Sewers, 6 H. 6, 5. 23 H. 8, 5, wherein they are authorised more largely then in this case, yet they are bounded by law and reason; and 5 Co. 100. 10 Co. 140 they cannot judge, but according to rule: and the word discretion is more large then the word expedient: and therefore in such case they must act by rule, à fortiori here: also these are not sworn, as those are: so 12 R. 2, 13. 4 Inst. 41. And the Parliament themselves can judge none, without being heard, as 18 Ed. 3, *Mortimers case*, or without summons; so 18 Ed. 3, Rot. 13, *Earl of Arundels case*, both those judgments being without accusement, or hearing, were reversed; much less can Inferior Courts proceed without hearing or summons. Jones for the commissioners agreed, that in pleading omission of date is fatal, but in retorns, its sufficient that they be substantial, remedy being to be had against them if they make it false. Also they could not do it by vertue of their commissions, unless they did it in due time. 3. The Act hath reposed a trust in the commissioners, for breach of which the party is remedyless: also the statute is not, that if it shall be expedient, but only if it be so in their opinion, whether there be cause or not, and

for this reason, there is no use of summons: and here were secrets of State in this Act, and they intended not a judicatory, as at common law. Keeling held this retorn good, being by the mayor, and not by the commissioners, yet he was one of the persons to whom the writ is directed, and so well enough. Also commission may be good enough after the 20th February. Also the causes why no particulars were limited, for which only they might turn out, was because the House was unwilling to rip up any old sins pardoned by **[541]** the Act of Oblivion; also whatever any legislative power say, we must think fit; contrà of a power only judicial. Windham held the date of the commissions doth bind their power, being particularly given; but this shall be intended, being said by virtue of the statute. But 2. He doubted that they ought to retorn a summons, or that they judged it not expedient so to do, and the Act saith nothing to the contrary: as the Act for the Militia, that men shall be fined ad discretionem on default of arms, shall not be construed good, without summons of the party: and so in all expositions of boundless commissions given by the late irregular powers to justices. Twisden agreed with Windham; Foster with Keeling. The Parliament being sitting, the Court conceived the best way to pray advise of the Lords in Parliament for exposition of the Act, and not to give any opinion in it during their sitting. Adjornatur.

39. THE KING *against* STAFFORD. *Ante.*

Sewers.

Smith for the commissioners of sewers, that its not material to shew what possession the defendant hath in the said Oldbury Mills in comitat' Cloc. this being 12 Ed. 4. present on their view, as the case of Wisbig, 1649. And 2. The decree may by 23 H. 8 be as well on view, as by inquisition, as 1 H. 4, cap. 12. Also that the miller, on opening any of these gates, shall be imprisoned, which is well enough, being a contempt to their law out of Court, and for which the commissioners may fine, and consequently imprison for a time certain, but not quousque finem fecit, because the fine is leviable only by estreats of the Exchequer. 2. Admit this is void, yet the decree is good for so much as is well awarded, as an arbitrement of more then in the submission. 7 Jac. *Laurence* against *Car*, The Court overruled all the exceptions, only the imprisonment, and left them to be tried on issues: also that all the rest of the decree is good, but only that: also they need not set forth that the mill was erected since Edward the Firsts time. The Court ordered trial should be of the right, by taking issue on what they have retornd. Adjornatur.

[542] 40. PARRE *against* EVANS. *Ante.*

Admiral.

Glyn insisted upon it, that this bond in certain sum of 1000l. as stipulation to pay condemnation in default of the party, is good, and according to the constant and auncient course. Powis on search affirm'd, that this course began only in the time of Queen Eliz. and aunciently they used to take only stipulation in sums incertain to see the decrees perform'd; and this security by bond of certain sum, Noy. 24, *Records case*, is the same recognizances on which all former prohibitions were grounded. Glyn agreed it would be void, should they proceed to levy the 1000l. on the lands, &c. but they never do so, but only proceed in the cause for the condemnation. But, by Foster, This cannot advantage them more then the ancient stipulation, unless in that they may proceed on the bond it self, as at common law, which Twisden agreed; so Windham; and that stipulations were the auncient course; and whither in a sum certain, or uncertain, is not material, but they might use both. Keeling agreed with Foster, that its needless, and not fit to alter the old way of stipulation. Adjornatur.

41. POPE *against* RAMSEY. *Tuesday, June* 30.

Slander.

In suit in Spiritual Court by parson, for calling him knave, and a noted knave, and prospered in the world accordingly, and he cared not a turd for him. It was moved to stay prohibition, that the suit was only pro reformatione morum, as 1 Cr. 457, *Pew* against *Jeoffryes*, it was staid quousque, the Court inclining the suit well lay.

42. HOST *against* OAKEMAN.

Slander.

Action upon the case was brought against feme (on a question asked her per quendam ignotum) Did J. S. the plaintiff ravish you? She answered yes. Had he the use of your body? She answered yes. Whereupon the plaintiff brought his action against baron & feme. Foster conceived, in regard the person is found to have done it falsò et malitiosè, and without any legal authority, it's a scandal; contrà by Twisden in the case of Emme, where one that had a child at nurse came to a surgion, under whom she was reported to be **[543]** in cure for the pox, who on enquiry told the father she had the foul disease, which was held no scandal, it being not spoken malitiosè, or with intent to scandalize her; and Bacon directed him to be found not guilty. Adjornatur.

43. GWIN *against* GWIN. *Ante.*

Error.

Baldwin for the plaintiff in the writ of error, that the record is well removed, being betwixt the same parties, and of the same lands. And the president in Cr. is verbatim the same. But by Williams for the defendant, The cursitors affirm their course is always in such certiorari's to express the particular nature of the writ, as it's protested to be followed; but the Court conceived it well enough: whereupon Williams affirming the judgment below to be right, quod habeat terram et teneat to him and his heirs, prayed a new certiorari for this diminution. Keeling, The course is never in such Superiour Courts to alledge diminution in the judgment, or any plea-rolls that remain with the prothonotary, and are hither translated; but of any other rolls, as of the original, &c. they may, which the Court agreed, especially being to reverse the judgment; but to affirm the judgment it may be alledged. But by Windham and Keeling, no diminution can be alledged in the judgment it self, although it be to support the judgment; contrà by Twisden. Also this, if it might be alledged on in nullo est erratum pleaded, is in discretion of the Court to grant, or not, and is never granted to reverse the judgment, but ad informand. conscientiam judicis to affirm it, yet when it comes in, it's made use of to reverse it, as was resolved 2 Car. in a famous case. Judgment reverst, nisi.

44. FRIER *against* HEN.

Assurance.

In ejectment on special verdict, the case was, Sir J. Packington conveyed to feoffees to the use of himself for life, remainder to Sir A. Ashly and his heirs, &c. lessor of the plaintiff, during the life of Sir John Packington; after he becometh a delinquent, and is ordered, in satisfaction of his composition, to levy fine to the Corporation of Aylesbury, ten years after which he in remainder enters for a forfeiture, and whether by the Act of Judicial Proceedings, 13 Car. 2, cap. their nonclaim be saved. Winnington for the plaintiff held it was clearly, the proviso extending to all persons whatsoever, their heirs and feoffees and trustees, **[544]** parties to the fine: and on the forfeiture committed, the feoffees cannot be said trustees for him, but for the remainders. 2. This

saving shall be applyed to any sale made by colour of any order, &c. of Parliament, or convention, &c. so that if tenant in tayl's lands were sold for his loyalty, his issue shall not be barr'd, no more shall any in remainder. Jones for the defendant, 1. These lands are not sold within the meaning of the proviso, which was intended to be applyed only to sales by the trustees of Parliament, of lands taken away from such by them, but not to extend to any case where the party himself had conveyed, although it be conveyed out of a fear of this order: but the order doth not mention these lands in particular, nor any particular estate or manner of conveyance, so it cannot be said by colour of that. However here is part of another consideration then of the fine remitted, viz. 5s. mentioned in the deed to be paid (but not so found) but only the deed in hæc verba. 2. The parties to the fine could not in those times avoid it; but the persons in remainder had remedy then to claim their estate. As if H. sequestred had been disseisor, and levied fine, the disseisee would not have had any new five years; and the remainder-men here have but a trust to support the others, who may yet enter after the death of tenant for life, so only the delinquent is at prejudice. 3. The verdict is insufficient, they finding the bargain and sale by deed inrolled; and that fine was after levied, but do not say when; so that if it were after enrolment, as *Hind's case*, the party is in by the bargain and sale; contrà if it were before: yet he agreed, that if the bargainee of tenant for life accept fine upon conusans de droit, come ceo, it's a forfeiture; but not so on fine sur conusans de droit tantum: but, per Curiam, this can be intended but one conveyance. Keeling conceived the Act intended only to remedy such delinquents as were no parties to fines, nor had given their assents thereto, but were estrangers, and could not make any claim till now: also these trustees being made to preserve a use to the heirs of Sir J. the remainder to Sir A. Ashly for life of Sir J. the remainder to the feme of Sir J. for life, the remainder to the first son of Sir J. &c. may not be said his feoffees; nor yet they are not barr'd by his fine, even by the law of those times; which the Court agreed: and by Twisden, those times would as well have compelled the trustees as the party himself, or else they would not have remitted his fine. Adjornatur.

[545] 45. DR. PORYES CASE. *Ante.*

Perjury.

The Court conceived this perjury in promissory oath, as well as in Chancery, to be within the general words per jury, excepted in the Act of Oblivion, for which cause they would not award prohibition: for as *Brunkers case*, such perjury was punishable in the Star-Chamber, and so may as well in the Spiritual Court, pro salute animæ. *Post*, 547, pl. 51.

46. THE KING AND HAYES *against* THE INHABITANTS OF WOODFORD, &C. IN ESSEX. *Ante. Wednesday, July* 1.

Common.

In writ on the statute of W. 2, cap. 46, the inhabitants of the vills adjacent being admitted to plead, after mony levied, &c. issue is taken that the said sepes & fossatas were pull'd down in the night, or at such times when the plaintiffs could not take notice thereof. The defendants having pleaded that they pull'd them down in the presence of the plaintiffs. And in evidence to the enquest now, it was observed, 1. That no evidence can be given after the date of the first distringas; also (and) in the statute, or (or) in the issue, are all of the same sense. Jones for the defendants conceived, that if they were broken down in the day, it's not within this law, especially not by reason of the plaintiffs absence from his dwelling: also on issue of pulling down sepes & fossatas, evidence cannot be given that pales were pulled down: and per Curiam, in this special issue the defendants cannot prove that the plaintiff is no lord of the manor, but that J. S. is lord, as on not guilty pleaded they may. Foster and Twisden directed, that it must be either done in the night, or else secretly, and by such persons that cannot be known in the day: also this offence being in forest, where

the keeper may come always, it had not been within the statute on not guilty pleaded: but on this special issue nothing is to be enquired, but whether the parties did it with intention not to be discerned, as skulkingly in the day, and when the owner might not find them. Keeling agreed that it's not material whether done in the night or day, so the parties be known, or that the owner have any notice of them.

[546] 47. THE KING AND PRIMATE *against* FENWICKE AND HOLT. *Ante.*

Perjury. Siderf. 149, pl. 13.

Glyn moved for a new trial for perjury, the defendant, for whom the first verdict went, having suborn'd, and by practice laid great actions, and arrested the witnesses that they should not come, which appeared by affidavits. Windham conceived there ought to be a new trial, and that fraus neminem patrocinari debet, and is not like the case of life, but on bare absence of witness none shall be granted; Keeling contrà; and that the imprisonments, having been a long time before, viz. 13 May, when the trial was 15 June, it was cause to stay it, but not to avoid it; but the King ought to inform against such person for contempt, which is better and less hazardous; and new trial (unless for misawarding of venue, which may be done, as *Arundel's case*, in case of life) is without president; so Twisden; but he would have the first verdict staid from entring, till the trial of the practise by information, especially there being no other ground for it then affidavits; Foster accordingly: and Windham conceived this way very expedient; the case of Tourner, nor of the leather-sellers are no fit presidents, a new trial being granted by consent. *Post.*

48. THE KING *against* COSTING. *Ante.*

Bastardy. 1 Cr. 343 & 350.

Keeling on perusal of *Pridians case*, *Hazelings case*, *Hamonds case*, and *Smyth's case*, 6 Car. said that on the first order of justices for keeping a bastard, the security by 18 Eliz. is to abide the order of the next sessions, and no other. And if they affirm the first order on appeal, or adnul it, still the first security only remains, and no other can be taken of him, or any other person that shall appear to be the reputed father: and in this case the justices of a third sessions have nothing to do to discharge or affirm the first order. Twisden conceived the next sessions to be meant, cum grano salis, viz. the next of that division where such offence is in Kent, or Sussex, the justices of the western division never coming to Canterbury, nor contrary, although both be pro comitat. And this did Lambert, who was a learned man, and Sir William Eyely, a fearful man, held them; Windham accordingly, as in Wiltshire, his country, is used; also although the clause of new security be void, yet it's good for the rest: so Foster for Sussex, The next must be intended the next sessions fit for that occasion; and this is the truest sense of the **[547]** Act of Parliament. And per Curiam, the order was confirmed præter that clause of new security should be quasht, and the first security stand; but by consent the order was wholly quasht, and security put in here to abide the order of the next sessions, and to pay the church-wardens their charges, the rather for that Keeling insisted, that the order ought to be at the next sessions precisely, unless where the law takes notice of any particular divisions, as in Yorkshire. Also he conceived, that where any part of the order goeth to the whole (as here the imprisonment) the whole order ought to be quasht: sed Curia contrà when the clauses are distinct.

49. VANGANGELL *against* BROWNING. *Ante.*

Alien. Alien shall not have a tales de medietate, unless the first ven. fa. were so. 3 Ed. 4, 11 b. pl. 3.

If the defendant be an alien, on notice given by his attorney to the plaintiff, or his attorney, the plaintiff ought to enter it on the roll, to have trial de medietate at his

peril; but the Court refused to award it for the defendant, on his affidavit that he is an alien.

50. SHIRLY *against* DOBSON.

Visne.

Nota pro regula ex motione Stroud jun. That venue on declaration delivered before essoin day may be changed that term any time; but if declaration be delivered before, &c. as of the last term, or within the last term any time after the essoin day, the defendant may change it any time in eight days within the term following, but not after, but by the act of God.

51. DR. PORIE *against* EVERARD. *Ante* 545, pl. 45. *Thursday, June* 2.

Fees.

Wild moved against a prohibition, which was granted, quoad a table of fees taken out of the church by the churchwardens in 1640, being pardoned by the Act of Oblivion, affirming the Act was never pleaded there; and besides, this is a kind of sacriledge excepted in the Act. Jones for the plaintiff granted it, had the controversie been for the table it self, but this is for a fraudulent altering the fees. Also it appears by the libel it self, that the first Judge disallowed the Act, but he confest that on appeal they had not offered it de novo; but the dr. ought to take issue on, or demur to the suggestion, which Twisden agreed in omnibus; **[548]** and that the property remains in the parish, as of communion plate, and recoverable at common law with damages; so Foster. Windham agreed that it's suable for at common law; but yet it's sacriledge to take away any thing hung up in the church, and the Spiritual Court may punish it now pro reformatione morum, which Twisden agreed as a crime, but here the original is pardoned, and so the continuance of it. Windham contrà, that it's not pardoned, being utensils; and if it were, yet the continuance is a new crime, punishable pro reformatione. Keeling conceived, that wherever offence is punishable at common law, as debt for subtraction of tythes, it's not to be punisht also in Spiritual Court pro reformatione morum; Curia contrà, as for beating a clerk, suit may be in both places. Wild offered now to accept the plea, but the former Judge having refused it, Jones conceived that they could not now accept it: the Court directed them to take issue, or demur on the suggestion.

52. THE KING *against* WARD. *Ante.* Siderf. 150, pl. 15.

Coron.

By inquisition it was found, that one Reynolds was possest of a term now in possession of the defendant, and that in 1648, he became felo de se, and that after the King pardoned all felonies, 12 Car. by Act of Oblivion, excepting murders; and whether the goods of felo de se, whereof no inquisition was taken before the Act, were pardoned, is the question. Keeling conceived that the party was not capable of a pardon, and so could not be within the exception, the intent of the Act being only such murders that were punishable as examples; but this is within the words of the pardon, quoad the goods, there being no inquisition; but if there had, they could not be discharged (being actually vested in the Crown) without a special restitution. Windham agreed it's murder, and more then murder, yet so is petit treason, which Dy. is not excepted by such words, having a peculiar notion and nature, and of another appellation; so hath felo de se; Twisden agreed. Foster contrà, that it is excepted, and it's by his own act that he is become incapable of pardon; and the end of law is, that pœna ad paucos metus ad omnes pervenerít, which cannot be satisfied without this punishment; and the King is intitled by the death of the party, and that after office is but for instruction. Mallet, when here, did accord with Foster: but now, Keeling being of another opinion, judgment for the defendant, nisi.

[549] 53. WHEATLY *against* THOMAS. *Ante.*

Patents.

In ejectment of the manor of Cooling on special verdict, Glyn for the plaintiff, G. Lord C. and Tho. his brother. G. had issue eight sons and two daughters, and G. Lord C. devised to Sir William B. his eldest son for life, remainder to his first son, &c. in default of such issue to G. his second son, and so to all, and after to the daughters for their lives, and after to the first son, &c. In default of such issue, to the heirs of the body of Tho. his brother; in default of such issue, to the general heirs of the body of the first, and so of the eight sons, the remainder in fee to Edward the youngest son. G. Lord C. dieth, then William Lord C. the eldest son, who had issue H. and G. and four daughters; then he died, and the lands descended to H. and the uncle, and the brother Edward being dead, he had three estates in him in special and general tayl, and in fee: then H. and G. are attainted of treason, and all these estates are forfeited; then all the brothers dye without issue, and the daughter of William, who was the son of G. being heir to all the estates, is lessor of the plaintiff, after the attainder of H. now Lord C. and G. was found by 3 Jac. and G. was executed, and hereby they were to forfeit all, and that the King shall be in possession without office, with proviso to save leases made by the King since the attainder: also there is a proviso of the lands in question, saving them to Duke Brooke and his heirs males; and for want of such issue, to the heirs of the body of William. Adjornatur.

54. BAKER *against* WESTCOM.

Maintenance. In costs, Br. 23.

Stroud moved for costs for the plaintiff on the statute of 18 Eliz. 2, of Maintenance, which giveth them generally. And 4 Jac. giveth it for the defendant: this action is tam quam, but it only demands damages to the party, not any moiety: whereupon the Court gave damages for all.

55. COLLINS'S CASE.

Mandamus.

Raymond moved for a mandamus to restore an attorney within the liberty of St. Martyns le Grand, to be directed to the steward there, et ei conceditur per Curiam.

[550] 56. WOOD *against* TOURNER.

Records.

Per Curiam, the course of the Court is, that whenever the plaintiffs attorney hath notice to bring in the postea, if he putteth it not in till the last day of the term (as here) the defendant shall have four days to move in arrest the next term, and judgment shall stay, without shewing any cause; and being signed immediately after the term, it was vacat.

57. HODGES *against* HOLDI. *Ante. Friday, July* 3.

Ancient demean.

In trespass in A. the defendant pleads that A. is parcel of the manor of Long-hope, which is ancient demean, and prayeth it may be tried by Doomsday book, which was granted: and now in that book it appears the manor was Hope only, which being trial by record, as 9 Co. *Strata Marcella's case*, it's a failure; Pl. Com. 18 as any variance in person or time is also. By Symson for the plaintiff, They might have pleaded conus by one name and the other, as 22 Ass. 45, which would be triable per pais, but now it is not examinable, whether they be the same or not; which Twisden agreed; but

Windham doubted it may, it not being necessary that the names in the book, and as pleaded, should exactly accord; but if there be any similitude it's sufficient, the book being but an evidence of it, as inspection of infancy, which may be supported by witnesses and examination. Keeling and Foster accorded with Twisden; and that this trial is not like the case of inspection, which is solely in the breast of the Court; but this is precisely to be tried by the book, and the Court are not judges. Respond' ouster award.

58. THE KING *against* FOUNTAYN.

Trade. Siderf. 152, pl. 22.

Powis moved to quash an information in the Quarter Sessions of Abbington, for using the trade of a grocer, contrà to 5 Eliz. which the Court would not allow, this being suit by common informer, which is to recover costs, and is interested in the suit: and the course of the Court is, that he cannot quash it, as they may an indictment or information at suit of Sir Thomas Fanshaw Clerk of the Crown, but they directed him to demur, or take issue on the declaration.

[551] 59. DR. PATRICK *against* QUEENS COLLEDGE. *Ante.*

Mandamus.

On mandamus to the Senior Fellow of Queens Colledge, to swear and admit him, being duly chosen head, masters excepted to the retorn, as omitting all the statutes for election. 2. Its not said, that the vice-chancellor was pro ea parte appointed in the absence of the chancellor, as is requisite by the statutes of the colledge. 3. There is no cause shewed, why he should not admit him: and as to the matter, this is of a mastership, *Dr. Witheringtons case*, but a fellow of a colledge. Also in *Dr. W. case* the Court held the retorn, being particular, good; but the Court did not do it for want of jurisdiction: but in this case there is no special retorn, nor any visitors, but of private appointment; whereas in *Dr. Witheringtons case*, there were visitors confirmed by Act of Parliament. Also here is no controversie in the election in the case at Bar, and so no need of suit to the visitor. Adjornatur.

60. WARD *against* HAUCHET. In Elegit, Br. 5.

Execution.

Maynard prayed that the plaintiff might file a fieri facias, part of the debt being levied thereby on judgment (to the intent to have an audita querela on elegit executed after it) which he alledged they ought to do, had the sheriff only taken bond (by assent of parties) for payment of the money; and the taking such bond was adjudged in a western cause at Exeter, to be pleadable in bar of new execution, which the Court agreed; yet held that if no execution be done, they cannot compel him to retorn it: and here the sheriff had only seised, and then the parties compounded, and the goods were delivered to the defendants, and therefore they would not compel him to retorn the writ, but in strictness they ought to force it. But by Twisden, an action upon the case lieth against the sheriff, if H. be endammaged by the not retorning it. 2. He excepted against the elegit, which was quousque residuum debiti (nothing having been specified before levied) be satisfied, which per Curiam is well enough. Adjornatur.

[552] 61. FOSTER *against* NORCLIF. *Ante.*

Baron & feme.

In ejectment, the sollicitor prayed imparlance till next term, that in that time they may cause a divorce causa præcontractus, which precontract alone he conceived would not avail them at the trial, and so the Court held as 11 H. 4, 14, pl. 30, by

Rolf. And also that as this case is, they cannot stay it, no question arising on the loyalty of the marriage, but on the fact: but for the difficulty, they awarded a trial at Bar.

62. PANE *against* EVANS. *Ante.*

Admiral.

Glyn attended the Court with presidents in the Admiralty of such bonds of stipulation in sum certain, and Tr. 13 Car. *Burroughs* against *Blofield*, this point was adjudged that no prohibition should go, but the Court remembred not the case. In 21 H. 8 there (as all downard had been) was fide-jusserunt in 400 mark de judicio sisti & judicato solvendi the condemnation, which being but pro forma, and the proceedings only like scire facias against the parties, is not like recognizance or bond, but as stipulation made in any Court whatsoever, whither of record or not. And had it been bond or recogn. the Court would have awarded a prohibition, but as this case is, per Curiam, should we grant prohibition, we should overthrow the whole Court.

63. TAYLOR *against* HARDY. Siderf. 150, pl. 16.

Trespass.

In trespass pedibus ambulando, Stroud assigned for error, that in the Court (ad valentiam was omitted) but it was in the writ, which by Twisden is well enough; Windham doubted, this being on judgment by default: but 2 Cr. 654, *Bradford* against *Ramsey*, it had been well enough; so valentiam for pretium, as 2 Cr. 147, *Bagshaw* against *Gower*. Adjornatur.

[553] 64. DUNCOMBE *against* DALE.

In challenge Br. 159.

In ejectment, the defendant suggested on the roll, the plaintiff is lessee of dean and chapter, within whose distress the sheriff, to whom the venire facias should be awarded, is, and therefore they prayed elisors, which was awarded, and judgment given accordingly in County Palatine of Durham: and now it was assigned for error, that this is no principal challenge, and so the venire facias ill awarded, as 9 H. 7, 22, but by Jones, 2 Cr. 547, pl. 6, after an award made as here, its no principal challenge, notwithstanding it went to elisors by consent. And, per Curiam, had the title of lessor of plaintiff been awarded dehors, it had been no principal challenge; contrà here, where it is induced with the plea it self on the roll. Judgment affirmed, nisi.

65. PALMER *against* FLESSIER.

Nusance.

In action upon the case for stopping lights by the lessor, who built the house with windows, and sold it to the plaintiff, and after sold his lands adjacent to the defendant, who built on his own ground adjacent, and stopt the lights; which, by Jones, for the plaintiff, he cannot, which Twisden agreed: but otherways of a house built near the land of a stranger; so Foster, all claiming under the lessor or grantor, are as well concluded, as he himself, especially for such necessaries as light and air, &c. *Clerk* against *Cogg*, 1 Cr. 170. On selling two closes, and keeping the middle, I shall have a way against my own grant, although I may by another as convenient: and so he held the defendant could not stop up the lights. So when a way is necessary, unity doth not extinct it, as *Sury* against *Piggot*, 1 Crook contrà where its only convenient: and, by Keeling, here the lights are no more. Adjornatur.

[554] 66. BRUMFIELD *against* PENHAY. In Debt Fitzh. 80.

Sheriffs.

In debt brought by the sheriff on bond for appearance; the defendant pleaded there was no writ ever delivered to the sheriff, and so would avoid it by 23 H. 6. Jones for the defendant agreed the case so to be, that the sheriff after writ sent out, but before delivery, takes security, which per Curiam, he may, if the defendant will give it. Judgment for the plaintiff, nisi.

67. GARDENER *against* MOREFIELD. *Saturday, July* 4.

Usury.

Pemberton assigned error in action tam quam on the Statute of Usury, that it was brought in the Court of Ely, which lieth not there, as *Gregories case;* and *Barrington* against *Kine*, 1 Cr. but only in the Courts of Westm. Adjornatur.

68. LISTER *against* COPLIE.

Error.

Error of a judgment in the Court of Doncaster in action upon the case, for that no retorn appears of the venire facias, which per Curiam, there being no pannel annexed, its not aided by 21 Jac. although there was an hab. corpora; for it cannot appear by examination, without a panel, that the jurors were the same as were sworn: also pannels are never annexed in Inferior Courts, nor was the statute ever intended to help them. 2. It was on a promise, and the count was quod super se assumpsit (but said not & fideliter promisit) yet it is after said quod promissionem & assumptionem non curans, sed fraudulenter intendens ipsos decipere, &c. non solvit, &c. Adjornatur.

69. SOUTHCOT *against* NEWLAND.

Error.

Error of a judgment in Doncaster, for that the venire facias twelve, was per quos rei veritas melios sciri (for scire) posset, the which, per Curiam, is error, as was on long debate resolved here betwixt *Ludlow* against *Edgware.* Judgment reverst.

[555] 70. DRAKE *against* BEAR. *Ante.*

Mich. 14 Car. 2, Rot. 801.

Lieu.

In action of debt for rent on lease made infrà jurisd. Curiæ of lands in T. in the same county, (not saying within the jurisdiction) which on nil debet pleaded, was assigned for error, in that eviction or suspension may be given in evidence; but Mich. 22 Car. *Linsey* against ——— Rot. 372, Pasch. is contrà by Polyxphen for the plaintiff, in such an action in Norwich Court, the Court held it ill, in regard the matter alledged is traversable, and not only enquirable, in which case it would not be material, as *Masters* against *Hudson* on any consideration executed, as that at H. the defendant had promised on lending him his horse, to ride from H. to London, he would redeliver him at H. and on error judgment was affirmed in the Court of H. for that the riding was not inquirable: but whatever is traversable there, is not triable on the general issue, if it appear on the declaration, although it be not actually traversed; and so is *Ivie* against *Stone* H. 14 Car. 1, Rot. 844, 1 Cr. also on a bond sued at Hull, a county of it self, which was dated at Halifax, the judgment was held void in debt, on escape against the sheriff; and although, as Tr. 14 Car. 1, Rot. 1590, *Barnard* against *Richardson*, the sheriff can have no advantage of error, yet he was allowed to shew this, being coram non judice; and by the whole Court, judgment reverst.

71. HOOK *against* SWAIN. *Ante.*

Rents.

In consideration of marriage with the defendants daughter, and of natural affection, the defendant covenanted to pay to the daughter, or to the plaintiff her husband 20l. by the year, which, per Curiam, shall be taken more strongly according to intent, then a grant like a will, and therefore shall be for life, as 8 Co. *Sir Richard Pexhalls case;* and whichsoever of them that survive, shall have it, it being apparent on the record, that it was for their maintenance; and this is the meaning of parties, as *Pooly* against *Tracy*, condition to pay when the plaintiff should devenire & obligari, and breach was assigned, that the plaintiff did not devenire & obligari per scriptum, & per Curiam it was well enough. Judgment for the plaintiff, per Curiam.

[556] 72. GLASCOCKE *against* MORGAN. *Ante.* In Debt, Br. 49.

Execution.

Keeling conceived that after this elegit no new action of debt can be had, because this cannot be said a fieri facias, in that in the elegit the goods are to be delivered to the party per rationabile pretium; but in fieri facias the sheriff cannot do so, but ought to sell them, and the party ought to pursue that way he hath begun, although only part of the goods had been taken, 17 Ed. 4, 4. 2 Cr. 338, *Crawlyes case*, and 1 Leonard, 176, *Knowl* against *Palmer*, are all contrary by Twisden, that the party, after nichil retornd on elegit, may resort (which Keeling agreed) to a new execution. Windham conceived this is pleadable in barr (that the elegit was taken out) in any new action of debt, 2 Inst. 395. Sed Foster absente. Adjornatur.

73. COLLET *against* YOUNG. *Monday, July* 6.

Audita quer.

Nota per Curiam, contrà Twisden, that on judgment in aud. quer. for the defendant, he hath election to take out execution on either the first or the last judgment.

74. WADE *against* DRAKE. In Cond. Br. 251.

Assumpsit.

In action upon the case on promise, that the plaintiff could prove a promise made to him by the defendants father, that then the defendant would pay, &c. It was moved in arrest by Jones, upon *Gold and Deaths case*, Hub. 92, & 2 Cr. 381. 10 Ed. 4, 11, that proof here shall be by a trial precedent, because the plaintiff in action against the father might have proved it: the Court agreed that this proof must be by jury; but they also conceived, as in *Travis* against *Meers*, that the proof may be in the same action, and the consideration precedent is sufficient that the plaintiff is put to labour to seek out proof presently, although it be not done till the action be brought: and the plaintiff having averred that he was always ready to prove, it's sufficient. Judgment for the plaintiff after verdict.

[557] 75. GWIN *against* GWIN. *Ante.*

The granting certiorari on diminution alledged, after in nullo est erratum pleaded, or special errors assigned, being only ad informandum conscientiam judicis, is in discretion of the Court, and not ex debito justitiæ, and therefore diminution being alledged in the point of the judgment that was alledged for error, the Court conceived it but for delay to grant it, the judgment it self, and not only tenorem recordi being removed hither. Williams seeing the opinion of the Court against him, prayed an amendment here, in regard the verdict is right, quod recuperet seisinam, and so

is the docket in the Great Sessions, and only the entry on the roll is mistaken, wherefore, as in the Common Pleas, he conceived it might be, as *Smith* against *Smith*, 1 Cr. 410, pl. 486, quiet possession having gone along with the judgment; the Court agreed, that if such suggestion be true, they may amend as in C. B. But it appearing by the prothonotary that the docket was taken by the judgment, and after it, and not the judgment entred by that, or any copy book certainly kept for that purpose, the Court would not amend it; but because it was suggested that the record was right, the Court granted new certiorari to remove the record, as it was when error was brought. *Post.*

76. THE LORD OF RUTLAND *against* GREENE. Siderf. 152.

[Discussed, *Holden* v. *Weekes*, 1860, 1 J. & H. 284. Referred to, *Ecclesiastical Commissioners* v. *Wodehouse* [1895], 1 Ch. 563.]

Incumbent.

Maynard prayed a prohibition to the defendant the Parson of D. as *Lyford's case*, 11 Co. 49 a. b. on suggestion of a mine digged by the parson in his glebe: the Court conceived that he may well enough do it as evesque: but for any waste in cutting of trees, &c. they would grant a prohibition, but that must be such as may be to the destruction of the church; but this is no depopulation: nor can the parson be deprived for opening this mine, as he may for other waste in cutting trees. Twisden conceived the lord may open a mine in copyhold of inheritance. Foster held it a trespass. Keeling conceived he could not do it. Maynard conceived there is no other mean for the patron to try his right, wherefore the Court gave rule to shew to the contrary.

[558] 77. COLLINS *against* MAN.

Slander.

Per Curiam on affidavit of the lye given by any man to another in the hall, they will bind him to his good behaviour: so for any provocation which may induce any quarrels or striking.

78. HURSTS CASE. *Ante.* Siderf. 151, pl. 21.

Attorney.

Now the Court were of an opinion, that a mandamus lyeth to restore an attorney in the Court of Canterbury, or any other Inferiour Court, but not of the C. B.

79. HARDIE *against* TAYLOR. *Ante.*

Count.

The Court, Foster absente, conceived the warrant of ad valentiam in the count, as pretij, &c. is error, the judgment being by default; contrà had there been a verdict. Adjornatur.

80. THE KING *against* HARLOW. *Ante.*

Trades.

Crooke moved to quash an indictment on 5 Eliz. for using the trade of a hosier, in which he had not been educated, according to the form of the statute (not saying ut apprentitius). 2. It was said he had not been educated in that art of hosier, not saying, nor in any other; both good exceptions. Per Curiam quasht.

81. *Tuesday, July* 7.

Certiorari.

Proctor moved for alias procedendo to Snape steward of the Court of St. Catherines, there being a new habeas corpus (after procedendo awarded) brought, he

refused to proceed till the opinion of the Court were known, which was now declared to be, that on procedendo to any Court where the steward is above three years standing barrester, he may proceed notwithstanding any new habeas corpus, else not: but he ought to retorn, that he is so on the second habeas corpus.

[559] 82. THE KING *against* GREENE.

Slander.

Jones assigned error of judgment on indictment taken by justices of peace for words spoken of another, the justices of peace having no power so to do, as Justices of Assize may. Foster held it good, as well as they may bind him to good behaviour. 2. He assigned that the judgment was capiatur, and no fine assest: but per Curiam, the fine is usually set afterwards.

[561] DE TERMINO MICHAELIS, 15 CAR. II. B. R. DIE VENERIS, OCTOB. 23, ANNO 1663.

Twisden, Windham, Keeling.

1. CHAMBERLAIN *against* STACY. *Friday, Oct.* 23.

Judgment.

Barwell moved to set aside a judgment on suggestion that it was satisfied, which the Court refused without aud. quer. but on sight of the warrant of attorney, which was delivered up, and suggestion that the judgment was entred afterwards, they referred it to the Secondary, as an undue proceeding without audita querela.

2. MOURCH *against* LAUND.

Trials.

Jones moved for a new trial on suggestion that the plaintiff, after notice of trial by Nisi Prius, and a copy of the jury given to the defendant, at the day of trial changed the jury, which, by Twisden, is well enough, as hath been resolved in an Essex cause by great advise, in regard that until the venire facias be filed, the party may continually resort to the sheriff to see who are the jurors, notwithstanding it be re-**[562]**-torned, since which it's used to file the venire facias presently, which Keeling agreed: but by Windham it's not reasonable the jury should be changed without motion, although no trial be had, nor the venire facias filed. Adjornatur.

3.

Admiral.

Wild moved for a prohibition to the Admiralty, on suggestion of an order there made to render ship, or abide the order of the Court, which being on the parties appearance and confession of the matter of the suit is all the proceeding there without any libel, which Keeling granted, this being no bare stipulation for appearance, but a full decree, which cannot be without libel: but Twisden and Windham doubted, & adjornatur.

4.

Judges.

Foster Chief Justice being dead this vacation, Hyde second Justice of the C. B. was called into his place, to whom, standing at the Bar, the Chancellor Hyde said, It's a sign the troubles have been long, that there are so few Judges left, only your self: and after so long suffering of the law and lawyers, the King thought fit to call men of the best reputation and learning to renew the reverence due and used to the

law and lawyers: and the King, as soon as the late Chief Justice was dead, full of days and of reputation, did resolve on you as the ancientest Judge left: and your education in this Court gives you advantage here above others, as you are the son of an eminent lawyer, as any in his days, that got as much, whose felicity was to see twelve sons, and you, one of the youngest, a serjeant, and who left you enough, able to live without the help of an elder brother. He gave you all the assistance, being in his chamber, and lived in time of learned men: and for your integrity to the Crown, you come here to sit among such persons as you desire; and the King and the kingdom do expect great reformation by your activity and the severity of this Court, that vitious persons may find your justice. For this reason the King, when I told him Chief Justice Foster was dead, made choice of you. Courage in a Judge is as necessary as in a general; therefore you must not want this to punish sturdy offenders, especially robbers and burglers; for which remember your uncles dexterity. 2. The genteel wickedness of duelling, which I beseech you inquire into, and the provocations and grounds of them; the carriers of challenges and fighters, however they escape death, the fining and imprisoning them will make them more dread this Court then they did the day of judgment. 3. I advise you to patience; angry Judges, like generals, seldom give good **[563]** orders whilst angry: you must mind your profession; your eminence, in which hath brought you hither, and the professors thereof, to keep up learning, and take care there be no conspiracies within doors; two inns of Court having omitted reading this vacation, which you must take care to reform. Thanks be to God we have avoided conspiracies openly made.

Hyde Chief Justice answered, I had ever thought of the advise of the wise man, not to seek to be a Judge, nor ask to sit in the seat of honour; being conscious of my own defects and small learning, which hath been lessened by plunders in the late times, and my constitution ex traduce, I admire His Majesties grace to advance me to a Judge, which had been sufficient; but I shall, seeing His Majesties further grace, humbly submit and serve him with my life with all alacrity and duty: and desire his protection no longer. Your favor makes me hope not to sink under this burden; as also the learning and experience of the assistants I am to meet with; I had rather endeavour to shew my duty in practice, than in answer to particulars. Sins of infirmity, I hope His Majesty will pardon; and for wilful corrupt dealings, I shall not ask it: I attended Cooks time as a reporter here, and after attended the Bar, till call'd away: and as he said, when he was made Chief Justice, I say now, I will behave my self with all diligence and honesty.

5. SAUNDERS *against* LEEKE.

Error.

Error of a judgment in the Marshalsey, the venire facias being probos & legales (not saying, as Register 7, liberos homines, &c.) de visineto; sed non allocatur. But judgment affirmed.

6. THE KING *against* CHALLANOR. Siderf. 156, pl. 7.

Force.

Wallop excepted to conviction of forcible entry by justices on the view, that it wanted addition: sed non allocatur, for this is not traversable no more then rescous, although H. may be utlawed on it. 2. There is no fine assessed, which by Windham and Keeling is not necessary, where the fine is part of the punishment; contrà where the imprisonment is only a penalty set, as judgment of the fine for offence. 3. No bail is allowable till the exceptions ru-**[564]**-led, this being a judgment, and the defendant brought on habeas corpus, must on filing, be in custodia. Adjornatur.

7. OSBORN *against* PARKER. *Saturday, Oct.* 24.

Trespass.

In action of assault and battery, the defendant pleads ex insultu querentis. The plaintiff replies, The City of London is an auncient city, and have pleas, and that

there was a plaint in such a Court before Fr. Meynell, by virtue of which process, the plaintiff was taken: the defendant joyns issue, non cepit virtute querelæ prædict. And after verdict, Baldwin in arrest of judgment, excepted to the replication, that the prescription was for Court, time out of mind used, and that according to the custom at a Court held before Fr. M. J. S. entred a plaint, &c. which should have alledged the custom to hold a Court before the sheriffs, and that Fr. M. was then sheriff, &c. but, per Curiam, its well enough in pleading either way. 2. Its said coram Fr. M. uno vicecomitum, which is well enough, there being two Courts, although they are but one sheriff: also the writ is vicecomitibus Lond. but vicecomiti Middlesex.

8. HARDY *against* TAYLOR. *Ante.*

Trespass.

Error of a judgment in C. B. in action of trespass, one of pedibus ambulando, another for spoiling grass, another for driving cattle, and several damages; and in the first, trespass ad valentiam was in the writ, but not in the count, which by Coleman is well enough, after judgment by default: its so resolved after a verdict in 2 Cr. 147, and so on demurrer; for its aided by the Statute of Jeoffailes, as 2 Cr. 653, Bradford. 2. There are four several trespasses, 3 for breaking closes, and spoiling grass in several closes, and chacing his cattle ad tunc & ibidem unto a pound, and there detaining them, and the judgment is de transg. in clausis prædict. and nothing of the driving and impounding, which, by Coleman, is well enough, several damages being severally assessed: but, by Keeling, this trespass is particular, and its said that the cattle were impounded at tunc & ibidem, which shall be intended out of the closes, and therefore the judgment being the warrant for the enquiry, this enquiry is without warrant. Twisden conceived both exceptions fa-[565]-tal, in that formal departure from auncient presidents alone is not aided, and the impounding ad tunc & ibidem must be intended in the vill, not in the close: but, by Windham, the ad valentiam omitted is aided, and the chacing and impounding per quod his cattle were impaired, is but a consequence of the former trespass, which are alledged in the closes. But Hyde Chief Justice conceived the latter a distinct trespass, not aided. 3. The count is ad 40 solid. which being intended solidos, is well enough; which the Court agreed. Sed adjornatur.

9. KNIGHT AND KITCHING *against* BUNKLY.

Hill. 15 Car. 2, Rot. 1258.

Covenant. Siderf. 157, pl. 8.

In action of covenant, Baldwin moved in arrest of judgment, it being that lessee, his executors and assigns, shall repair, and for breach, the plaintiffs being tenant in common, by recovery suffered of reversion, one moiety to one, another to the other, bring this action against the assignee of lessee, and this being in the realty, they cannot joyn, as was resolved in the case of *Baker and Berisford*, in an action of covenant for rent, it was ruled in Mich. 57 Rot. 1902, that the action by one for the moiety was good: and though they may joyn, where both are privy to the contract, yet the assignee of one and the other, cannot joyn; sed Curia contrà; *Hull* against *Arnald*, adjudged they should joyn in covenant for arrears of rent; so of aunt and niece, although it were much doubted, whither the arrears should go to the issue of parcener: and the case of *Baker* against *Berisford* was grounded on the custom, and not like to this case, which is only in the personalty. Keeling doubted, the personal contract being determined, that they cannot joyn in covenant, being collateral, and goeth with the interest, and not like Littletons case of covenant on lease made by tenants in common: but by Windham, for wast, if tenants in common assign to any one man, he may have one action for several wasts. Adjornatur.

[566] 10. LEE *against* RAYNS.

Executors.

Powis moved in arrest of judgment in action upon the case by executors on promise, for wares sold by the testator; the defendant pleads the Statute of Limitation, and that the promise was not within six years before the action: the plaintiff replieth that the promise or cause of action was within six years before Mich. 14 Car. when the action was brought, which is a departure; the plaintiff having in his count alledged the cause of action in 1650, thirteen years before, so 1 Cr. 228, *Tyler* against *Wall*, but the defendant doth not demur, but traverseth, that the cause of action did not arise within six years before, which is found for the plaintiff. Windham doubted the case in 1 Cr. 228, and thought the time not material, but that the plaintiff may alledge it well enough in his replication. Keeling, This doth not answer the first time alledged, and the issue doth not help against an Act of Parliament; sed Curia contrà: and there being a verdict, the omission of the former time cannot come before us, it being not material at common law; and to plead non assumpsit infra sex annos, is a kind of pleading the statute, and devised for ease of the people, that they should not plead at large: and the party hath passed by his advantage of the departure: judgment for the plaintiff, nisi. And by Hyde, The statute is no bar alone, but is made so by plea; for alledging fact done forty years since, will not abate the action, unless the defendant plead non assumpsit infrà sex annos.

11.

Fees. March. 89, pl. 143.

Winnington moved for stay of retorn of habeas corpus, directed to the Mayor of Hull, because the party would pay no fees, which the Court granted, and gave it for a rule that on all habeas corpus in civil causes, the party that procureth it, shall tender reasonable fees to the goaler; and if he demand unreasonable, the Court will here certifie it.

12. PAINS CASE.

Perjury.

The Court refused to stay judgment on conviction of perjury, on suggestion of a prosecution against the testimony, ready for a trial, in the same point, by the end of the term; in regard the prisoner could not produce present creditable persons of his behaviour, but gave sentence of a months imprisonment; and on 2 days in Westm. and **[567]** Cheapside to stand in the term on the pillory, with a paper declaring his offence, and fined him 100l. the indictment being at common law.

13.

Incumbent.

Winnington moved for a prohibition to the Bishops Court of Exeter, the Court conceived, that lessee of impropriator being an hospital, is all one with lessee of a parson, and suit for annuity must be in Spiritual Court; so for tythes. Adjornatur.

14. SNOW *against* CUTLER AND STANLY. *Monday, Oct.* 26. In Devise Br. 1.

Remainder. Siderf. 153, pl. 2.

In evidence to a jury, the Court conceived that a will proved 1625, and on the file in the prerogative, need not be proved now, although possession hath gone against it: but the council of the defendant standing on it, it was proved. 2. The lands were copihold of the feme, and she with her husband suffers a recovery to the use of him and her for life, remainder to the use of the will of the baron, who deviseth to the

heirs of the body of the wife, if they shall be of, or come to fourteen; then they in the mannor according to the custom, suffer a recovery before the infant born, and then the husband dyeth, and after she marrieth the lessor of the plaintiff, and then dyeth leaving heir of fourteen, which doubted by the Court, was found by special verdict. 3. The recovery was proved by copy of the roll under the stewards hand, the roll being lost tertio Car. but without proof there was such a roll the Court refused to allow it, although possession had gone along with it according to the recovery: and although this be copyhold, whereof the rolls are not in the custody of the party, but of the lord, and no records, but all done at one Court, and the copy found but of late, without other concurrent evidence of a Court then held: but, per Curiam, such a copy would be good evidence of the copyholders estate, but not of such a recovery, being a Judicial Act; but it being recited in a roll of Court within four years after, the Court admitted it. *Post.*

[568] 15. NOY *against* TUCKER.

Trials.

Coleman moved for a new trial on suggestion of deed inroled suddenly trumped on the defendant at the Assizes, whereby he suffered verdict against him, whereas there was no such deed ever inrolled, which the Court refused, although no remedy be against any parties for forgery or perjury: and by Twisden, so was the case of one Polington, who had paid fees, but the clerk omitted the inrolement, and the party added it, and no remedy against him; so of cyrograff of a fine. But, by Keeling, such an endorsement is forgery, when nothing will pass without it; sed Curia contrà, that its only great misdemeanor, but no forgery.

16. PRIMATE *against* SIR JOHN JACKSON. *Ante.*

Trials.

The defendant being now found guilty of tampring with the witnesses, with intent to keep back and stay the trial in an information of perjury against Fenwicke and Holt, in a cause that concerned Sir John Jackson; Symson moved for a new trial; which, by Keeling, is without all president, being a criminal cause; and the Chief Justice Hyde doubted it, although the cause extends not to life, but only to member, and the defendant hath been once acquitted: sed Twisden & Windham contrà, that new trial ought to be, in regard of the inconvenience that would ensue if such perjuries should escape with such foul practices. Adjornatur.

17. GEORGE *against* ALSOP. *Ante. Tuesday, Oct.* 27.

Admiral.

The suggestion that there was only citation in the Admiralty, and recognizance forced on the defendant to deliver lighters, or abide the order of Court, being not put in, the Court refused prohibition quousque.

[569] 18. JAMES *against* MORGAN.

Assumpsit.

In action upon the case on colloquium, on the sale of a gelding, the defendant promised that the said horse should have four shoos, and in each eight nails; and so for the first, the defendant was to give a barly corn for the second two, and four for the third, and so double to every nail proximo, whereas it should have been prox' præcedenti. Sed non allocatur after verdict.

19. AYER *against* STEEPLY.

Slander.

You are a barretor and a riotor, and I will indict you for it; which, by Bramston, in arrest of judgment, is not actionable, being not any attorny, which the Court agreed. Judgment staid.

20. ROUS *against* LUN. Siderf. 154, pl. 4.

Arbitrement. March, 10, pl. 186.

In debt on bond, condition to submit to umpirage, if award were not made by a day, which was, that the defendant should pay, as the plaintiff and his attorny by a bill and oath should make appear, which, per Curiam, is well enough, after verdict on issue, on no award made, and at most, it would but be void, quoad the attorny, were he an estranger; but the party and his counsel &c. are all one.

21. SHERARD *against* KIRKMAN.

Rents.

In debt for rent against assignee of term, Baily moved in arrest of judgment, for that the plaintiff counted of lease to commence à die Mich. post. 27 July, which was the date of the lease: & quod postea scil. 28 July, virtute dimissionis, the lessee entred, which is a disseisin, according to 3 Cr. 766, *Douglas* against *Sheffield:* sed Curia contrà, the scil. being void. Judgment for the plaintiff.

[570] 22. KING *against* TERRY.

Bastard.

Coleman excepted to an order made, for keeping a bastard child, which was made on appeal ad sessionem pacis in Westminster, not saying General or Quarter Sessions next. 2. On 18 Eliz. these justices cannot, as they have done, confirm the first order, and add further penalty, but only one. They have also adjudged the defendant the reputed father, which the former order did not: but, per Curiam, they may alter, or enlarge at pleasure. And as to the first exception both sessions are shewed particularly, and so it appears to the Court, none could be betwixt, and so ad proximam sessionem not necessary: but by Twisden, The justices on appeal cannot refer the order back to be altered by the first justices, which the Court agreed: and by Hyde Chief Justice, On appeal they may order the feme to the house of correction, or alter the maintenance, although nothing were made by the first justices. 3. Order to keep the child at so much a week, or discharge the parish, which is good; and for ease of the party, the Court confirmed the order.

23. DUKE LYNOX *against* DRURY.

Tr. 15 Car. 2, Rot. 566.

Leases.

In debt for rent, the plaintiff counted on articles of agreement, per quod testatum sit quod dimisisset, which, by Wild, the Kings Serjeant, is ill; this action being grounded on the demise, which must be more positively alledged, contrà in covenant, which is collateral, which Twisden and Keeling agreed: but Hyde and Windham absente. Adjornatur.

24. BARTLET *against* RAMSDEN. *W ednesday, Oct.* 28.

Devise.

On issue out of the Chancery, to try whether the plaintiff were entitled by two writings, or any other, purporting a will of J. S. and the evidence was of a feoffment

to the use of such person as J. S. shall name and appoint by his last will, in which case the devisees are in by the feoffment, and not by the will: but per Curiam, that is only **[571]** fictione juris, but they are not in without the will, and therefore that is the principal part of the title; and such proof good enough, and pursuant to the issue, and verdict for the plaintiff accordingly.

25. GREENWOOD. *Thursday, Oct.* 29.

Slander.

Greenwoods wife is a witch, and hath bewitched B. Fleming, is actionable, per Curiam; so to say, she had betwitched her mothers milk. Judgment for the plaintiff.

26. THE KING *against* ALCOCK. Indictment Fitzh. 1.

Peace. Siderf. 155, pl. 5. Hub. 135, pl. 180.

Shelly moved to amend an indictment of barretry, taken in Middlesex at the sessions there, being by the certiorari only a transcript removed, which Hyde and Keeling refused, in that the custom of London to remove only tenorem, extends not to Middlesex; but Twisden contrà, as in Moors case: coram Rege for domino Rege, it was on such tenor amended, ex motione Keeling, when at the Bar: and by Windham, Although this be but tenorem recordi there, yet here its the very record, and that below but the transcript, and so amendable: but all agreed, that such custom extends to records in sessions for London and Middlesex together. Adjornatur.

27. MUNDAY *against* MILLS.

Slander. Siderf. 155, pl. 6.

The defendants wife said, J. S. hath cozened my husband of 11l. which 2 Cr. 427, is not actionable, there being no colloquium of any trade at the time of speaking, but only that he was a carrier of good fame, &c. The words were farther, that he made false letters, and gave me a false and forged acquittance, the Court agreed the first part of the words not actionable, Hut. 14, nor by Hyde, are the second, being uncertain what false letters mean, and it is not said he used to carry letters, nor are the words applied to be spoken of him in his trade, which Keeling agreed. Judgment staid quousque.

[572] 28. THE KING *against* CHALONER. *Ante.*

Force.

Baldwin excepted to conviction of forcible entry, that it wanted Regis, being only contrà pacem Domini Caroli Secundi; also it wanted vi & armis intravit, which being on the statute of 15 R. 2, is erronious: and although this be a judgment, yet it may be quasht thus without writ of error, as well as a commissioners of sewers order, or conviction by justices for being drunk, which Twisden and Keeling agreed, and that presidents are both ways: but by Hyde and Windham it cannot be quasht without writ of error; although this be not done in any Court, yet it is certified to the next sessions, and there recorded. And for *Meverell's case*, or any president since 1640, they are not to be valued, the times being stayn'd. Adjornatur.

29. KITCHIN AND KNIGHT *against* BUNKLEY. *Ante.*

Trin. 15 Car. 2, Rot. 1256.

Assignee.

Jones moved for judgment, the covenant being to repair by lessee, which is assigned to the plaintiff. Lit. sect. 315, 311, layeth it down as a general rule, that in all actions real or mixt, they shall sever; but as to actions personal, where damages

are to be recovered, they shall joyn; on this ground he says they must joyn in debt for rent. The case of forger of deeds is not that tenants in common shall sever, as 18 H. 6, 6, & 7, which is better authority then Kell. 114, where it is said they shall sever as in prohibition, but in detinue, which is as real as forgery, although it concerns the inheritance of both, yet they may joyn, as 1 Inst. 197. And the reason is apparent, lands being to be recovered according to the right, which is several damages only according to possession, which is joynt. The case of *Hall* against *Arnald* cometh not to this purpose; the only question being, whether the arrears should survive; and the case of *Baker* against *Berisford* is on particular reason, being covenant for rent by tenant by custom of moiety, and the parcener tenant by discent: also there may be difference betwixt debt for rent, which may be divided, and this of damages, which is inseparable. And for this reason they may joyn, 1 Inst. 197, as 18 Ed. 3, 90, in warrantia chartæ, but they may sever in voucher; and this is a stronger case than ours, being covenant real. Waste is a mixt action, yet for waste in the tenuit, **[573]** as Moor 101, pl. they may joyn. Baldwin for the defendant agreed Jones's rule, where the possession is only concerned, and damages only recoverable as in trespass, &c. they may joyn, in regard the interest there shall survive in mixt actions, they may joyn or sever, as in parco fracto, Moor 452, *Wentworth* against *Savill:* so in account, Godbolt 90, & Hill. 19 Jac. Godbolt 283, (the Court refused to give any countenance to such books as authorities any more then news books, &c.) is nearest to the case at Bar, the personal contract being determined, and the right in the assignees only by cause of the reversion, which is real, and Dy. 326, *Huntley's case*, Moor 40, several, Litt. 71, Joynder in Action, Br. 104. A full authority in this point is Mich. 7 Jac. C. B. *Biot* against *The Lady Saint-Johns*, Rot. 3214, in covenant for not repairing by the plaintiff, who was assignee in fee of two messuages by several assignments on several demises; with which agrees 45 Ed. 3, 13 b. pl. 10. And the Court agreed, that wherever several interests are in one hand, they may be joyned; but not so when in several hands, although the personal contract be determined. 3. The covenant was only with the lessor, and so his assigns cannot bring the action against the assignee of the lessee, as here: but, per Curiam, this is *Spencer's case* expresly, he may make such covenants that run with the land. Also by Hyde, the reversion is not here couched, Bendloes 89. By Twisden they must joyn in action upon the case for pew, but they must sever in their prescriptions, and so they must in debt for rent. And he was never satisfied with the resolution of the case of *Baker and Berisford*, and it was resolved that tenants in common must joyn. And *Hammon* against *Whichelow*, 2 Car. B. R. in action upon the case for common, per quod he lost his cattel for want of sustenance, ruled not good by one. Windham agreed the case of *Baker* against *Berisford* no law, especially against Littleton, whose rule is safe and undoubted. Keeling, Although as a templer bound to maintain Littleton, yet according to his reason, doubted the case of debt for rent, being betwixt assignees; and in all Littleton's cases the parties were joyntenants of the thing sued. And so in this case of covenant it is clear they may joyn, it being grounded on the possession, which is joynt and indivisable as to the perception of profits, although the inheritances be several. Judgment for the plaintiff.

[574] 30. SLAUGHTER *against* TUCKER. In Droit, Br. 16.

Error.

Williams moved for a rule absolute, that judgment be reversed in a writ of right, being on default before appearance, without any grand cape, which, per Curiam, is error. Judgment reverst, nisi.

31. JACKMAN *against* HATTON EXECUTOR OF RYOL.

Assumpsit.

In action upon the case in consideration the plaintiff would forbear 100l. (due by the testator) by twelve months next following, the defendant would pay, &c. The

plaintiff avers that he did forbear à tempore assumptionis, twelve months, which is well; contrà if it had been usque 12 months. Judgment for the plaintiff apres verdict.

32. THE KING *against* PECKE.

Peace. March, 37, pl. 11.

On habeas corpus the defendant, churchwarden of Hadly, was committed by the justices next, as such, without bail, for refusing to give an accompt of all moneys received or disbursed by him, and of all such things as concern his office, which, by Hyde, is ill, which the Court agreed: and that if he be committed as overseer of the poor by 43 Eliz. 2, it must be so expressed in the mittimus, although to be overseer be annexed to the office of churchwarden; for in default of accompts of mony of the poor, the first is 20s. which must be mentioned before the justices can commit. Also the accompt as churchwarden must be before the commissary, and in default they may excommunicate: but such accompt will not discharge the accompt according to the Statute of the Poors Mony: so the Court discharged him only for insufficiency, and being a sufficient person, would not bind him over to the next sessions, else they would.

33. THE LORD BALTINGLA'S CASE *against* SIR RICH. TEMPLE.

Nonsuit.

On leave granted by the Court to discontinue, Sir Ed. Tourner prayed the discontinuance may be entred, which per Curiam, is needless; contrà on nolle prosequi: but by Jeakill and the clerks, it's usual to enter on the roll ideo discontinuatur: but this being a rule of a former term, the defendant cannot cause the rule to be entred (if the plaintiff refuse it) without motion.

[575] 34. GILBERT & SA FEME *against* MARTYN.

Visne. Siderf. 157, pl. 9.

Sawyer moved in arrest of judgment given by default in covenant on lease in O. in com. Hampshire, of house in Berkshire in B. and a special breach assigned for not repairing, and issue taken on non infregit conventionem, and the venire facias is awarded de visineto de O. in Hampshire, which is ill, the breach being local: but per Curiam, This action being brought by the parties that are privy in the first contract, it's in his election to bring the action where he will; but when issue is specially joyned to a special local breach, Hub. 187, *Reeves* against *Moxam*, the venue must be of that place according to the issue, 15 Ed. 4, 19, *Stoker* against *Billesdan*, by Fincham, although the plaintiff hath liberty to lay his action where he will, 2 Cr. 446, *Sheres* against *Bretton* accordingly, that breach in not repairing cannot be laid where the lease was, but only where the land is; so 3 Cr. 701, Williams. Also this is a special tort, and not grounded on the contract, and only this assigned for breach, therefore the non infregit conventionem modo & forma, can be only intended as to the breach assigned, and tied to that, which the Court agreed; and that venire facias should be special to the place of breach, and not where the action is, as according to the rules of the Court it always is, unless specially drawn into another place by plea. Judgment staid quousque.

35. EVERS *against* HOPKINS.

Trover.

Trover de uno fuso, Angl. a spindle for the mill, which was moved in arrest of judgment as incertain, and too general, signifying as well a spindle for a tourn, sed non allocatur. 2. De uno acerio promensa, Angl. a table-board, good. 3. De uno fornacio, Angl. a furnace, good, being only false Latin, or obsolete word, and well enough. Judgment for the plaintiff.

36. CROSSE *against* BIGS. *Friday, Octob.* 3. Siderf. 158, pl. 10.

Admiral.

Pawlet opposed a prohibition granted to the Admiralty on suggestion that the plaintiff libelled on prescription that the Kings have granted to the Admiral to have the order and management of all beacons and sea marks, and the **[576]** profits thereof, and for taking of 6d. due for a beacon erected on the rock of Falmouth, 4 Inst. 149. The libel was against the collector, and the end hereof is only to give notice to mariners, which doth denominate every thing, as 8 Ed. 3, 70. Hospital of alms is spiritual, of other ends temporal: also this beacon is betwixt the high and low-water mark, only to give notice of that rock, which is within the Admirals jurisdiction; Keeling contrà, The government of beacons undoubtedly belongs to the Admiral, but the profits may belong to a subject: and here the libel being for the profits, it ought to be tried at common law. So by Windham, where the right of the thing is in question; but else the profits may be sued for in the Admiralty, which the Court agreed. Adjornatur.

37. BILL LESSEE OF STROUD *against* HOLT CHANCELLOR OF WELLS.

Leases. Siderf. 158, pl. 11.

In evidence to a jury, Mr. Attorney proposed as doubted, that a lease by the chancellors predecessor is not within 32 H. 8, 28, he being infrà minores ordines qui famulantur ecclesiæ, and no prebend, and *Euston* against *Dennis*, 18 Jac. a precentor of St. Pauls, although a prebend, is unresolved whether capable, or not, to make such a lease; and a prebend hath been but lately setled as able: also this chancellor hath a prebend distinct, and this impropriation is not part of his corporation. Hyde, Hereby all the cathedral possessions will be shaken: and by Windham, this is but a name of dignity annexed to the prebendary, and they are prebends as sub-dean, &c. Twisden, The better opinion of the precentor was, that the lease was good; but I do not remember it was adjudged so of a treasurer; these are but offices annexed to such prebendary, and Keeling never doubted it: and Br. Leases, doth give the reason why prebend is within the statute, in regard he is not exempted, but only parson and vicar. Jones for the defendant, Lease by prebend not warrantable by statute is void against successor, if unconfirmed, which is an argument that he is not seised in fee; and where he is seised jure prebendæ, it was much doubted, but now setled: but per Curiam, this being an impropriation, cannot be annexed as an appendant to the office of chancellor, but only in right of his prebendary; and therefore his lease is good against the successor, without confirmation of the dean and chapter, and they would not suffer a special verdict, nor question of it. But by Tourner for the defendant, the chaunters of Pauls in the case of Morrice in the Exchequer, now lately **[577]** were held unable to make lease, being only singing-men, no dignities as this is: also after forty years possession, the Court will intend it anciently demised and demisable.

38. HILL *against* KIRKMAN.

Way.

Action upon the case, by Windham, doth not lye for breaking a wall in which the plaintiff had no property, which was betwixt the plaintiffs house and an alley or street, and making a common passage through the wall: for if it be the plaintiffs, which is not alledged, trespass lyeth; and if it be not, this action doth not lye on such damage, that the plaintiff is disturbed in profit, guests, or of his rest, without particular damage, that the plaintiffs house is undermined or worsted, which the Court agreed. Judgment for the defendant.

39. DAVID *against* ISAAK AND MARTYN. *Ante.*

Accompt. Siderf. 195, pl. 12.

In action of accompt against them as bailiffs, after judgment quod computet on default of one, and verdict finding the other to be bayliff, one enters into accompt;

and now Jones prayed no judgment final may be entred against him until the other have accompted that made default. By Stroud for the plaintiff, this judgment quod computet is perfect against one, and only execution staid quousque; and by 14 H. 4, 1, a scire facias lyeth on such judgment after the death of any plaintiff, which the Court doubted. Also they conceived this but an award against them only as joynt bailiffs; and it would be inconvenient to have judgment against one, because he that is absent may be he that received all, and the other that paid, and no writ of error lyeth until the other accompt; and by Windham, when it's in the election of the party to sue, as in trespass or case, both or one, he may have a judgment against one on release of the other; and on debt by bond, the one must be utlawed before the other can be proceeded against, and here the receipts are several; but here one cannot be utlawed, the suit being not by original, but by bill; but yet he may be taken by capias, and then compelled here, but not before. Adjornatur.

[578] 40. HAYES *against* WHELER. *Saturday, Oct.* 31.

Slander. March 107, pl. 184.

Symson moved for a procedendo in action upon the case in London, on calling the plaintiff whore, and her husbands whore, such offence having there a corporal punishment by custom, in 4 Co. 18, it was denied; but the last authority in print in 1 Cr. 420 it was granted, which Keeling remembred: but by Hyde, it hath been often denyed. And the custom is not sufficient for action to lye, no more is penalty inflicted by statute on any offence. Nor is it sufficient that this Court hath no jurisdiction of the offence; for this Court is to regulate others inferior. Keeling conceived they could not easily convict them of whoredom; but, by Wild Recorder of London, they find her a whore at the wardmoot enquest, and such presentment is enough for indictment at the sessions in London; and being convicted, she is carted and whipt: but the custom, by Twisden, cannot come in question on this suggestion; but all may be done in a writ of error, although that be a long way about. Adjornatur.

41. LEE EXECUTOR OF CARTWRIGHT *against* RAYNS. *Ante.*

Tr. 15 Car. 2.

Dayes. The statute must be pleaded 1 Cr. 404, pl. 479.

Wild in arrest of judgment, the day generally is not material in action upon the case, but on promise laid twelve years since, H. is not concluded to give evidence of one within six years; but the day is made material by the statute, and therefore this replication is a departure, had the defendant demurred on the replication, for the Court will not presume the cause of action of another time then the plaintiff declared: if the action be laid within six years its not sufficient to plead the statute without traverse absque hoc, that it was within six years. Keeling was now satisfied for the plaintiff, that the day of it self is not material, and its not departure to vary in time and place, when one pursueth the defendants plea: Windham agreed in omnibus; and that the count thirteen years, and bar quod non assumpsit infrà 6 annos, with replication, that causa actionis did arise within six years, is good; and not like the case in 1 Cr. 228, where the variance was in the new assignment, **[579]** Twisden agreed, so Hyde, *Rogers* against *Ashton* C. B. in trespass of assault and battery in a close at Deptford; the defendant justifies as possessed of a gate in Chedingfield: the plaintiff replies that he was churchwarden of Chedingfield, and that for a levy there he took the beasts: the defendant rejoyn'd that the beasts were none of his; on which the plaintiff demurred; and held no departure, because the plea alter'd was only in pursuance of the defendants plea: so here. Judgment for the plaintiff.

42. COLLINGWOOD *against* PACE IN THE EXCHEQUER CHAMBER. *Ante.*

Alien.

Keeling for the defendant, as he had argued when counsel; 1. Because the Act of Parliament doth not put them in no other condition then if they had been

subjects born, and so is the plain intent of the makers of the Acts, who would not give an alien greater priviledges then they had themselves: and the words are plain, that to all intents and purposes they shall be taken as subjects born, which is a term of similitude: and the law of God makes our love to our selves, the measure of our neighbors: and so are the words of the Act, that aliens should be as subjects; and there are no words that enlarge this sense, that he shall resort and make his pedegree by any auncester; lineal or collateral, doth only remove his personal defects, not to give him new auncestors, nor could he hereby have been heir to his father, who was an alien; the Act of Parliament hath its perfect effect by making them subjects, 1 Inst. 129 a. and two natural sons born in England, cannot inherit the father, it being not the natural blood simply considered, but that blood with all legal circumstances which the law of England requireth; as that they be born in wedlock, that they be of persons attainted of no crime, and that they be of subjects born. The blood betwixt brothers, that makes them inheritable to each other is, that which is derived from the parents: and here, nil dat quod non habet, they being aliens, cannot communicate any such blood, as by the law of England is required to inherit. Its plain, that brothers have no other blood natural, nor civil and legal blood, then what they have from their parents. And although none can have legal, but those that have the natural blood, yet one may want the other. Also there is no way to distinguish the whole from the half blood, but by resorting to this commune vinculum: there are only three cases, propter defectum matrimonij, propter legeantiam, & prop-**[580]**-ter delictum, where the brothers have the same natural blood, and yet shall not inherit. The first sheweth the natural blood is not sufficient; for although in nature they have as true a father as any, yet by the law of England they have no father, and this is the very case with that in question, and so Dr. & St. 13, an elder brother alien, is persona non existens, not taken notice of by the law of England, nor shall not stand in his younger brothers way, no more doth the law take any notice as to inheritances of the father, being an alien. As to the other, propter delictum, such issue is as naturally born as any, but 3 Co. 41. Brit. cap. 5. Bract. 130. 1 Inst. 8, the parents being disabled by the law of England to transmit any blood to them, they cannot inherit each other. And I see not how the case in question differs from those cited, also that one brother may have mordancester of his other brothers estate, doth not make him antecessor sanguinis, but only of the estate, and therefore as F. N. B. 195, he must say he is brother and heir; which is yet the question in the case at Bar, whither the one can be heir to the other; for both are the commencers of new families, and the previledges given to them are several, and not communicable to the other. The not naming the father in the writ, is no objection, in regard therein no more is requisite then is necessary to the title, as 8 Co. *Buckners case*, I must shew the commencement; so of an estate tail: so when I claim as cosin, I must shew coment, for the uncertainty; contrà when one claims as brother and heir: but yet although I need not name my auncester in the writ, yet the defendant may shew any disability in the auncester; as in action by younger brother, he need not name his elder brother, but claim of the seisin of his father, yet the defendant may shew the elder brother survived, and was seised, 42 Ed. 3, 2, and where the auncester is named, 1 Cr. 524, Rot. 699. Tr. 11 Car. *Edwards* against *Rogers*, the heir is not always barred. In *Hobbyes case*, the attainder was after the brother and sister born, so not like this case. The case of *Eaton*, Decree 442 in the dutchy, I agreed; and that double blood of father and mother is not necessary; but if both the children have the same blood that any of the parents have, its sufficient; although either of the parties be disabled; for the half blood is only where issue are by several parents, fathers or mothers: also *Courtnyes case* 3 Inst. is not to this purpose, unless it make for my opinion. The case of *Godfry* against *Dixon*, cometh not to that in question, there being no disability either in parents, **[581]** which were denizens, nor in the children, which were natural born: but in the case at Bar, the disability of the father remains to his death. And Mountague held thus expresly, that they cannot inherit in that case: and in *Davise* against *Pace*, 55, B. R. this point came not in question: and *Foster* against *Ramsy* in 1656 is of no great weight, farther then the reason, and therefore need no answer.

2. Windham observed on the special verdict, that Robert the father is expresly found an alien, and of alien parents, and therefore it must be intended that his wife was no alien, no disability being to be intended. Also here is an office that finds the son John an alien, which Crumpton 54 ought to be first traversed in the hands of the King; but being granted over, it may be now traversed against patentee. As to the case it self, I do distrust my own judgment, which is, that the brother shall inherit, and that judgment ought to be given for the plaintiff, against the fundamental reasons that have been alledged to the contrary: I disallow not the distinction betwixt civil and natural blood, but its misapplied to this case; for no book old or new that I find, assigns this defect of civil blood as disability of alien. And in *Godfry and Dixons case*, the Judges found fault with this new term, and said this disability was not by reason of blood, but of the place of legiance; so in the civil law; but this is a metaphorical speech; when the parties cannot inherit, its a jus sanguinis superadded to that of nature by humane laws. He that is seised in fee and in tail, after felony committed, as to the fee, his issue cannot inherit, but the tail he may: so he that is English born shall inherit, but contrà, he that is born beyond sea of English, as in France, &c. And this civil blood is not ex traduce, but ex impositione legis, and so not necessary to come from the father; for he giveth no civil blood, but the law: as bastards are not so, because the father is such, so nil dat quod non habet holds not here; the law only determines civil blood, not the parents; which hath been the foundation of the arguments for the defendant. The law extends the disability of aliens upward, so as to set aside only himself and issue, not any that claim not from him, 31 Ed. 1. Cosinage 5. This is the difference betwixt alien and person attainted; for attainder corrupts upward and downward. But 2. If the lands move from the alien himself, none upward or downward can inherit: but if, as the case at Bar, the lands move from any beneath the alien, they may inherit; for its the craft that is to be respected, **[582]** not the stocks, for of this it only takes nourishment, but renders its own proper fruit; as quince on a crab will bear quinces, so here, the brothers are as born in England, and have only alimentum from the stock, not any alteration of their sweetness. I agree the case of mordancester, that brother must be said also heir, this proves him not heir, or the other his auncester, but that the discent betwixt them is as immediate as betwixt father and son. 3. The incapacity of an alien is only restrained to such as claim jure repræsentationis of the alien, and ariseth only ex loco, and so doth not transmit it self to all the blood, as the poyson of attainder. 4. Admit the brother hath no capacity from his father, yet he hath from his mother, who is not found an alien, and that is sufficient, where the father is as persona non existens; for there is no half blood as to mother and son, but only betwixt brothers. 5. Its not the office of Judges to enlarge incapacities farther then they have express warrant from our law, & sub silentio, I believe many issue of Scotch parents have inherited, and the law takes place with me, and therefore an incapacity ought to be shewed on the other side. I have not found any such objection against the brothers, that the father was disabled; the books do not warrant Cooks opinion, which is not hereby weakned, in that he doth not affirm them all to be laws: I think *Courtnys case* is against me, but not in the judgment of it, compared with *Vinians case* Dy. for this was of an attainder which goeth to the whole family; but the saying the son of a person attainted could have no other heirs but lineal, is expresly resolved contrà in 36 Eliz. and that the brother of such son may inherit; yet the attainder corrupts the blood ab origine; for a son born before, during the attainder, is in the same capacity, so long as the attainder continues, with a son born after attainder. And *Hobbyes case* is stronger for me then this case: I am not satisfied with any difference of this case at Bar, from the case of *Godry* against *Dixon*, for it was an alien (not a denizen) had issue a son, and after denization hath issue another, which differs not quoad the brothers at all from our case. Also according to the arguments on the other side, H. born in England of alien cannot inherit, for the denization is only ex nunc, and cureth nothing of the elder brothers disability. 2. Turning the case, that these brothers are aliens born, then the Act of Naturalization, that they shall be reputed and taken in every respect, condition and degree, your Majesties liege subjects, **[583]** and to every intent, as subjects born in England. So the (as) relates to the latter clause, and not to the former, in which case, the making them liege subjects, doth take away all their defects

of legiance in the father, as well as himself, both being in the same person, and of one and the same kind; the words no more restraining liege to the father then the son: general words would have extended only to natural birth, but here is a superaddition of proper words to make him liege, which is a sufficient word, without other addition, to cure all defects of legiance: and the resort and pedegree must be intended to such auncesters as were naturally so in blood, before only incapacitated by non-legiance, which being taken away, although such had been no auncester before, yet now they are; and in this case, there is no other defect of the persons, but the want of legiance in the father, which is cured, yet the half blood is not hereby cured for want of words: and the latter clause is rather added for enlargement then restraint, in that favores sunt amplificandi, as of the donati civitatis in Rome, where if either side had jus civitatis, the issue enjoyed it, as Godwin, the like of manumission, which for an hour dischargeth villenage for ever.

43. *Wednesday, No.* 4.

Partition.

Wild the Kings Serjeant, moved for a prohibition to the Hundred Court of Dover, in a writ of partition brought by tenant in dower of the moiety by custom, grounded on 32 H. 8, which lieth not there, per Curiam; but feme of tenant in fee doth there recover by meets and bounds, and is no tenant in common; but contrà of feme of one tenant in common, as this case at Bar was. Prohibition granted, nisi.

44. FRANKLYN *against* SYLVESTER.

London.

Coleman moved for a supersedeas to a procedendo on a cause removed out of London by habeas corpus, and bail put in here, after which the principal rendred himself in discharge of his bail, but by covin had provided persons that rescued him out of the hands of the tipstaff, which, per Curiam, is no render at all, being ineffectual: but if there be no practice in the bayl below, they are discharged by putting in bail above, although it were allowed below. Adjornatur.

[584] 45. SIR CHARLES STANLY AND ANDREWS. Siderf. 159, pl. 12.

Peace.

In evidence to the jury, it was agreed by the Court, that he that seeth a fray, and casually assists against the law, if any be slain, it's murder in such assistant, especially if he know what the cause is, whether an arrest, or what it is. 2. If a man be kill'd by whomsoever, those that resist baily or officer are guilty of murder: so of peers, or any arrested by erronious process.

46. FRYSER *against* BROOK.

Trades.

Powis moved in arrest of judgment in an action on 5 Eliz. of Labourers § 20, for exercising the trade of chandler, brought originally in B. R. the offence being alledged at Newcastle, which, as *Naylor* against *Ash*, is naught, Styles 223, pl. 507, and by the statute of 21 Jac. ought to be first brought below, being not tied to any of the Courts at Westminster, as the rest are: the Court agreed, that any cause of action for offence in Middlesex, may be laid in B. R. but dubitatur in this case. Adjornatur.

47. SIR THO. DRAPER.

Enquest.

The Court spared him from being sworn on the grand jury of Middlesex, although he had a house here, and his family here in term time, but seldom else, on allegation that his constant residence was in Berkshire.

48. SMITH *against* TRIMNELL. *Friday, Nov.* 6.

Nusance.

In action upon the case for continuance of wall, by which the plaintiffs lights were penitus obstupatæ in an ancient house; after verdict, Smith conceived it well enough, as H. 9 Car. Rot. 133, *Stonehouse* against *Corbet* in wast ad exhæredationem of H. in reversion, alledging tenant in tail dead, but not saying without issue, which shall after verdict be intended; so shall this wall be intended a nusance, as alledged, being so found: but, per Curiam, the plaintiff ought to shew the wall was new. Judgment staid.

[585] 49. THE KING *against* CHALLONER. *Ante.*

Peace.

The Court on view of presidents conceived this conviction quashable by motion, without writ of error; and the fault assigned was in the caption that was alledged anno Domini Car. 2, Angliæ 15, &c. (not saying Regis) which per Curiam, shall be intended, but however is well enough in the caption; contrà of such fault in the indictment, as *Moors case*, 9 Car. 1. Also it was quod disseisiverunt, not saying inde, which, per Curiam, is ill also in the indictment or conviction; but this is only in the parties complaint before them, which is well enough, & confirmatur le conviction: but in regard the justices on the view had restored the informer, and altered the defendants possession, the Court, on submission of the party to fine, ordered possession to the defendant.

50. THE KING *against* CHEDWICK. In Baron & Feme, Br. 1.

Baron & feme.

Baron and feme convicted of perjury, she only is taken, and Powis prayed she might stay till the husband came in to receive judgment together, which the Court denied. Stroud moved in arrest of judgment, that the indictment was joynt, which, per Curiam, is well enough: so of the issue joyntly taken. Adjornatur.

51. COLLINGWOOD *against* PACE IN THE EXCHEQUER CHAMBER. *Ante. Saturday, Nov.* 7.

Alien. In Denizen, Br. 7.

Brown, Justice of C. B. This case is without president, and therefore as post-nati 41, we must recurrere ad rationem, as previous to my argument; I exclude the two elder brothers, Patrick and Nich. and his son, and assist the two younger, John and George, who being aliens can take nothing, Litt. 129, being such as is not born within the King's legiance, but within the legiance of a stranger; and that H. is an alien is the plea, 6 Ed. 3, 22, not that he wants blood: nor is this by the law of God that he is excluded, but only particular constitutions of particular kingdoms: and the consequence hereof is, that being born out of the Kings legeancy, he hath no inheritable blood; so that Patrick, the son of Nich. although a denizen, shall not inherit, his father being also alive, but yet the law takes notice of him to protect him, so that it's murder to kill **[586]** him; and 39 Ass. 18, Dy. 222, will try whether he be so; and the law takes notice of his blood, 3 Cr. 683, *Box* against *Philips*, to make him administrator as next of kindred, so *Caroons case*, 1 Cr. yet the prudence of the law is such, that it will not permit them to purchase any lands, nor doth it give them any for the danger in our island, in regard strength will follow possession of lands, 2 Inst. 583, and for this cause the King seised the possessions of priors aliens, and this is the cause that the King doth seise the lands of others, 42 Ed. 3, 2, and these being excluded, I shall clear the discent against the title of the escheat, which is not favoured in law; and here is neither delictum nor defectum sanguinis, and so there

be any tenant, by how weak title soever, the lord shall not have it, as baron discontinues the lands of the wife, and dyeth without heirs, the lord shall not have the land, 6 H. 4, 3. So of feoffee of infant, who dyeth without heir; also escheats may be prevented by devise, 2 Co. Epist. in fine, saith, there hath been scarce two questions in all his time on escheats and discents, yet here are both grounded on his opinion, 1 Inst. 8. But I deny the grounds thereof; as the brothers cannot inherit each other, because they cannot inherit the father, this was ruled contrary in *Hobbies case*, where the father had no inheritable blood at the time of the discent, and that they had before is all gone by the attainder, so is *The Marquess of Exeters case*, 3 Inst. and the blood of the mother will not support, for the blood of the father must first take according to the book, 49 Ed. 3, 12, but yet the heir of the mother shall take her inheritance notwithstanding the attainder of the father, because in conveyance to this land, 1 Inst. 187, no mention need be made of the father, and her blood remains intire notwithstanding his attainder, 4 Ass. 4, baron and feme joyntenants, he is attainted, her heir shall take; the being an alien is an impediment, no personal defect, and favoured more then persons attainted, Dyer 159. 6 H. 7, 15, they are enabled to sue, 2 Cr. *Trulock* against *Morice*. Action upon the case for slanderous words lyeth for him notwithstanding his disability. I do conceive, that every one that is liber & legalis homo hath two bloods, auncestrel which inables discents, and a personal blood, whereby men are inabled to purchase and leave unto their heirs; and every purchaser of lands, as to that, is become a common auncester, and all the lines of discent are to be made from him, and no farther the law regards this blood more then the blood of the father, Litt. sect. 6. The lands of the elder brother shall not go to the younger by another venter, although both **[587]** are heirs to the father: so Litt. sect. 4, there is a nota on this difference betwixt purchase and discent. 2. There is need of inheritable blood of any auncester to H. that conveys from the first purchaser, as aiel pier & fits, the grandfather is attainted, the father purchaseth, the son shall inherit; so if he were alien or bastard: and that these are all recta linea doth not create any difference from brothers who are collateral, for the blood is the same; and in all, regard is only to be had to the first purchaser. The books on which I ground this opinion are 49 Ed. 3, 12, & 39 Ed. 3, 30, where the difference is as Pl. Com. 487, *Clere* against *Hadly*, that where the father is the purchasor, the discent must relate to him. 3. The conveyance of the title need not mention the father, but fraternitas qua fraternitas facit hæredem, as well as filiatio qua filiatio; and the discent betwixt brothers is as immediate as from the father to the son, as Litt. sect. 3, proveth, and where the father need not be named, no impediment can be objected; and however it's said that this is only rem breviter narrare, yet as 8 H. 6, 2. 1 Inst. 11 & 115, this argument from pleading and entries is very sufficient in law, which is agreed, Bar. F. 315, & 17 Ed. 4, 1, by Billing Chief Justice; and the disability of such person hurts not the son: so 1 Cr. *Broadstock* against *Rogers* was adjudged accordingly of a fine levied by such persons from whom H. claims, only by way of pedigree. 4. Upon the Act of Naturalization this is stronger, for the discent from an alien naturalized, is as one attainted and pardoned, and these words are very large. None will doubt but the Parliament may make them inheritable, but whether this hath done so, is doubted; but unless it had been said in terminis they shall inherit each other, the words are large enough to make them so, especially if every word be made significant, F. N. B. 195. Register 294. 1 Cr. 235, one brother is an auncestor to another: and here all impediments above them are removed by the intent of the makers, who otherways had made them but half brothers. Dyer 274, is a stronger case then this, the restitution being only in blood to the father only, who was attainted, yet having general words of resort to any auncestor, &c. it was held that the son may have petition, as heir to his uncle; in *Godfrey and Dixons case*, every one of the Judges agreed, and spake, but argued not, in regard four arguments had been at the Bar; all agreed that naturalization shall not relate but only to the time of the making. And *Starky* against *Tredway*, Mich. 1657, C. B. in this very case at Barr, the Court were against the escheat for John the son of George the now plaintiff: and I conceive judgment ought to be now for him.

[588] 2. Tourner, third Baron, ad idem for the plaintiff. Its generally and

regularly true by the law of God and man, Numb. 27, & Grotius lib. 2, cap. 7, that brothers may inherit each other, and the disability therefore lyeth on the other side to shew. The argument from 1 Inst. 8 is ex male suppositis, for there is not any hereditable blood here necessary: nor is any inheritable blood transmitted from the father to the son by generation, as is said to be vehiculum hæreditatis; nay, there is no such thing as heritable blood in any person whatsoever, it's but a meer phrase and notion, and cannot be a quality in the blood, as is supposed, nec habet suum esse naturale vel artificiale; nor is there any use of such blood, unless in reference to discents, and here it's useless. In the beginning, all things were in common, and propriety introduced by assent, and as a consequent thereof, every man might dispose of what he had; and on default of disposition, the law gave it to whom the law supposed he loved best, viz. his children; and should the law suppose men loved their neighbours best, the law would give it to them; and it cannot be intended that H. loved his child attainted, being communis hostis, and uncapable to retain. Also the law will not give unto a bastard, because the father hath no assurance that the child is his: as for legitimate children he hath on her solemn vows, and why bastard shall not inherit the mother, is because the law presumes this a reproach to her, and born in sin; this inheritable blood is an expression of use, when one may, or may not inherit, but without any propriety, only tropical and metaphorical; for one cannot have blood and no blood at the same time, which he must have, should he be enabled to take as purchaser after pardon, and disabled as to that before attainder. But 2. If there were any such blood, it is in this case, there being no law of man that puts any impediment or disability on aliens; not the Scotch laws, none will disable themselves; but if any, it's our English laws, which at this time could not have put any disability on foreign blood not to our English lands; if any law could do it, it would be our statute law: but Parliaments before the accession of the Crown of Scotland, could not affect them with any intrinsick disability; their omnipotency is circumscribed, as the power of natural agents, to the sphere of their activity; subjection and obligation are reciprocal, laws themselves have their laws, and such a law could not reach their persons. It's one thing to give a benefit to one that desires it, as to naturalize aliens, another to bind those that are unwilling: as to enact that the French should observe our fast, is void; our laws may affect English that go **[589]** beyond sea, but not such as are originally out of the reach of them. 3. If they could affect the blood of aliens, yet it would be more convenient to lay the impediment on our lands here, as our laws have done, then on the persons; and our law doth thus disable them as fully, as if it could lay an impediment on their blood: so by making lands burg-English or gavelkind, the law will carry the discent accordingly; if the impediment should lye on the blood, the inconvenience would be, that H. should not inherit to one that is enabled to purchase and retain, because an auncestor that is a stranger hath disabled their blood; and the common law never works so irregularly in discents, as it doth with uses and estates, as to disable at one, and inable at another time. Also it's said by Prisot in 22 H. 6, 18, that succession is guided by law. 4. This inheritable blood is not transmitted, being not natural, which is not alterable by any law, nor artificial, which can have nothing to do with nature. When propriety was first induced, before inheriting created, had the father left two sons, the one shall inherit the other, and the presumption that the education of the sons, being under an alien father, will savour of his principles, and so they should not inherit each other, nor to any, doth not make against us, for our law will trust aliens with some lands, not others; as the son of feme marrying an alien, shall inherit his mother, but not his father. 5. As to the present Act of Parliament, the clauses being distinct, cannot refer one to the other, as Windham and Brown had agreed. If priviledges be odious in any case, it's when they bring inconvenience to a third person, which is not in our case, which the farther is by Act of Parliament, not by letters patents: and in exposition of Acts, we must not depart from propriety, unless there be great cause, as that the Act would be absurd, unjust, or inconvenient with another exposition; this Act is to be taken favourably, in that it doth but restore men to the law of nature. *Post.*

52. HERBERT *against* TURBALL. *Monday, Nov.* 9. Siderf. 162, pl. 17.

[See *Haines* v. *Guthrie*, 1884, 13 Q. B. D. 826. Referred to, *In re Smith*, 1890, 45 Ch. D. 635.]

Infant.

An infant makes a will under the age of 21 years, and when of age dyeth without publication, it's void; but, per Curiam, If after age he new publisheth it, it's good: so if the publication were (as in the case at Bar) on the same day that he came of age, which was the day also of his death; also by Keeling and Hyde, and not denied, that H. born the 16th of **[590]** February 1608, is the 15th of February (1629), 21 years after of full age, and whatever hour he were born is not material, there being no fraction of days. Also by Twisden, Will made on the day that H. cometh on age, is good, which was agreed also in evidence to a jury at Bar.

53. BROWN *against* SPENCE. *Ante.* Siderf. 163, pl. 18.

Incumbent.

In evidence to a jury, it was proved that Dr. Geery lessor of the plaintiff, had read the articles in several churches, hamlets of the mother parish-church, having only sent his servant to demand the keys of the defendant, without any personal endeavour to read them at the cathedral church, which the Court inclined was not sufficient. 2. The acceptance of a second benefice, after sequestration of the former in time of war, is not plurality within 21 H. 8. It was pressed to be specially found by Sir J. Palmer the Kings Attorney, for the plaintiff. Also presentation made from the King pleno jure vel quocunque alio titulo, when there is one in due possession, is void, unless title be made to the King, as *Greens case*, for the King cannot usurp, by Windham and Hyde against Twisden and Keeling, for although the institution be a judicial Act, yet the foundation thereof is gone, as 2 Cr. 232. 3. The confirmation of a parson to the latter living by the Act of Ministers, 12 Car. 2, doth not make the former void, without proof that the parson was instituted and inducted to the second, and did make his election to continue in it. But the counsel for the plaintiff not attending to draw special verdict as they ought at their peril, there was a general verdict for the defendant.

54. PRIMATE *against* SIR JOHN JACKSON. *Ante. Tuesday, Novemb.* 10.

Perjury.

Twisden, Hyde, and Keeling on conference and opinion of Bridgman, and the rest of Serjeants Inn, conceived no new trial ought to be granted, in that the same, which is dearer then any sober mans life, is in question, and this is without all president. Windham contrà, That all laws agree against such escape of the punishment by multiplying his crime, if by his innocency he be cleared, its otherways.

[591] 55. THYN *against* THYN. *Ante.*

Hill. 12 & 13 Car. 2, Rot. 448.

Recovery.

Issue out of Chancery, whether tayl were cut off of the manor in question, and of Near-Mead and Leverton Lees, the special verdict find these lands no parcel of the manor, but demised by copy as parcel in the time of E. 6, and ever since in reputation, the manor and both the closes are in one mans possession: and whether by 80 years possession this will pass per nomen manerij in common recovery, is the question. Jones for the plaintiff conceived it did, though without Act of Parliament lands can neither be made a manor, nor parcel; but the name of the manor is only such

a description of the thing that may make it known to the visinage, as *Sir Moil Finch's case*, which differs not from ours, being only of manor in reputation in a fine. The objection, that the demand is satisfied by the manor, without these lands will make no difference, for we must look to the intention of the parties, which cannot be satisfied, without these lands pass also as parcel expresly in this point, is the case, 1 Cr. 308, *Sir George Symonds case*, there being only a reputation but for five years, and in a fine which differs not from recovery; also the contrary would be very inconvenient to purchasers, who by often changing have made many parts of manor separate, and no parcels. Winnington for the defendant, The recovery is only de manerio cum pertinentiis, although the bargain and sale precedent, which (signifieth nothing, being only to make tenant to the præcipe, have ample words to pass the manor, and these parcels by particular names) as lands, Pl. Com. 168, they cannot be parcel of other lands, but may pass by general reputation with this difference, when there is nothing but what is in reputation that passeth: but here is a real manor that passeth by the recovery; and therefore other lands that are only parcel in reputation shall not pass like an estople, which cannot pass part so, and part by way of interest, 2 Co. *Sir R. Heyward's case.* Nor can any conveyance go to two intents, or two several ways; which double intent must be here to make the grant good, Hub. 171. A mistake of the place or thing doth only cause an abridgment of the grant, but doth not make it void in all: so Dyer 376 on mistake of person: so *Ognell's case*, on mistake of inferiour termor. Also this is rather a question of fact, the issue being, whether the tayl **[592]** were doubt by recovery, and not whither they were parcel, or not. Keeling conceived the question proper, and so found, leaving it to the judgment of the Court, whither by such reputation it will pass as parcel. He also held strongly, that the closes pass as parcel by this reputation. Windham held this case different from Sir Moil Finches, and from the other of fine, in that præcipe must demand things according to truth; but doubted it as considerable point; Twisden accordingly: and the remainder of tenancy for life, although really parcel of the mannor, will not pass, as in fine it will by such general words. And *Sir Moil Finches case* was only carried by Cooke, when Chief Justice, against the resolution of all the Judges, and therefore it is not to be extended; although *Sir Moil Finches case* be not to be questioned, for the many estates that depend on it. Adjornatur.

56. WEB *against* DYER. Siderf. 163, pl. 19.

Encumbent.

Jones prayed no prohibition may be granted, in that tenant of impropriate rectory, now in the hands of lay-hospital is such a person, that by the vicar may be sued in the Spiritual Court. Winnington contrà; That prima facie, all hospitals are lay-fee, and therefore ought not to be sued in the Spiritual Court; the Court would not grant a prohibition, the suit being against parishioner tenant for life, 12 Co. 66, is stronger then this: so would they had the plaintiff sued as impropriator, but if it be 1 Rich. 3, 4, specially alledged that he hath them by Act of Dissolution, &c. its a good plea for prohibition where the impropriator is sued, 46 Ed. 3, 32.

57. EDGAR *against* CHUT.

Merchants.

In action upon the case on a bill of exchange grounded on custom of merchants, that when ever any such, or other negotiating for them with any other merchants in England, have bills directed to them, that if H. to whom such bills are directed, refuse to accept on sight, or to pay such bills, then he that drew it ought: both being, by the custom to be merchants, the bearer as well as the drawer. And the plaintiff having not shewed that the bearer was such a merchant, or person negotiating, it was moved by Winnington to arrest judgment. But, by Jones for the plaintiff, Such merchant is to be referred only to him to whom the bill is directed, and to the procurers of such bill, and not of **[593]** the drawers, or they for whose use the money is to be paid, which the Court agreed. Judgment for the plaintiff.

58. LORD ROSSES CASE.

Baron and feme.

Mountague prayed a prohibition, on suggestion of a citation out of the diocess by the Dean of the Arches in suit there, pro restitutione officiorum & debitorum personalium conjugalium by his wife, which the Court granted nisi; although, by Windham, it is doubtful whither 23 H. 8 doth extend to transitory causes of action, where the plaintiff liveth in one diocess, and the defendant in another: but such follow the form of the plaintiffs aboad, but the wife is intended to inhabit where the husband dwelleth.

59. GIFFORD *against* BOND AND POCOCKE.

Judgment.

The plaintiff giveth a warrant of attorny to acknowledge satisfaction of any judgment that is, or may be had against bond, whereby execution may be had: by vertue of this, the attorny may acknowledge satisfaction on a judgment had against Bond, Pococke, and Becks, for if any of the parties be sufficiently named, its enough; and judgment against three, is sufficient for acknowledgment of one against two; but not contrà.

60. PRETTY *against* ROBERTS. *Wednesday, No.* 11. In Count. Br. 6.

Lieu.

In debt upon obligation dated in Surry, brought in London, and brought hither by habeas corpus, one Blumley of the Inner Temple had pleaded the statute of 6 Rich. 2, cap. 2, proces 10, that all obligations ought to be sued in their proper counties, as dated, and prayed judgment of this writ, which, per Curiam, is a frivolous plea. And Hyde Chief Justice, would have forejudged him the bar for pleading it, the law being clear, 21 Ed. 4, 26, that unless the obligation appear in the count, or on the pleading to be out of the county, although it bear date out, its not material where its brought.

[594] 61. FRANKLIN *against* SYLVESTER. *Ante.*

Bail.

The bail above was only de bene esse, but never accepted, but the three terms were out, whereby according to the course of the Court they were absolute: also the fraud was after the render at a tavern, to which the tipstaff carried him in the way to prison; yet, per Curiam, the whole was but a design, and therefore the bail below must stand, and procedendo was awarded on habeas corpus, but on sight of agreement in writing of the plaintiff, to discharge the action on promise to pay, &c. they granted supersedeas, conceiving the action good against all.

62. THE KING *against* PRIN. *Ante.*

Mandamus.

Powis now excepted to the retorn of mandamus, there being no cause specified of his amoval, which at common law is necessary, as *Bags case* 11 Co. and so it is on this Act of 13 Car. 2, in that the commissioners are made Judges, who do always determine ex causis, and else the Kings best subjects may be turnd out without remedy. 2. It can never be intended, should the former be admitted, that they may turn him out without summons, for otherways they can never know whither such a person be fit and able. Also the meaning of the Parliament was only to give a like power to them, as to the Judges of oyer and terminer, whose power is impliedly to do this: and suitable to this is the exposition of 11 H. 7, cap. 3, the commissions of Emson and Dudly, which, as all doubtful words in statutes, must be expounded for the

hearing of the party; and else this Act being against Magna Charta 29 would be void, which is enough, however, to bough the interpretation rather according to it, then otherway; this is also against natural equity, which Hub. 33 is void: this Act is like 6 H. 6, 5, & 23 H. 8, 5, of Sewers, which hath as large words as this, being to proceed according to discretion, 10 Co. 140, which is always expounded, to be in legal way. Also the Parliament themselves, as in 28 Ed. 3, nu. 8. And. 10, and *Mortimers case* cannot proceed against any, without hearing or summons; and for this cause his attainder was adjudged void 28 Ed. 3, nu. 13, &c. *The Lord Arundels case* according, Com. Br. 3, the Kings commissioners to proceed without summons is void. But Twisden took a suddain exception, that its not said in the retorn that Mr. Prin was recorder, 24 Dec. 1661, **[595]** and otherways, the commissioners have no power by the Act to turn him out; which Keeling conceived shall be intended: Windham agreed with Twisden, who also doubted whither the Act were general, or but particular. Keeling held it general concerning the Government; but, by Hyde, There being mention of the Act in the retorn, and that by commissioners, by vertue thereof he was turned out, the Court must now take notice of it. Adjornatur.

63. DAVIE *against* ISAAK AND MARTYN. *Ante.*

Account.

Stroud prayed judgment against Martyn on the verdict, there being no other remedy, in that a capias lieth not here, the accompt being by bill, on the reason of 41 Ed. 3, 3, pl. 30. But by Twisden, that book is against the plaintiff; and there is no other process but by capias in infinitum, which lieth here on bill by constant course: but the party cannot be utlawed on such capias, but only have an alias. Keeling doubted not, but that one might refuse to have accompted till process determined against the other; but when one cometh in, and accounts voluntarily, judgment may now be against him alone well enough. Windham conceived an accompt is not of the nature of debt, but several, for which each is chargeable with his own receipts, as one executor de son tort can do no hurt to another, and so judgment may be against one. Twisden conceived this action joynt, and the receipt of one baily, is the resceipt of the other; also auditors cannot be assigned to one, till the other come in, and therefore his voluntary coming in to accompt, is to no purpose, although the suit be by bill, and not by original, as 41 Ed. 3, 3. Hyde, The action is joynt, and not like the charging of guardians in soccage, as bailiffs, whose receipts are several, and shall not charge each other, as when they are originally (as in the case at Bar) constituted and charged as bailiffs. Also it doth not appear that any capias or alias is awarded against the other, which perhaps might alter the case; yet he that is in default shall have advantage of the discharge of him that appears, and ought to shew if he hath any release or other discharge: also he that comes in, ought before the auditors to plead that they are not joint bailiffs, but having passed that time, he cannot now assign it in arrest of judgment, but it ought to come in by certificate of the auditors, unless it were pleaded by the defendant when he cometh in on the capias ad computandum, judgment for the plaintiff per Curiam; præter **[596]** Twisden, against him that was convicted to accompt: but Jones in arrest of judgment, prayed new venire facias, in that the verdict finds the defendant bailiff for part of the time mentioned in the count, and says nothing to the residue, which per Curiam is ill, and had been error if second judgment had been given; but being moved before a new venire facias was awarded.

64. THE KING *against* ALCOCKE. *Ante.* Endict. F. 1.

Place.

Coleman prayed an amendment of the record of conviction of barretry, removed hither from sessions of Middlesex, according to the original in the sessions, which Hyde denied on sight of president, Pasch. 9 Car. 1, where commissioners of bankrupt were removed out of London, and resolved that records may be here amended

according to the record below by their custom, but not elsewhere. Keeling 12 H. 7, 25. 2 Cr. 276, yet the King may alledge diminution, and have a new certiorari, as was resolved Rot. 3, Collier, Tr. 41 Eliz. B. R. and so on omission of ad comitat. tent. in indictment and utlawry of murder; so Tr. 3 Car. 1, *Plums case* in an indictment of murder. And Windham agreed it amendable as well as in C. B. And by Twisden in *Samsons case*, although the lords by escheat cannot alledge diminution on utlawry of murder, yet the King may; and so may amicus Curiæ ad informand. Conscientiam Curiæ: but how far this is allowable, was doubted; in that hereby all manner of indictments of force would be amended, which would be very inconvenient: the C. B. is not to be compared to other Inferior Courts, although by course of the Courts, they remove the record it self; also per Curiam, as *Sir Anthony Ashtons case* no diminution can be assigned by the party for the King, but only by the Kings attorny, who is for him, ad lucrand. & perdend. and then only to such places as have full records, and not only notes of clerks.

65. COLE *against* SKINNER. *Thursday, No.* 12.

Partition.

In ejectment, the ouster was confessed of a third part, of a fourth part, of a fifth part in five to be divided, which by Hide, is very inconvenient, and crept in since the new rule of leaving declarations, the lands lying in several places distinct from each other, and may be held by se-[597]-veral titles, which could never be had, the old course of actuall ejectment continued; but on suggestion that the title was but one, and one plaintiff, and one defendant, it was admitted. 2. The limitation of the estate by Sir Peter Vanlore, by covenant to stand seised of the fifth part to the use of four daughters, and their issue in tayl, and so to the fifth; and on default of such issue in any one, her part to go to the survivors, according to their several shares and proportions before limited, and to the heirs of their bodies, which, by Jones for the plaintiff, shall be intended to be divided, and the estate only as the former parts: but by Glyn for the defendant, The survivors are joyntenants with several inheritances, as Littletons case, and so the issue cannot take so long as any of the daughters are living, which the Court directed to be found specially: and Windham agreed, that had the limitation been to the survivors and their heirs males, according to their several shares, they had been joyntenants, but this is several. Twisden said, that the devise to A. B. and C. and their heirs respectively, were tenants in common, and the discent is intended per stipites, not per capita.

66. THE LORD ROSSES CASE. *Ante.*

Prohibition.

By Hyde, After prohibition awarded, the Court will not take notice of the remission of the Court by Inferiour Ordinary, shewing the instrument by suggestion only; but contrary here, no prohibition being awarded, but only nisi, which the Court agreed. Also a remission by the official of the bishop, is good within 23 H. 8, cap. Whereupon the Court discharged the rule for a prohibition.

67. THE TOWN OF WIGON *against* PILKINGTON.

Confirmation.

The town retorned that they removed him from the place of alderman, for that contrary to his oath, spoliavit & dilaceravit quædam recorda of such a Court which was after presented, without shewing the presentment: which, per Curiam, is well enough on mandamus, in that the record being spoiled, the town cannot certainly shew it. Also being said contrà officium & juramentum, it shall be intended in a retorn to be voluntary, and the retorn was confirmed; although it's not said, that the defendant was a resident within the precinct of the leet, to which he was summoned.

[598] 68. THE CITY OF EXON *against* MORGAN.

Certiorari.

It's a good retorn on the second habeas corpus, that procedendo after the first was awarded here, and allowed in the Court below, and that their recorder, Sir Peter Ball, was according to 21 Jac. an ekemij then above three years, Angl. an utter barrester, which, per Curiam, is sufficient. So by Twisden, where the second is by practice brought by another name, as *Leech* against *Brumsall*. 2. It's not shewed that the cause of an action did arise within the jurisdiction of the Inferiour Court, which, by Hyde Chief Justice, & Curiam, ought to be shewed; and the Court would not give leave to amend, being matter of fact, and out of Inferiour Court, although the retorn were not filed, it being to oust this Court of jurisdiction, & infrà jurisdict. is in no case whatever supplied when wanting, per quod the Court amerced the mayor for not removing the record.

69. THE RULES OF COURT FOR AC ETIAMS.

Bayl.

In debt ac etiam billæ ipsius querentis versus præfat. A. def. pro 100l. (not saying by contract or by obligation).

In detinue pro detentione bonorum & catallorum ipsius querentis ad val. 100l.

In covenant pro fractione conventionum ad dampnum 100l.

In promise pro non performatione promissionum & assumptionum ad damnum ipsius querentis ad val. 100l.

In trover pro conversione & dispositione bonorum & catallorum ipsius querentis ad val. 100.

In trespass pro captione & asportatione bonorum & catallorum (vel captione & effugatione averiorum) ipsius querentis ad damnum 100l.

These were invented by the clerks, for avoiding the statute of 13 Car. 2, cap. 2, which requireth that the cause of action should be specified, or else no special bayl, unless the sum be above 40l. But when no special bayl is to be put in, no ac etiam ought to be; but the writ is at common law before; so against executors, administrators, &c.

[599] 70. LIGHTFOOT *against* SALT.

Nusance.

In action upon the case for erecting swine-stye, and house of office de novo tam proper domum, that the walls thereof were putrid, and became ruinous; and by reason of laying a dunghil near it, and of the stinks, the plaintiff could not live in his house, but left it for fear of infection: the Court held this damages not well applied, but only to the dunghil; and the Court on verdict will intend dammages for no more; but however the plaintiff need not in such case of nusans say his house is ancient, so long as it appears the nusance is de novo erect. Judgment for the plaintiff.

71. THE KING *against* CHEDWICK. *Ante. Friday, No.* 13.

In baron & feme.

Per Curiam at common law one may be indicted for false oath before justice of peace, per quod I was bound to the peace: so in Chancery on contempt; and its not necessary the oath should be material to the issue, which is the difference betwixt common law and statute 5 Eliz. But the oath in the case at Bar, being that the trunk was the goods of J. S. and not of the plaintiff, in an action, wherein she was produced as witness; and the issue was, whither certain plate and jewels (which revera were in that trunk, but not so alledged) were the goods of the plaintiff. Adjornatur.

72. TILFORD *against* FRENCH.

Siderf. 160, pl. 14. Arbitrement.

In debt on award, the plaintiff counted of mutual agrement, and submission ad performand. an award, which was made that the defendant should pay 50l. to the plaintiff; and super receptionem inde, the plaintiff should deliver up writings, and give general release, which after verdict, was said insufficient, the defendant having no remedy against the plaintiff if he refuse to deliver the writings. In arrest of judgment, Jones for the plaintiff, Rast. Entr. Debt, in Arbitrement, This is a reciprocal promise, and therefore performance need not be averred; nor that the submission was by bond on promise: also the defendant being in default, why the plaintiff doth not perform his part, (and in such case, it **[600]** need only be said that they mutually submitted, as in 5 Ed. 4, 7) and in this case the award is good for the other part. Winnington for the defendant, The very case in point hath been adjudged for the cause, that no remedy can be had for the release, as *Mounteagle* against *Penruddock* 10 Jac. C. B. Also it was resolved, no action upon the case lieth on such a submission, the remedy being only on the judgment of the arbitrators; so was *Reader* against *Palmer* in B. R. 16, 57. Stiles 106, pl. 221. Twisden agreed it hath been held, as Winnington said, but nicely, for he did see no reason why an action upon the case should not lye, in regard else their submission is fruitless. Windham, One may declare generally of so much awarded, and the defendant may set forth the particular award; but seeing the award is set forth particularly, and it appears to be only of one side, its void: and so no action upon the case lyeth: and by Hyde and Curiam, The mutual submission is no promise in it self, but only an evidence of it; and however, without express promise, no action upon the case lieth in debt, it being long before such promise was created, which is not to be extended; and therefore it self it will not create any promise, though it be evidence of it. The plaintiff ought to discontinue, or go to new trial in action upon the case on special promise.

73. THE KING *against* BURGHES. *Ante.*

Force.

In bar of restitution, it was pleaded by the defendant, indicted of forcible entry, that J. S. was tenant for life, and his estate continuing, the defendant as servant, and by his command entred and kept possession. To which the plaintiff demurred; 1. That the master was a stranger, not indicted, and so not within 31 Eliz. 11. But by Windham, The possession of master and servant is all one. 2. It was not shewed how the estate of J. S. commenced, which per Curiam, is needless here; contrà in pleading. 3. There is no place nor time of the command, which, per Curiam, is needless: but to say servant generally, is sufficient, and if it be traversed, the servant by reply must set it forth particularly. Keeling doubted the first point, in that the defendant hath done an injury; and by 8 H. 6, the plaintiff ought to have restitution, and therefore 31 Eliz. shall be taken strictly. But by Hyde, Nothing of conviction appears here, but only an accusation, and the indictment removed hither by certiorari, and is but as an enquisition found; and here the party pleads in bar of restitution, which should **[601]** else be awarded on 8 H. 6, but not unless some title appeared by evidence, especially if any thing were alledged by affidavit against it. Twisden accorded with Keeling; and it was the fault of the servant he did not in his indictment put in his masters possession. Also by Twisden and Keeling, Prohibition and restitution is of duty; and by Hyde and Windham they are only in discretion.

74. GILBERT *against* MARTYN. *Ante.*

Visne.

Guidet moved for judgment, that the action is well brought, and no mistrial, the action of covenant being transitory, & non infregit conventionem the issue. Also the foundation of the action is where the action is brought, as 6 Co. *Dowdels case*, and so

like an action of debt brought, where the arrest was in London on escape in Surry: but by Twisden, There being only one breach assigned, the non infregit conventionem modo & forma goeth to that only: the trial of policy of assurance shall be here for necessity, as 11 H. 7, 16, & Br. Visn. 19, is expresly in the point at Bar in debt upon an obligation, 22 H. 6, 13, pl. 19. 16 H. 7, 1. Windham agreed, that had the issue been special, quod reparavit, it should have been where the place is; but here the not repairing is set forth only as evidence of breach of covenant: and after this general issue taken, the defendant may say there was no decay, and many other matters. So on nil debet pleaded in debt upon escape, the visne may be where the action is brought, for that many things may be given in evidence, and it lyeth on the defendants part to make the issue or breach local. Keeling agreed the difference; but conceived that here the plaintiff hath made his breach local, in not repairing, and the issue non infregit conventionem prædict. refers specially to that: and by Hyde, This is a special issue, as well as if the defendant had pleaded that the houses were in good repair. Twisden accorded in omnibus, all relating to the house, and on nil debet when general issue was in force, the Judges would have nothing but nil debet. Judgment arrested.

[602] 75. TERRY *against* COUPER.

Slander.

The plaintiff is run away, and is a base cheating knave and a rogue, and shall not think to bring W. where he is gone himself, and rather then so, I will spend 20l. The count was habens colloquium of the plaintiff, the defendant spake these words of him, and of his profession, which was laid to be a lime-burner: and per Curiam, although cheating knave be actionable, yet not with this application, that the words were spoken of him, & de arte sua, unless the precedent discourse were of his profession, and so they would be actionable for any trade, as well as of lime-burner. And so by Hyde, Although he be not within the Statute of Bankrupts, as of thatcher; but where the words themselves relate to the profession, such colloquium is needless, as your counsel is a knave, *Franklins case*, adjudged actionable; and notwithstanding verdict, the Court will not intend this application of the words to his trade sufficient. Adjornatur.

76. BAUDINK *against* BUSHEL. In Disms, Br. 11.

To the Chancellor of Lincolns Court.

Tythes.

Bigland moved for prohibition to his Court, on suggestion of custom that all the occupiers and tenants of Skegues, that are inhabitants in any place out of the parish, shall pay to the vicar only 4d. a year for every acre; and alledging that the plaintiff was such occupier, and lived out, and conceived that sufficient prescription, being only in discharge of the occupiers. But per Curiam, This is an unreasonable custom, and only invented by the country to cheat the parson; also it's a leaping custom, not fixed to any person certain, or to the land, nor of any permanence: and by Keeling, There is no president of any modus so variable and dancing.

77. TOWERSON *against* WINGET. *Saturday, Novemb.* 14. In Disms, Br. 11.

Tythes.

Wild moved for prohibition on suggestion of suit in the Arches before Dr. Swet, for tythe of conies of warren, without special custom, which was granted per totam Curiam, the Court having proceeded only on libel; but **[603]** yet because the defendant would not swear how many conies there were, being seen in Court, without any time, presently excommunicated him.

78. WHEELER & UXOR *against* WELSH & UXOR.

Slander.

Symson prayed a procedendo to London in action upon the case by the plaintiff for calling the defendants whore, it being by custom there actionable, it being removed hither by habeas corpus, which the whole Court granted on view of presidents.

79. COLLINGWOOD *against* PACE. *Ante.* In Denizen, Br. 7.

In the Exchequer Chamber.

Alien.

Tyrrel for the defendant according to what he had argued in the C. B. as to the exception, that the wife of Robert is not found an alien, its not of force, it being expresly found that all the children of Robert are aliens, which necessarily intends the wife was: so as to the main question, it depends on a due consideration of the nature of escheats and discents, the last, according to Littleton, must be of the intire blood, without which blood none can inherit the former, 3 Co. 47, *Ratcliffs case*, 1 Inst. 13. Escheat is a word of art, Fleta, lib. 6, cap. 1. Quoties hæres deficit per defectum sanguinis, or delictum parentis; every consanguinity is not sufficient to make an heir, not sanguis naturalis, nor sanguis legitimus, for then several venters may take, nor sanguis integer, nor sanguis magis dignus; filius est nomen naturæ, hæres juris, nor all these together, but only sanguis civilis & legalis, which is the sanguis naturalis, with all the other circumstances of proximity intirely, legality and dignity. This is evident by shewing what blood it is that is corrupted by attainder, which cannot be of natural blood, 7 Co. 13, *Calvins case* but only of his hereditary blood which is ex provisione hominis, 1 Inst. 8. Subject seized in fee hath issue an alien, he shall not inherit propter defectum, not of natural, but of legal blood only. 2. For the fountain of this blood, and how the natural blood becometh hereditary, 3 Co. 41, it cometh by procreation of one father and mother joyned in loyal matrimony: and I deny that brothers, qua brothers, shall inherit each other; for if one be alien or attainted, the other shall not inherit; they are so only in respect to that common blood they have from the same parents: lineal blood men may have without resorting farther then themselves, but no collateral heir without resorting unto the common stock; **[604]** and this is the reason bastards, who are commencers of their own families, can have no collateral heirs, Littl. sect. 4. This is Littleton's account, as of two brothers by several venters who shall inherit, because they have only the blood of the father: also from him the civil, legal, and hereditary blood doth flow, in whose power it is to destroy it, which is the father. 3. As Litt. sect. 198, it's sufficient to say the father, plaintiff or demandant, is an alien, which doth imply, Co. Entr. 62 & 482, as of attainder, with shewing the record, the defect of blood and it's corruption. Brothers, natural subjects, shall not inherit each other by reason of any personal, but for their paternal blood; and where the father is an alien, there is no personal blood, for by generation all were aliens, and in this state none of them could inherit each other: and the Acts of Naturalization giveth none, they remove the alienigenity of the brothers, but do not alter the parental blood, which it takes notice of as disabled before, and doth give resort to any auncestor, but still such persons must be an auncester; for as to this, it's but expressio eorum quæ tacitè insunt in the naturalization, the last relative clause depends on the whole: so when it's said they shall be deemed liege, it must also relate to the whole, although (as) be not in it; but were that middle clause distinct and separate, yet there must be an auncestor existing, and lands discendable, else he cannot inherit; for this Act leaveth the heir, auncestor, and discent to be guided and found out by the rules of law, and the brothers might as well claim to be both heirs to the father, who is an alien, as the one to the other: and the words of such Acts must be taken secundum subjectam materiam, as that they should be as subjects who must have parents that are so, and else an Act would exceed nature: also these are but as adscriptitij in Rome, and therefore cannot have

greater pre-eminence than natives; else would it be better to be born an alien; and that the Parliament can make such, therefore they have done it, is no good argument: nor doth this Act enable the person naturalized to inherit his brother that is natural born, nor contrary, 1 Inst. 241, was an Act of Restitution; and *Courtneyes case* supplyed this defect by express words, 1 Inst. 13. That H. is an alien doth tantamount, as that he hath no blood, as the lord claiming by escheat, where natural subject's heir is an alien, doth only say he died without heir; locus nativitatis was not the sole impediment of the discent, but the want of heritable blood, neither of which is supplyed by removing the other defect, which is causa proxima, as by pardon of attainder the blood is not restored to H. born before; **[605]** So where father and son are both aliens, by denization the defect of place is taken away, yet the son shall not inherit, but the lord by escheat pro defectu hæredis: and this answers *Godfry* against *Dixons case*, the non-allegiance being only the disability; and the Acts take no notice either of the parentage or brotherhood, but leaveth that to the construction of the common law, had they been named brother, as *The Lord Leicesters case*. Others might be estopt to alledge the contrary, but not so by the finding of the jury that they are brothers, which on this special verdict is as void as if they had found the younger brother heir to the elder, which is the case in question, and on which the Court are to judge: so if they find feme hath issue A. and B. brothers, and that A. is heir to B. is not sufficient to make them so, unless the father appear. 4. On the relative clause is made this query at common law of natural subjects, who can no more inherit each other, or to the father then where he is a subject and they aliens, Bract. 130. The opinion of Cook in *Hobbies case* hath been always received, Fleta 43. Brit. cap. 5, *& Ratcliffs case*, 3 Co. 41, and in the same reason with sons born after attainder, which is that they never had any inheritable blood from the father: in *Godfreys case* the father was denizen, and so the son, after naturalized, shall inherit to him: and as *Shelleys case*, 1 Co. the elder brother, so naturalized, shall enter on the younger if there be no restraint in the Act. Also in *Hobbies case*, as Bract. 113, the blood of the mother uncorrupted was sufficient to preserve a privity betwixt the brother and sister: also it's sufficient for the defendant to shew such disability, although the plaintiff need not convey, as *Mack-Williams case*, Hub. 232, Coment brother, 1 Inst. 239, 11 Co. *Lord Delawares case*.

Twisden for the plaintiff observed, that Patrick who claims through his father Nich. cannot inherit John, but yet the issue of George may inherit his father, being naturalized, and he born in England, as born in England, they may inherit each other, though the father be an alien, but the Act of Naturalization doth not put them in any better condition. The ground of all discents is love, but that love is engendred by blood, Pl. Com. 445, yet must be pure and uncorrupt, as Pl. Com. 545. So bastard, or issue of persons attainted, are poyson'd; and inheritable blood is no more then such a blood as the law doth admit to inherit; so the law makes the same blood in the same man corrupt and uncorrupt: as if H. be seised of lands, and also of foundership, as to the lands, its corrupt, not so as to the other: **[606]** this blood is all over the world clear and pure, and they are brothers every where, which was the reason of *Sir Upwell Caroons case;* but in person attainted, its part of the judgment that the blood be corrupt; but in aliens blood there is no crime, but only a weakness in defectu allegeantiæ, which is only in the place; so in the same place, the law makes difference, for alien amy may traffick, but the alien enemy, like *Dowmans case*, 9 Co. Cr. 476 *Baker* against *Wills*, or the water of the sea, whilst in the ocean, its salt, but when it runs through the earth, its pure and sweet, Denizen 7, the blood is not corrupt, nor so termed in any book, but only by similitude; as entry into religion, H. 7, the brothers born in England shall be as fresh-river, and have their blood inheritable ex provisione legis. That denizen sons cannot inherit the father, is, propter defectum, or imbecilitatem medicinæ, that only looking downwards, whereas an Act of Parliament works upward and downward, 1 Inst. 129, and removes the defect. Baron & feme having issue before marriage, beyond sea, and there marry, and then retorn, and such issue is naturalized, yet he shall not inherit; but yet ex operatione legis by their being born in England, they have an hereditary quality added to their blood, being born in England. Also the conveyance need not be made higher then the first purchaser, and in that by nature he is brother, the law makes

him heir. Also the blood of the father, however disabled or corrupted, Lit. sect. 747, shall never hurt the son, but where somewhat descends from the father, (or where the father might have by possibility inherited the first purchaser) as Dy. 274, *Vivians case*, where the uncle dyed seised, and the father is attainted, *Edwards* against *Rogers* 1 Cr. is a stronger case then this: the attainder of the eldest son bars the youngest, for that its a gift in law made to the King, and none ever doubted, but the youngest son by another ventre should be bar'd by bargain and sale, or devise, by the eldest, before entry. The words of Bract. & Britton are only in decision of doubt that was then, whither issue of person attainted may inherit the mother, which they hold he cannot; and Cook delivers no positive opinion, but only some have said. And before *Hobbyes case* it was doubted, whither issue of person attainted should inherit collateral auncester or his brother. In *Foster and Ramseyes case* B. R. it was resolved, they should inherit each other, where the father is alien: the reasons of Cook for *Godfryes case* are all against him, as the father need have no inheritable blood, &c. nor hath the father any by denization, as **[607]** to the son that was born before. 2. Admit they cannot at common law, the Act doth not enable them to inherit one to the other, for that it must receive a construction is evident: for in the largness of the words, heirs by several vertues may inherit, and construction must be according to the intent, and that to be judged by the wisest, such as have Plowdens head, that gives this rule, not by every man: also it cannot be intended as was to St. Paul, said by the chief captain, that an adopted son shall be prefer'd before the natural, which is as the elder to the younger son, Hub. *Stukely* against *Butler*, the whole intire sentence must be taken together: also the particular words of these particular clauses, are but a repitition of the general before, and therefore to be tied up unto them and guided by them.

80. THE KING *against* WAINWRIGHT AND JEOFFRYES. *Ante. Monday, No.* 16. Siderf. 164, pl. 21.

Admiral.

Sir Jeffry Palmer the Kings Attorny, prayed consultation to the Admiralty on exception of all money growing due for any goods before mentioned, among which are prize-goods in the Act of Oblivion, and the jurisdiction thereof since given to them by the King; but by Jones for the defendant, The exception is only of the fermors, and of such moneys as were in their hands by their sales, not of any moneys of such goods that were in the hands of other persons; but by the Explanatory Act, as *Whethams case* in Eschequer, which giveth the Admiral jurisdiction, the immediate buyer of such goods was chargeable, but not any second or third hand, which Windham agreed; but Keeling conceived only accomptants liable, where they had not discharged themselves, not any private persons. Hyde and Twisden accorded with Windham, the defendants being immediate buyers, if they had paid their money they are discharged, although the receiver run away, but having not paid any money, they are chargeable by the very Act of Indemnity, which excepts all money due to publick use and unpaid: also that the buyers of such goods shall be accountable, cannot be intended of collectors or treasurers: also the treasurers are chargeable only for what they have received, but not for any contract made, but he puts money unpaid upon the buyer, and so is discharged against the King. Also here the sellers in the Admiralty are but as bailiffs, and the contract is the States, and so such sellers have no remedy for such **[608]** moneys, unless he pay the money to the State. 2. Jones prayed, that seeing the denial of the Act of Oblivion pleaded in Admiralty was suggested in the prohibition, they might demur, or plead, and so this Court may determine the point: but the Court would not compel that, but unless cause be farther shewed, consultation awarded. Sed adjornatur.

81. THE KING *against* KEBLE AND SAVADG.

Prohibition.

Wild prayed prohibition to the official of London, but the Court denyed it, on suggestion that the defendants were chosen church-wardens by the major number of

inhabitants of the parish, according to custom, in Anne Bl. fryers, which, by Hyde, is only parochial since H. 8, but before was a religious house, and therefore cannot prescribe. Also this choosing by all the parish, is but an opinion lately broacht to avoid the Act of 15 Car. 2, cap. 5 of Vestries, but is indeed but an election by a select vestry, thereby put down, and these were sued by those elect, by the private vestry, for the key of the church.

82. HOPKINS *against* STEPHENS.

Trover.

Trover de quodam instrumento ferreo, Angl. a vate-horse (which in the west country is a frame to set a wash-tub or vate upon) which in Kent is called a stall or stane-horse; and by Jones, is good, there being no proper word, as in casu Morgan de instrumento, Angl. a skrene. Judgment for the plaintiff per Curiam.

83. THE KING *against* PRIN. *Ante. Tuesday, No.* 17.

Mandamus.

Jones pro Rege, this Act is a general law, of which the Court ought to take notice, in that it hath a general influence on the most, or on all of one genus, although 4 Co. 76 be more scolastick, yet according to him, an Act concerning the clergy is a general law; so of this of corporations, of which every corporation is a species, an Act concerning persons is but particular, but Yelverton 106, the Act of Nonresidence is a general law, and 11 Ed. 4, 8, is express in the point of our case. 2. Its not necessary to return any cause, in that the design of the Act is to enable them to do it without, and although the party should conform. **[609]** 3. Here needs no summons, as generally where corporations, as such, turn any out, must be given in that they cannot turn any out without objecting some cause, but the commissioners may do it without any cause; also these commissioners were but hac vice, and transitory, and so not like a standing judicatory, who may give reasonable time, as is necessary, in every summons, and against the intent of the Act. 4. He agreed, unless he were in possession of his office, Dec. 24, the commissioners have no power; but this defect is supplied by other helps in the retorn, it being said that the commissioners, by virtue of the Act, and secundum actum, which doth intend all necessary circumstances incident, as Dy. 312, and in retorn of sheriffs that men retorn F. 80, were summoned secundum exigentiam brevis, is always held good, and if the defendant were not in at the day he is not removed according to the Act, and so may, seeing the mayor hath undertaken such retorn, have his action for a false retorn. But a full answer is that this retorn is by a stranger, the mayor, and not by the commissioners who were parties to the putting of him out: also the Court may, notwithstanding the commissions determined, send a writ to them, to know for what cause they turn'd him out; which Keeling agreed, as Justice of Assize after his commission determined, may certifie any thing before it ended: also by Hyde, this being a general law, the mayor cannot put him out that is establisht, in the place of him that is put out. Windham agreed it a general law, being made for publick safety; but disallowed the exceptions of virtute brevis, &c. as *Thin* against *Thin*, where the subject matter doth not warrant it. Twisden and all agreed, that the mayor need not certifie the cause of his being turn'd out by the commissioners, but yet they must shew he was person within their power, as they must whereever its but qualified; and default hereof is not cured by any general words of virtute brevis; also the mayor may omit it on purpose, by Hyde, which would be inconvenient if it should hurt: by Keeling such shall be expounded according to the general intent of the Act, as in 32 H. 8, 33. Dy. 219, and in 21 H. 8, cap. 15, Windham agreed that such in these Acts do refer to the mischief, but in this Act such referd to the subject matter, which were such as were officers 24 Dec. 1661, which Twisden agreed. Adjornatur.

[610] 84. THE KING *against* PATRICK. *Ante.*

Mandamus.

The retorn of mandamus was of the particular foundation, and the Statutes de Pacificandis Discordijs, and that because the defendant had not appeald to the local visitors appointed, Queens Colledge cannot restore him: to which masters excepted, that its not said that the Bishop of Ely, was loci illius Ordinarius, but only that the vill of Cambridge is within the diocess of the Bishop of Ely; and there are many exempt places, as arch-deacon, and other peculiars, which are Ordinaries. 2. As to the matter, its ill; the words of the letters patents 11 Co. 65 are affirmative, and so exclude not the Kings jurisdiction, as five ports is previledged, but not from mandamus, which is breve regium; this grant is but as grant of cognizance of pleas, 12 Ed. 4, 17 b. which exclude not this Court: also a foundation of a colledge is but as every private conveyance the manner of the making being in the authors own power, but the exposition thereof is in this Court; also the proper work of visitors is to reform personal excess only, not to decide matters of freehold; and ad visitandum & commodum, must only refer to such excesses, being particular words, within general, as *Althams case*, also as Lit. sect. 137, although the King hath given many things spiritual to the Ordinary, 1 Inst. 96, yet hath he reserved many as spiritual to himself, Yelverton 60, *Gair and Fairchild* F. N. B. 48 A. 2 Inst. 492, and this Court are Judges of such things as are in their jurisdiction, 3 Inst. 42, as of deposition of abbot, Prohibition F. 21 & F. N. B. 41, 139, 51, 80. Also this colledge is no spiritual corporation, Dy. 255. 1 Co. *Porters case* Finch. Ley Engl. 92. Also this act of pronouncing him president is not spiritual, no more then induction of person; so *Conyers case* Dy. but we cannot have assize, being not sworn 14 Ass. 9, the foundation ad orand. & studend. 1 Inst. 142, doth not make it spiritual, in that all are bound to the first, and the second is uncertain, that an appropriation cannot be made to a lay-corporation, but may be to a colledge, is no argument that its spiritual, in that appropriation may be to a nunnery. And the case of *Alden* against *Tollet*, 6 Car. was not adjudged. Mandamus's have been granted to restore ushers, schoolmasters, churchwardens, and parish clerks. Bramston pro Rege, and Brian senior fellow, The foundation is ad studend. & orand. juxta ordinationes to be made by the evesque and chancellor, and that e-**[611]**-very fellow should within two years regency enter into orders; 1. Its a spiritual corporation, although the persons be lay, as knights templers, Fleta 111, and singing-men in churches, who are capable of tythes: and abbots at first were lay, durenus de beneficijs, cap. 20, and so the end be spiritual its sufficient; and although it be not said ad studend. theologiam, yet the intent is apparent they should do so, being to enter into orders sub pœna expulsionis: also ad orand. is sufficient to make them spiritual, as of nuns, 1 Inst. 342, which can do nothing else. Linwood, 111, verbo personis ecclesiasticis, the Carthusians, 105, verbo notabilis diversitas, the strictest order among Papists, are only founded in this manner, ad studend. & orand. Also 3. Diocesis signifieth the jurisdiction of the bishop, and the vice-chancellor is intended visitor in the chancellors absence without any special deputation: also the right of visitation is to depose, Linwood 115, 8 Ed. 3, 327. 10 Co. 31, *Suttons Hospital*, 8 Ass. 31, by Scroope, *Covenyes case*, its intended that assize lieth on ouster made by a stranger, without visitation, *Allen* against *Ash*, 13 Car. 1, the same with *Huntlyes case*, the Court will not examine the cause of deprivation; also the writ need not be answered, in that the retorn is to the jurisdiction. Twisden, What corporation soever it be will not be material, but it will be hard to maintain they are spiritual corporations, any more then lawyers, who come ad studend. & orand. also, if there were no visitors, yet the law will create them: and in neither case, by Hide, can any man come hither per saltum: and it will shake the whole government of colledges, should we give any remedy here. Windham held, as in *Dr. Witheringtons case* had been adjudged, that where there are visitors, none can come hither per saltum: and in 8 Ass. 29, 31, notwithstanding a deprivation pleaded, the plaintiff may pray the assize at large super titulum; but if then the assize find he was deprived, he must first recover his name before he can sue. Keeling contrà; that it can be no inconvenience for all to retorn hither; for had they any cause, it would be sufficient to set forth their particular

statutes; and that for breach of any of them, they removed him: also all the law is divided into temporal and ecclesiastick, and here is no pretense of suing in Spiritual Courts, but only to visitors, which are set up as an intermediate jurisdiction, from whom lieth no appeal, which is derogatory to the justice of the nation: every founder may make laws, but the common law shall judge whither **[612]** they be broken, or not, else it would set up an uncontrolable jurisdiction against the King, and would shew a fayler in him. Hyde conceived this of visitors a branch of ecclesiastick laws, as the Vice-Chancellors Court, which is a peculiar, that partakes much less of either the common law or ecclesiastick. Adjornatur.

85. MUNDAY *against* MILLS. *Ante.*

Slander.

The plaintiff prayed nil capiat per billam for expedition, seeing the opinion of the Court, that the words were not actionable, being not spoken of his trade of currier, nor directly refer to it, as *Slapers case* Hill. 1655, Rot. 2552, C. B. the case of lime-burners; where the defendant habens colloquium de querente, and of burning lime, said the plaintiff was a cheating rogue, cheating knave, and a devil.

86. TOOK *against* LEDGIERD. In Dism. Br. 11.

Tythes.

The Court refused to grant prohibition on suggestion of modus to pay 4s. for every days plowing of wheat, and 2s. for every days plowing of barly, for the incertainty: but if the modus had been so much for every days work, with averment that its certainly known, and how much it contains, it might be. But by Hyde, Wheat could scarcely be so much worth, time out of mind.

87. KING *against* CHEDWICKE. *Ante. Wednesday, No.* 18.

Perjury.

The defendant in indictment at sessions in Middlesex, for taking away goods, which on the evidence appeared to be in a trunk, and the perjury is assign'd in swearing that the trunk was taken away from J. S. indicted, innuendo the trunk, with the goods therein, were J. S. which after verdict is good enough, although the trunk is not exprest in the indictment, nor that the goods were in the trunk, by Windham and Keeling; Twisden contrà, conceived this substance, and not to be intended without special averment, that the goods in the trunk were the goods in the indictment, which Hyde agreed. Adjornatur.

[613] 88. WINCHCOMB *against* WINCHCOMB.

Error.

On writ of error brought by the defendant on judgment in ejectment, the plaintiff, defendant in the writ of error, brings scire facias quare executionem non, to the intent the defendant, plaintiff in error, might assign errors; to which the plaintiff in error pleads, that the defendant ought not to have execution, because he is in possession already by hab. fa. possessionem, which was only a new trick for delay, which, by Williams, is good enough, the plaintiff being to have execution; but per Curiam, Its only a device, the scire facias being only to the intent that the defendant may assign errors, and there can be no such plea to it in stay or delay of execution.

89. DEAN AND CHAPTER OF PAULS *against* CAPELL.

Bail. Execution § 5. March, 74, pl.

Williams prayed special bail on 3 Jac. 8, in error on judgment in debt upon bond, to pay such sum and sums of money as shall be declared due by the dean and chapter

on audit of accounts, which Keeling denied: but by Windham, Where the condition is to pay so much money as I shall disburse, its good, and by Hyde, The defendant hath pleaded that nothing was declared due on just account, on which the plaintiff took issue, and by verdict its found that the dean and chapter did declare 1800l. due, and in this case the dean is made a Judge, and therefore the defendant cannot give any evidence, whither the account be just or not, and therefore now special bail ought to be put in, which Twisden agreed; and it differs from the case of award of mony, in that the condition of bond is only to perform that, not to pay the money awarded, and this law was made to provide security for the plaintiff: and per Curiam, præter Keeling, special bail was awarded.

90. THE KING *against* STEPHENSON AND COLEGATE. *Friday, No.* 20. Siderf. 165, pl. 23.

Excommengement.

Wild, the Kings Serjeant, prayed the defendants (who were taken by an excommunicato capiend. and brought hither by habeas corpus), might be discharged, for that the writ was never brought out of Chancery, and recorded here, as it ought, before it be delivered to the sheriff, **[614]** by 5 Eliz. cap. 23, Windham conceived that the statute is only strengthening, not enacting, and therefore the writ as, at common law, is good. Twisden contrà; because the statute appoints a certain way, it cannot be varied from; which Keeling agreed: but the penalties in the Act do not incur, and therefore the party shall be put to avoid it by plea, but only for the nine causes: Hyde accorded with Windham, in that the sheriff is not fineable for not so retorning, the Court baild them, as 2 Cr. 566, pl.

91. THE KING *against* BURGESS. *Ante.*

Force.

The Court now held that 31 Eliz. cap. extends only to forcible deteiner, not to forcible entry; also the indictment is found 30 Maij, the force was 11th of May before, and the quiet possession is pleaded three years possession, prox. ante 11 May, and a prædict. 11 to 30 Maij, whereas the three years possession must be until the enquisition found: also by Twisden, He that enters with force doth imply he was out of possession, and so cannot plead he was three years in possession, Dy. 141, a new entry cannot unite his auncient right to possession, but the defendant having had several verdicts, and quiet possession, the Court ordered the plaintiff, to waive his demurrer, and accept plea de novo, Dy. 122, it being by Hyde, in the discretion of the Court to grant restitution, or not, according as the title appeared; and so hath been the constant opinion of all my time: the Court refused to grant restitution to the plaintiff, but offer'd to take a writ of restitution, and execute it according to verdict next assize.

92. HALL AND UPPINGTON *against* NORWOOD. *Ante.* Siderf. 165, pl. 24.

Partition.

Witherington opposed the prohibition to the five ports in suit in Dover Hundred Court there, for partition betwixt tenants in common, this being the same suggestion as heretofore was in C. B. to the plaint; and on debate the Court thought fit to let the woman defendant here proceed in the Court below; also after sentence and partition there made, this prohibition cometh now too late to be prayed here. Wild, the Kings Serjeant, This writ betwixt such tenants, lieth not at common law, and by 32 H. 8 the writ must issue out of the Chancery, and the suit is there by plaint; but, by Hyde and Windham, That Court had plea of land and partition between perceners, and therefore ha-**[615]**-ving capacity to hold plea of the writ, this judgment betwixt tenants in common is only erronious; but Keeling totis veribus for the prohibition,

in regard by Magna Charta no freehold can be questioned by plaint. But this Court had a writ of partition before the statute, by Witherington, as 22 Ed. 4, 23. 14 H. 4, 20, and B. R. Premunire, 15, and the statute 32 H. 8 is only affirmative, and so elegit given by Westm. 2 Hub. 148, *Coxe* against *Bransley*, doth lye in auncient demean, and such tenant may sue in nature of assize; and the statute never intended that tenants in common should ever make any partition where breve Regis non currit, if before the statute there were partition there by custom: but by Wild, The action below is quare partitio non, secundum formam statuti, which per Curiam, is but erronious: and by Windham, Where ever the statute giveth remedy de novo for the same thing, whereof Inferior Court had cognizance, they may proceed on statute, and the Court may award prohibition, or any such mandatory writs, but would not, it being now too late after execution, although after sentence they may.

93. DAVIE *against* ISAAKE.

Fines. 2 Roll. 13, pl. 3 Cr. 510. Vaughan 40, 43.

H. covenanted to levy a fine to the use of J. S. for life of a rent by 24 Dec. and that conusee on default of payment may distrain; the fine was not levied till after the day, and yet the defendant now avowed for the rent in replevin, and on nient seisie in fee, found for the defendant, Stroud moved for judgment for the plaintiff, in that the distress is given by the deed of covenant, which is not pursued: but, per Curiam, the fine may be averr'd to the uses of the deed, although not levied by the time, and distress is incident by statute, although the covenant were not. Judgment for the defendant.

94. WHEATLY *against* THOMAS. *Ante. Saturday, Novemb.* 21.

Patents.

Glyn for the plaintiff, George Lord Cobham had a brother Tho. Br. and eight sons and two daughters, and being seised of the soccage lands in question, &c. he deviseth to his eldest son William for life, remainder to the first son, and the heirs males, and so to the rest, remainder to the daughters in the same manner, remainder to his brother **[616]** Tho. And in default of males, to William the eldest son, and the heirs general of his body, and so to the rest of the sons, the remainder to Ed. a younger son in fee. William was seised, and had issue Henry and George, and dyed seised; then H. and G. are attainted 1 Jac. and so attainted in 3 Jac. there was an Act made on which the question groweth, which recites their attainder and the execution of George, and enacts that they forfeit to the King all their lands, and that the King should enjoy only against them and their heirs, and all claiming under them, saving the rights of others, and leases made by the Crown; and also saving several grants made to others, provided that the manor of Cooling, being the lands in question, shall be and remain, and be enjoyed by Duke and Charles, and Calisthenes and John Brooke, and the heirs males of his body: and in default of such issue to William the eldest son of George and his heirs, and in default of such issue, to the heirs males of the body of George, &c. and on default of such issue to and for such estates tayl, and such other estates as were limited by the will of old George Lord Cobham, and according to the intent thereof, notwithstanding any fine by any claiming as patentees, &c. The jury find also the stat. 7 Jac. that restoreth William Brooke in blood, the son of George that was attainted, to lineal and collateral auncestors, as if no attainder had ever been: then Henry Lord Cobham the elder brother being alive, died after 17 Jac. after which William died, and so all the brothers and sisters are dead without issue male; after which Francis the lessor of the plaintiff entred, and made the lease, &c. The sole question is, whether by the meaning of 3 Jac. the daughters of William the son of George, who was son of William son of old George Lord Cobham, who are yet alive, be inabled to inherit, the males being spent; which, had there been no attainder, is indisputable. And it's admitted also, had the attainder been in force, and no Act made they could not inherit: but this

reference of the Act of 3 Jac. to the will, is as much as if the will had been recited in hæc verba, which appears at large by *The Abbot de Strata Marcella's case*, & 8 Co. 29, & 2 Co. 46. So *Pridle* against *Nappers case*, 11 Co. 14, and *Molineux's case*, 2 Cr. 144, Avowry 129. And supposing the case such, the express words of the Act are, that the females should take according to the will; and the intent of the Act is the same as of the will, otherways that clause of the Act is wholly void: for by attainder of H. and G. the remainder to the other brothers are not toucht, but only the three estates in them: and as *Holland* against *Fisher* in C. B. **[617]** all the Court agreed, that the next in remainder after them may enter on the Crown, which was also agreed in *The Lord Dacres case* in the Exchequer: and hence it follows, that by this clause, after the death of the five brothers, it shall go according to the will, cannot operate to save their remainders which were saved before, but only to help the posterity of the persons attainted; and they had a favourable aspect to them by name, in that after Duke, who was dead, they prefer William the eldest son of George before the sons of H. which were Charles or Calisthenes, &c. Also the Act hath inserted the clause of perpetuity which was in the will, and conceived then before *Mildmayes case* to be good; the objection that Henry, for whom this Act hath no kindness, should take by the will if he survived the fine named in the Act 3 Jac. is only suppositive; for they that had kindness for George who was executed, cannot be intended but that they had so to Henry; but yet they did not intend that Henry in person should enjoy it, but his issue they did. 2. That here is a corruption of blood by attainder, which by rules of law hinders the taking by the issue of George, and that the will must ensue those rules doth not hinder their taking by this Act, which as every gift must be intended to remove every impediment that hinders the donees taking, as 3 Co. 86. So Hub. 234, *Darcy* against *Ascue*, Grant F. 41, and also all disabilities in the person wherever, it is in the power of the donor to remove them, as grant to a villain by the lord that is a common person; contrà of the King, his grant cannot inure to two intents, yet if he grants probis hominibus de Islington, 7 Ed. 4, 14, pl. 7. Villinage 42. 2 H. 7, 13, pl. 16, it makes them a corporation, in regard he is able to capacitate them. And in the *Princes case*, there is no such charter in law, but yet being by Act of Parliament, all defects of law are supplyed by the intent of the Act; and though the blood be not hereby wholly restored, yet according to the rules of law, it may qualifie the heir as to this purpose to take this estate given, Litt. sect. 22. Formedon, F. 64, and in 7 Co. *Nevills case* 33, it's true the remainder limited to the heir of such, is not good; but here the heir shall come in quasi per discent, not by purchase, 8 Co. 166. 2 Inst. 334. Formedon 36. At common law the issue of a person attainted should not inherit; but by W. 2, before 26 H. 8, he should inherit an estate tayl, 7 Co. 33. *Nevills case*, 1 Inst. 391, sect. 746. Because the statute saith voluntas donatoris de cetero observetur, yet it mentioneth nothing of attainder, 5 Ed. 3, 14, by Herle, who lived when the Stat. W. 2 was made, and said the intent of it was to preserve **[618]** inheritances; and in all circumstances this exposition falls pat on our Act of 3 Jac. which is stronger then W. 2, in that it takes particular notice of the attainder, and yet limits it according to the will: and it is to be taken beneficially to the issue of G. being in nature of a restitution, an act of mercy and indulgence to the innocent children of nocent parents. Also the Act of 7 Jac. were the same men prorogued, who knew their former intent; and they restore William, the son of George, wholly in blood, which shewed their pity of the posterity of George, and the continuance of their affection to them: and although remainder to the heir of J. S. be void, where there is no J. S. at the time, yet 9 H. 6, 20, remainder to a corporation that hath inception, is good: so devise to infant in ventre sa feme, or to the heir of J. S. is good remainder to heir born after; so to the heir of person attainted, as here.

Finch for the defendant, The only question is, whether remainder to the heirs general of the body of old William Lord Cobham be so revested, and put into the old course of discent, that it would have been in, had there been no attainder, which I conceive it doth not, although the males of the lessor of the plaintiff might have inherited by the Act of 3 Jac. and the statute of 7 Jac. works nothing in this case, in that William the father of the lessor of the plaintiff is thereby only restored against the attainder of George, not of Henry. Also there is a special proviso, that he shall

have no benefit of any of the estates of Henry that was attainted, but William had a right by the Act of 3 Jac. in this manor which was necessarily saved by 7 Jac. Henry being then alive, the saving of his remainder would be illusory and flattering: the weight of the question lyeth on 3 Jac. and the words of reference to the will therein, which neither in justice nor equity can be construed to set up the remainder according to the will, neither by way of creation of new estates, nor by way of reviver of the old estate forfeited, for then the heir of the body of William would take by purchace, which is Henry, who is person attainted and incapable: and although there be five precedent estates limited in the Act of 3 Jac. yet the old remainder, if revived, must radically first vest in Henry, for whom it's confest the Act had no favour, but only for his issue, and this is impossible to be done by these words of reference: every Private Act as *Altonwoods case*, 1 Co. 47, is to be expounded as a private conveyance, and giveth no more then the person to whom it's given can take or keep, only it's a better assurance, but yet it's guided by the same rules of law, **[619]** and such estates tayl as are dockable by common recovery: also it's the King who had this remainder by attainder of Henry, so he is the donor, though the estate be conveyed by Act of Parliament; person attainted, where the King is donor, hath no capacity of taking or keeping, else the grant would work to two intents, of pardon and restitution. I agree that villain shall hold by gift of the lord, but the exposition of such infranchisements is favourable, but not so of persons attainted; also grant probis hominibus de D. is for the Kings benefit, and if he release the rent, the corporation is ipso facto void, as Dyer so not like our case. This Act cannot be construed to create a contingent remainder, in regard they are as full for a present remainder as can be; and it would be a violent exposition that such remainder should be suspended till Henry and his posterity be extinct: but however, as 1 Inst. 3 b. such contingent would be void as to the issue of J. S. where bastard eigne hath issue, in regard there was an utter disability at first: also this Act is not quasi a restitution, but sets up the estates in the will, only subject to the rules of law; for the King had granted to Duke Brooke so long as Henry had issue of his body, which was confirmed in the same Act, and would be defeated should this Act work in nature of a restitution. Also such construction would confound the method of the Act it self, as well as of the will, for of necessary consequence H. would take before William, although not named at all in the Act; and William, who was named in the Act to take first, shall take last: also H. is not restrained to alien, as all those are to whom any estates are limited; 7 H. 4, 18 b. pl. 23, all are but one estate in the King: also a restitution to blood without lands is frequent, but never was president of restitution to lands without restitution in blood; and as Hub. in *Ratcliffs case*, the Stat. W. 2, neque per fait neque per feoffment was never intended by Ed. 1, the Lords should not forfeit by treason; this was but a violent construction gained by time, and restored to the Crown by 26 H. 8, and if Henry cannot hold it, his issue cannot have it: nor can general words restore any ad liberam legem, as *Sir Walter Ruleighs case*, without express words: and although the two Houses prepare the Act, yet its the King makes it and stamps it, who can never be intended to make such restitution; but the intent of the Act was first to establish the parents of Duke Brooke and Charles, and to graft on the new stocks he had named, and after that currat lex. The King did not intend to work any estates out of himself by confirmation of a will, which cannot add any dis-**[620]**-cendible quality, 9 Co. *Beamonds case*, & 9 H. 6, 9, to an estate not in the person before, although the estates should be set up: but the Act only signifieth that as much use may be made of the will as if the Act had never been made. In the case in the Court of Wards, 9 Car. of *Sir H. Pope Bland*, this very point of reference of an Act was resolved, and the lands enjoyed so at this day, where there was a private act of settlement of D. provided that the manor of S. should go according to the uses mentioned in the indentures, which by advice of Bramston and Bridgman, doth make no more then the uses shall go as if no Act had been made. Adjornatur.

95. SIR CHARLES SYDLYES CASE. *Ante.* Siderf. 168, pl. 29.

Peace.

He was fined 2000 mark, committed without bail for a week, and bound to his good behaviour for a year, on his confession of information against him, for shewing

himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden, contrà pacem, and to the scandal of the Government.

96. LLOYD *against* POLLARD. *Monday, No.* 23. Discontinuance Br. 32.

Tail.

Tenant in tail of the Kings gift, the reversion in the King, bargains and sells to J. S. who levies a fine, and five years passed, then he dyeth, and five years more passeth, which by Wild, the Kings Serjeant for the defendant, in ejectment in evidence to the jury, doth bar the issue for his life, although it doth not hurt the issue of such issue, nor prejudice the Crown: but, by Twisden and Hyde, this is no bar to the issue, nor to the issue of issue, contrà if such gift had been of the creation of a common person. 2. The plaintiff proves an entry within five years by these words, I claim these lands on behalf of the Countess of Peterborough, lessor of the plaintiff, having only paroll command from her agents, which the Court conceived sufficient to support an estate against a bar by fine or recovery of such tenant in tail; contrà if the defendant had set up any other title. 3. It was agreed that entry by estranger is sufficient, so the cestui que use assent within five years after the entry, as *Wallops case:* and, per **[621]** Curiam, the subsequent entry of cestui que use is a good evidence of such assent, so is here declaration of her assent, which may be made seven years, or at any time after.

97. THE KING *against* THOMAS.

Coron. Wales § 109. 19 H. 6, 12, pl. 31.

The defendant and others were indicted at Hereford, of a murder done in Glamorgan, before Judge Hyde. The defendant pleads former indictment at the Grand Sessions in the county of Glamorgan, and acquittal there: to which the plaintiff replied, that the fact was done at Kavenheregood which is within the jurisdiction of the marcher, and that by those statutes, 26 H. 8, and 27 H. 8, and 34 H. 8, he is indictable in the next adjacent county. Williams for the defendant, who demurr'd on the replication, conceived that at common law he cannot be tried out of the county, nor after acquittal. But the question is on those statutes, of which 26 H. 8 is the principal, which is for speedy punishment of all murders committed within the dominions of any marchers; and in another clause, that notwithstanding an acquittal in any of the dominions of the lords marchers, they may be tried in the next English county. And I admit it thus far, that any felony committed within marches, and tried in any court of the lords marchers, its triable in the next English county; but this statute never intended to extend to other acquittal, then such as were in the proper courts of the lords marchers; not to any acquittal in the Grand Sessions, the reason of the law being for speedy, and legal course, among the lords marchers, it doth not at all touch Wales, who had a legal way of proceeding in their Great Sessions before, as appears by 27 H. 8, the original of the marchers being by particular grant to lords, on the conquest, to rule at their discretion, before Wales were fully subdued, Cr. 261, *Perimans case* they proceeded by six. Nor doth the Statute of Rutland, made for Wales, at all touch the marchers, but they proceeded ad libitum; but since the statute of 27 H. 8, their counties are divided into English and Welsh, and peculiar jurisdiction given to them, and this Glamorgan is made a new county: and the Parliament did only intend to regulate their proceeding according to common law, all which I learned out of Jones his argument of *Sandly and Prices case* 7 Car. transcribed by his son. 2. An acquittal in the Grand Session, is no acquittal in the court of any lord marchers, **[622]** as the letter of the law of 26 H. 8 is, there being no such Court as the Grand Sessions within the lordships marchers, no more then acquittal in Monmoth before the Judges of Assize, Monmoth being wholly within the lordships marchers: so of several places in Glocester; and the same of Shropshire, &c. made English counties. Also this Great Sessions is constituted by 34 H. 8, 26, afterwards, which as to Denby, Mountgomery, and Glamorgan, is introductive of a new law, but not so in auncient counties: and the proviso of this Act,

which leaves murders or felonies to be proceeded against in the next county, was only to continue the auncient liberty given by 26 H. 8, that if such as commit felony were tryed in the court of marchers, they may be tryed in the next county, but not such as were tryed in the sessions. And all these statutes have, on all occasions, been taken strictly, as in the former case of *Sandly* against *Price*, 1 Cr. 1, where after three arguments of a side, per totam Curiam, adjudged no appeal would lye; so *Cheedle's case*, 1 Cr. a certiorari was granted, and the party tried in his proper county; and since 26 H. 8 not one person hath been questioned on it. Winnington pro Rege, The general jurisdiction of Wales ensued the Government of England, as 3 Ed. 3, 9, and 24 Ed. 3, 23, and by Doderidge 36, these marchers were set up to preserve the Conquest; and there are other places in Wales, where an after-tryal may be in the next English county, on 26 H. 8, and therefore the trials run, as to the locality whereever the lords marchers had jurisdiction, not to trials in their courts only, which yet were according to the laws of England: and the inconvenience of the law was, foul trials were usual, by reason of partial juries by that pais where the marchers were, so related and united in friendships, and this was intended to be remedied: also the time is limited unto two years to proceed in the English county next after the acquittal; and 27 H. 8 doth make Glamorgan a new county, which proves that it was parcel of marchers before, not Welsh, Poult. 614, the proviso of 34 H. 8 includes all in the former Acts that refer to any trial in Wales, as well to acquittal as suit; and all fines for murders formerly: uses are expresly taken away, which implieth that this clause and proviso of acquittal doth still remain, Poult, 776, every other clause being re-enacted. Windham conceived the difference betwixt the trial left to the next English county, and the retrial after acquittal, and Williams agreed, and by Keeling, 34 H. 8 recites only the clause of acquittal; but only 26 H. 8, its enacted at which **[623]** time there were marchers court, which were dissolved by 27 H. 8. Hyde according to Twisden, that 34 H. 8 only continueth the trial in English county, not to continue the pleading of acquittal. Adjornatur.

98. The King *against* Nelm's Case.

Fees.

The bayliff on arrest by bill of Middlesex, claims 1s. 8d. and if special bayl bond be given 2s. 4d. But by Hyde & Curiam, the fees are to be paid by him that sets them on work, not by the prisoner; of whom the defendant having taken 7s. for attorneys fees, was convicted of extortion.

99. Wilcox *against* Peacock.

Joinder.

In assumpsit against three, one confesseth the action, and a venire facias goeth as well ad triand. exitum, as to assess damages: the jury find generally for the plaintiff on not guilty pleaded, or non assumpsit by the other two, intending to find only against him that confessed, which by Hyde Chief Justice, is good against all, they having distinct directions as to each; and had they found for the defendant, yet they must assess damages against him that confesseth, although the contract be joynt, which the Court agreed, and it's all one in trespass: and although Wild, the King's Serjeant, offered the intent of the jury under their hands, yet the Court refused to grant new trial, præter Keeling, who doubted, that if the two had been found not guilty, here is now no assumpsit in the third, and so no damages can be assest on his confession, but ordered the plaintiff to shew cause why he should not assent to it, the verdict being hard.

100. The King *against* Mills. *Tuesday, Novemb.* 24.

Mandamus.

On mandamus to the Mayor and Aldermen of the City of Canterbury, to restore the defendant to his preheminence; the retorn is by the mayor, alderman, and common council, which, per Curiam, is well enough; so by Keeling, is any retorn by

the right name on a writ directed to them by a wrong name: also the retorn was, that by custom they may elect de novo on voluntary recess, and that the defendant did voluntarily recede, and petitioned to be dis-**[624]**-charged, which they did, and after he was elected de novo, which was good per Curiam.

101. THE KING *against* WAINRIGHT AND JEOFFRYES. *Ante.*

Admiral.

Goodrick opposed a consultation to the Admiralty, in that the defendants were not accomptable within the Act of Oblivion, and the Act for the Admirals jurisdiction doth not make them so, nor 6 Co. 13, revive any proceeding there; (Ellis) ad idem, that the defendants are pardoned by the body of the Act, and not excepted in any clause; and the latter Act doth falsly recite that all prize goods are excepted for only those in the hands of fermors, accomptants, &c. and they are but general words affirmative, 11 Co. 63, *Fosters case*, which doth not take away the force of the precedent Act of Parliament. Also this Court hath on this ground granted a prohibition before the Act for the Admiralty, which being well granted, this Act looks only forward, and so although it do except them, yet no consultation can be awarded. Keeling conceived these goods excepted by the Act of Oblivion, and so consulto revocabimus quod consulto fecimus, without regard to subsequent Acts, and the buyers are receivers within the Act of Pardon, unless it appear they have paid for them. Also the Act of Judicial Proceedings had confirmed judgment in dower given here, without being subject to a writ of error; and by Windham, sale of goods is only applyed to prize goods, not to any sequestrations, &c. These came in mony to them, but the prize goods came in specie to the treasurers subject to sale: also there is a sentence, and *Burtons case* hath been frequently denied before the Act of Pardon, which the subsequent Acts intend to strengthen, Dyer. Twisden ad idem, The defendants are receivers within the words and meaning of the Act of Pardon, as debtee executors of debtor, is quoad every other estranger creditor: but he agreed that action upon the case on assumpsit made at land, had not been confirmed by the Act of Judicial Proceedings, but only such causes of which usurped powers had given them any jurisdiction. Hyde ad idem. And consultation granted per Curiam.

[625] 102. THE KING AND MR. MIDDLETON'S CASE. Siderf. 169, pl. 30.

Corporation.

Mr. Attorney prayed a mandamus to restore him, being chosen Treasurer to the Corporation of the New River, which the Court doubted, being no publick corporation for government; so in the case of Cooke clerk of the waterworks in London; so to restore a member of the physicians; all which are but private corporations for commerce, established by a Private Act of Parliament. Keeling contrà; that this Court may grant a mandamus to any private corporation, where a person hath freehold, as well as for parish clerk, or fellow of a colledge. *Post* 629, pl. 114. Adjornatur.

103. PALMER *against* FLESSIER. *Ante.* Siderf. 167, pl. 26.

Hill. 14 & 15 Car. 2, Rot. 283.

Nusance. 3 Cr. 269, pl. 10.

In action upon the case, the plaintiff counted that W. Wheeler was seised within six years of a messuage and a piece of ground adjoyning, and in the messuage had three lights, which he let with the messuage to the plaintiff for years, and after grants away the land adjoyning, which the grantee or estranger hath stopt the lights, which is found by special verdict on not guilty. And by Jones for the plaintiff, on the reason of *Robins's case*, Hub. 131, although the house be not ancient, yet being granted with the lights, any claiming under the grantor cannot stop them, which Windham

agreed, the lights being now parcel of the house; as a mill to which a current is newly made, granted away, doth include the current without any words of cum pertinentiis, being an essential part of the thing: so *Clerks case*, 1 Cr. 170, where things are of necessity, as water, air, &c. Keeling is not satisfied, in that there is no mischief by such building, in that the grantor might have provided against the stopping them: 7 Car. It was adjudged that two having ground adjoyning, the one built de novo, and the other in his ground digg'd so near, that the other fell, and no remedy, the house being new. Also the grantors lease or interest cannot prejudice the power or liberty of the grantee. Things ancient, that have existence, as *Sury* against *Pigot*, 1 Cr. are not extinct by unity; and so conceived the plaintiff ought not to have judgment: Twisden accorded with Windham, that the grantor shall not derogate from his own grant; although I agree, that he that hath ground adjoyning may build, being a stranger, **[626]** which Windham agreed, as Keeling cited; but in this case he that erected the house was owner of the ground, and so none under him may build, as was agreed on motion in arrest of judgment of houses in Shoe-lane: but Hyde absente. Adjornatur.

104. THE KING *against* RICARD.

Market overt.

The town of Monmouth claimed fairs by patent infrà quinque milliaria & circuitu ejusdem villæ, the new patentee pro Rege in scire facias claiming another fair, saith that the grant by Ed. 6 was of all fairs infrà 5 milliaria burgi de M. and in circuitu ejusdem, Dyer 342, cited in 5 Co. *Edens case*, absque hoc, that the King granted all fairs infrà 5 mil. burgi de M. & circuitu ejusdem, which issue tried per pais, and found pro Rege. Jones in arrest of judgment, conceived it ill, this being matter of record; but he agreed non concessit generally a good plea, 1 Inst. 260. But this is on a point on which no other evidence can be then a copy of the patent enrolled. But by Twisden, This point of the writ may be specially traversed by inducement, as here, as well as general pleading non concessit, which was agreed by Windham; and the non concessit generally is rather the stronger case against such trial, than this special non concessit; for now the jury shall take notice what is the inside, and what the circuit of the town, and how it's limited, which is proper matter of fact, and well tried: Keeling according, as grant cum advocatione of the manor of D. and the defendant confessed the grant of the manor absque hoc, that he granted the advowson, and good. Also the circuit of the town is all it's liberties, which may be much larger than the walls. Judgment for the plaintiff, nisi.

105. GWIN *against* WIN. *Ante.*

Error.

The record being now removed, it appeared to be quod demandans teneat, which Williams prayed might be here amended, in that it appears the verdict was for the plaintiff, and only the judgment mistaken, which the Court refused, but reverst the judgment.

[627] 106. FOSTER *against* HOLYMAN. *Ante.* In Debt, Br. 79.

Assumpsit.

The defendant promised, that if the plaintiff do agree with J. S. for the price of a horse, on communication of the sale betwixt J. S. and the plaintiff, that if J. S. did not pay, the defendant would, which per Curiam, (it being assigned for error after verdict, and judgment in the Palace Court at Westminster) is good enough, in that unless the defendant had not promised, no sale had been made; and it's all one, as if he had said, if the plaintiff will agree, the defendant will pay, &c. Judgment affirmed.

107. LEAPER *against* BOOTH.

Surrender.

Special verdict found that surrender was made by A. to the use of B. and his heirs, to the use of such person as A. should name by his last will, this by Twisden is ill, in that no use can be on a use, although being copyhold it be not executed by statute: but the verdict finding further, that H. nominated by the last will of A. had surrendred unto B. the Court conceived no doubt in the case. Judgment for the plaintiff, nisi.

108. SMYTH *against* DRINKWATER. *Wednesday, Novemb.* 25.

Conspiracy.

Jones moved in arrest of judgment in action upon the case for falsly, and by conspiracy, making oath before a Master of Chancery, and farther petitioning the customers, per quod the plaintiff was then for that cause discharged of his office, in that if the Master have authority to take such an oath, it's but evidence, which being false, no action upon the case lyeth; and if the Master hath no jurisdiction, then an action upon the case lyeth; but the plaintiff ought to aver that the Master hath no jurisdiction: but per Curiam, It shall be intended he hath none, and so the words are actionable. Judgment for the plaintiff.

[628] 109. HOOKS *against* BELLAMY. *Ante.* In Devise, Br. 6.

Ejectment. Infant cannot assent. Her payment of legacy of mony devised to a person, adjudged good. 7 H. 4, 13 b. pl. 10. In Executor, Br. 47. She may grant, but cannot release. 21 Ed. 4, 24 b. pl. 12, per Littleton.

In ejectment of lands in Ascrick, the special verdict finds demise of lands in Ascough, which, per Curiam, is good, being said per nomen of Escrick: the lessee for 2000 years deviseth to feme for life, remainder to Martyn for the residue, Martyn in the life time of feme leaseth by indenture for 1000 years to C. whose administrator B. is lessor of the plaintiff. And by Powis for the plaintiff, 4 Co. 66. 10 Co. *Lampets case*, this is good by estople; also the feme was made executor unto the devisor, and entred generally; and after assignment by the remainder, she assents and dyes, leaving the defendant her husband administrator, who is ejector, and as 3 Cr. 719, *Price* against *Symson*, she may assent to this legacy, although she were covert, so there be assets, which must be presumed, as well as infant, as *Russels case*. The Court conceived the point of estople out of doors, and that the primer possession is good where neither party hath title; and the sole point is on the assent, whether being by feme covert, it be sufficient. Adjornatur.

110. TOOMS *against* ETHERINGTON. Siderf. 167, pl. 27.

Coron.

The plaintiff, administrator of T. brought scire facias on judgment on bond against the defendant, who pleaded that the testator T. became felo de se, of which there is inquisition found the same day: to which the plaintiff replys by the Act of Oblivion at large, and that he was not a person excepted: to which the defendant demurrs. Newdigate for the plaintiff, This plea is not sufficient to discharge the defendant, in that the King hath no title but by this inquisition, which is void, and not made good by the Act of Judicial Proceedings, in that then the King had but inception of title, which was before pardoned by the Act of Oblivion: but per Curiam, Hyde absente, the coroner is chosen by the county, and he ceaseth not by change of Government, and so his enquisition is good, and the Kings interest is not gone by after-pardon without special words of grant, in that the possession of all transitory things are by such office actually in the Crown; so of things in action; and this is a good bar

pleaded by the obligor himself, as well as utlary: but by Twisden, wares or such chattels that are derived out of anothers freehold, are not in the King till [629] office. Judgment for the defendant. But whether execution shall be awarded pro Rege, adjornatur.

111. KING *against* GAST OR GARTH.

Usury.

The defendant was indicted for usurious lending 20s. ea intentione to receive 23s. within a month, and that the defendant did receive 3s. for the loan of the 20s. which, per Curiam, is not good, without saying quod corrupte aggreatum fuit, & ea de causa ex motione Hoskins, it was quasht, being removed out of Inferior Court.

112. THE KING *against* FARRE. *Thursday, No.* 26.

Enquest.

In indictments here, in regard the Court takes the grand juries presentments, the entry is only quod per sacramentum 12 extitit præsent. without saying probos & legales homines, or quod juratores onerat. & jurati dicunt, or præsentant; but in all Inferior Courts which are removed hither, it is juratores præsentant, & overati, & jurati, & per sacrament. 12 probos & legales, &c. which difference was agreed per Curiam, and the clerks of the Crown side: and these exceptions being taken by Newdigate in arrest of judgment, were all over-ruled in indictment before the grand jury of Middlesex of forgery.

113.

Slander.

Of a justice of peace, that he is a logger-headed and a sloutch-headed bursen-bellied hound, is no cause of indictment before justices of peace in their sessions; partly for want of jurisdiction, partly because the words are not actionable: and after judgment, this was by Jones assigned for error. Adjornatur.

114. THE KING AND MIDDLETON *against* CORPORATION OF THE NEW-RIVER WATER. *Ante* 625, pl. 100.

Corporation.

Baldwin opposed the mandamus, because according to their patent of corporation, by King James, they had in a full Court, the Tuesday after All-Saints, elected another: also by Coleman, There must be some rule to fix the judgment of the Court in granting these writs, as because it concerns administrators of justice, as leet; but it hath been denied to court baron; or, because it concerns any [630] publick administration. Also the Court may as well send mandamus to admit one in the Corporation of Mercers. Maynard for the plaintiff, The only question is, whither restitution, which is not voluntary, be justly demanded, or not: to which I always observe the difference, whither the office be only at will, in which case they will not grant it; but whereever the party hath a freehold, although no benefit by it, the Court will grant it, as to fellow of a colledge in *Dr. Witheringtons case*, who hath a fixed estate, and no more for government then town-clerks which, as *Audlyes case*, and *The Town of Bostons Clerks case*, who was chosen alderman to void his place: and all these are of less government then our case at Bar, where the party hath doubtless wrong done, contrary to the Kings patent, which unless this writ go, is remediless; and quo warranto lieth to repeal this charter, and so every member of it should be of the same publick nature; and an apostata capiendo to take loitering and wandring monk is of less concernment: also a clerk of a parish removable, shall never have mandamus, but he that by prescription is elected, having a fixed interest, shall have it. Also in case of offices,

this Court hath always granted it, there being no other remedy for the place till W. 2. that gave the assize; and the Court cannot take notice of the duty of the place, till the retorn, in that its never averred that the place is for publick government in the writ; and so its all one with this, and the alderman. Also by Wild, The King hath a moiety of the profit of this river, and this office of treasurer is particularly named in the patent, which being not in *Dr. Goddards case*, was the reason he had no restitution: and Cooke, the clerk of the works, is only appointed by the City of London, and is no more a standing officer then an house-keeper, and therefore had no mandamus. And by Mr. Attorny, the only reason of not restoring Dr. Witherington was, because there was a local visitor, else the Court would have done it. Keeling conceived mandamus ought to go to a lay corporation made by the King, unless the difference be betwixt the individuals, and no inconvenience; for if they have pursued the patent, it may be retorned; and if it be not granted, there will be a mischief without remedy, which is not to be suffered: if the Court can enlarge their writ & in omnibus agree with Maynard, also in *Cooks case*, it was never pretended that he was a member of any corporation, but only appointed to survey, &c. Also all corporations are private, but when made by the King, and **[631]** its officers appointed by him, he ought to have an account of it. Windham, Take the same rule in this writ, as in prohibition, that unless the count be satisfied it ought to go, they will not grant it: and as this case is, it ought not to go, in that for private office the King hath given remedy by assize, or action upon the case, and I never heard of a president, that a writ was granted to such an office, as 8 Co. *Jehu Webs case*, or to a fellow of a colledge (contrà by Keeling, they ought to have it): but where the office concerns some publick or necessary work of government, or administration of justice, of which kind this office appears not to be, but only private, and their treasurer only elect to keep their stock, and so if freehold, assize, if not, action upon the case, is the proper remedy for removal. Twisden remember it granted for clerk of a parish and schoolmaster, which was the lowest: and of what nature this office is, we cannot know till they retorn, and therefore mandamus ought to go. Hyde agreed, that generally on complaint of such officer, as the Court can take notice of, mandamus shall be granted: but I can never assent it shall be granted for parish clerk or churchwarden, which are ecclesiastick officers; nor can the Court take notice of a schoolmaster. But this is corporation of an other nature then fellow of a colledge, for whom it lieth not, and I know the treasurer is eligible every year, and yet as members, they have interest, and may pass their interest, and share by fine, and surrender in Court; and had they been removed from being members of the corporation, I would not doubt to grant this writ: and now in regard, if it be denied, the Court doth determine the point before-hand, that no restitution will lye; therefore I agree it be granted: but all doubted that no restitution will ever be granted.

115. THE KING AND CROMER *against* COOKE.

Bail.

Coleman excepted to an information, tam quam, in that there was no pledges put in, because the party may be amerced, which the Court denied. And, by Hyde, before 18 Eliz. such informer should not pay costs. 2. Judgment was generally ideo consideratum est in sessions for the county at Bury, and doth not say per Curiam, which he conceived error. 3. The venire facias 12 was awarded de S. &c. not saying de visineto, which, per Curiam, is ill in Inferior Court; but in this Court the venire facias is 12 &c. only, is sufficient. Judgment reverst.

[632] 116. THE KING *against* AYLET. *Ante.*

Excommunication.

The Court discharged the defendant, because the excommunication on which he was taken, being on quarrel with the register, was not before recorded in Court, and

so, by Windham, is the constant rule of the books, where he is not taken for any of the causes in the statute, for which particular penalties are annexed; but, per Curiam, the party stands still excommunicated.

117. GARDINER *against* MOEFIELD. *Ante.*

Usury. 44 Ed. 3, 2 b. pl. 8. An attaint held good.

In debt brought in Ely Court, on the Statute of Usury; assigned for error, that as 6 Co. 19 b. *Gregories case*, it ought to be brought in one of the Courts at Westminster, and not there, to which the Court inclined: but the judgment being misericordia for capiatur, it was reversed per Curiam.

118. PHILIPS *against* TAYLOR.

Baron & feme.

After imparlance, it was pleaded in bar, that the plaintiff took husband, on which issue was taken by the plaintiff, to which the defendant demurred: and by Twisden, that's the best way, for if it had been tried, it had been peremptory, but now only respondeas ouster, which was agreed. Hyde absente.

119. HARGOLL *against* CREAMER.

Escape.

In action of debt upon escape, the original and capias, which was retorned Cras. Mart. in Mich. 1658 was set forth, and that Sydly in exitu ab officio in Decembre, after the retorn, he delivered him over to Creamer, and it doth not appear that the prisoner was ever in the custody of Sydly, which Coleman moved in arrest of judgment: but by Windham he could not, else be turn'd over; and its expresly said he was in custody, and it may be no writ was retorn'd by the sheriff: and although in law he cannot be in custody till the retorn, yet that shall be now intended; also it need not be said that sheriff was continued in his office above his year. Judgment for the plaintiff.

[633] 119. HOLLOWAY *against* CHAMBERLAN.

Ejectment. In an attaint a nisi prius cannot be granted against H. in Newgate, because always present, 44 Ed. 3, 2 b. pl. B. Jurisdiction 29.

Ejectment is brought against one in custodia here, of lands in County Palatine, and the action was laid here, and the record sent down by mittimus from hence, and a special indorsement of the postea: but *Done* against *Rogers* in trover, it was held such action is not maintainable, but only where the party is taken by writ original, as *Prices case:* but, by Windham, This is only in actions personal, which follow the person, not real, as ejectment. Sed adjornatur for the novelty.

120. BICKERTON EXECUTOR OF AUDLY *against* BONESOY. *Friday, No.* 27.

Limitation.

Twisden and the Court conceived, that in action upon the case on a promise to pay, where the defendant pleaded the Statute of Limitations, and that being after waived, pleaded non assumpsit, before which the plaintiff did make it satisfacere; on which issue is taken that this is but a jeoffail; for solvit is only of the mony, but satisfacere may be any other way. But the plaintiff having amended his declaration, while in paper, before issue, non assumpsit pleaded for the defendant, and made it satisfacere, all is well. The second consideration was, if the plaintiff would forbear, that then if she did ever pay such a debt, the defendant would pay; which, by Wild,

in arrest of judgment, is ill, in that averment is only of a forbearance to a particular day, whereas the defendant is to be totally forborn, which the Court agreed on demurrer: but after verdict, the Court will, by Hyde and Keeling, intend it good, as in arbitrement of all causes to the day of the award, on submission to the day of the bond, the defendant must shew any causes newly arisen: but Twisden and Windham contrà; the plaintiff here ought to intitle himself by the forbearance, which as this case is, ought rather to be intended till the payment of the other debt of senior, then absolutely, as if there were no reference of the forbearance at all: also by Hyde, The executor was suable although no recovery could be had against him; and so the original action was gone: but by consent, the plaintiff took judgment for security, and went to new trial.

[634] 121. THE KING *against* SPEARING. *Ante.*

Poor.

The justices and overseers and churchwardens of Spalding, or Bledon in Somersetshire, put Hannah Williams an apprentice on the defendant, who was parishioner, but no inhabitant, on which the defendant appeal'd to the next sessions at Taunton, who confirmed their order by the defendants consent: for contempt of which, he was indicted after at Bridgwater Sessions, and removed the order and indictment hither; and now Serjeant Merifield prayed a procedendo, in that by 43 Eliz. the child is well placed, in that the defendant hath agreed to it by appeal: but, per Curiam, the defendant is a draper in Axbridge another parish, and may have 100l. with one, and this is a poor child, which cannot by them be bound an apprentice; but in regard the case was of general concernment, therefore the Court declined to give any opinion, but referred it to the Justices of Assize amicably to make an end; præter Keeling, who would have this setled by the Court here, specially because the order being removed, cannot be sent down by the procedendo, which the Court agreed, but yet copies may, which is sufficient for the Justice of Assize to compose the heat of prosecution in presence of the justices.

122. COLLET *against* YOUNG. *Ante.*

Aud. quer.

After judgment against deputy of the Commissioners of Excise had 1655, in action of false imprisonment, the defendant brings now an audita querela on the Act of Oblivion, in that the imprisonment was made by colour of their authority; and Serjeant Witherington moved in arrest of judgment, that this action lieth not, the verdict finding it was not done virtute, but only by colour of such authority. Sed adjornatur 640, pl. 9.

123. HELIAR *against* BROWN.

Arbitrement.

Nota pro regula, when parties by rule of Court submit to award, he that will have an attachment must by affidavit suggest breach, and then the defendant may come in and plead nullum fecere arbitrium, or shew cause why an attachment should not be awarded, and so the matter may come in debate; but no attachment may be awarded on general suggestion of breach, without notice.

[635] 124. TILFORD *against* FRENCH. *Ante.*

Assumpsit.

The Court were of opinion no action of debt or action upon the case would lye, but only an action upon the case on mutual assumpsits; and by consent a nil capiat per billam was awarded against the plaintiff.

125. THE KING *against* CHEDWICK. *Ante. Saturday, Novemb.* 28.

Coron.

The Court conceived that the indictment ought to aver that the goods were in the trunk, and then apply her false oath, said to be, that the trunk and the goods therein were the goods of J. S. and not barely to insert this in innuendo; and on information of the counsel pro Rege at the trial, that the evidence against her was not sufficient, the Court arrested judgment, and discharged her.

126.

Peace.

Stroud jun. moved to quash an indictment of riot said to be taken ad Quarterialem Sessionem Pacis tent. in comitatu, and not said pro comitatu, sed non allocatur for being in the county, and said the Quarter Sessions, it must needs be intended for the county.

127.

Prohibition.

Nota pro regula per Curiam, no motions for prohibition, unless quia comitatus Anglicanus, or such as need no defence, nor for reading records, to the intent they may be made conciliums the next term, unless for special cause, as to prevent priviledge of Parliament near at hand, &c. Nor to make reports, unless specially ordered by the Court: nor for judgment, or in arrest of judgment, unless the postea by delay of the attorney were not put in till within a day or two of the end of the term, ought to be made the last day of the term.

128. THE KING *against* WHETSTONE.

Bastardy.

There being a demurrer put into an indictment for keeping a bawdy-house without any counsels hand. Stroud and Holt prayed the defendant might waive it, and be admitted to plead, which the Court refused (as they had done yesterday in the case of Alcock, who was indicted for being continuus communis & assiduus perturbator pacis) because this priviledge can be granted to none but to the King, although the **[636]** Kings attorney do consent that they may waive, especially after the King hath taken such defendants at their words, and joyned in demurrer: whereupon the Court fined him 200l. and imprisonment till payment, and without bail or mainprise until next term, and then to come into every Court with a paper on his head, subscribed, for keeping a common bawdy-house; which was done accordingly.

129. CHAT AND EDGAR. *Ante.*

Marchants.

The truth of the case was, that a butcher having bought cattel of the plaintiff, who was a grasier in Norfolk, came to the defendant who was a parson, and desired him (having mony in London) to draw a bill to J. S. in whose hands it was, to pay the plaintiff, and that he would repay the parson in the country, which was done by the parson, with private advise to J. S. not to pay the plaintiff till he had received the mony of the butcher, who broke and became insolvent, and so on default of payment by J. S. the plaintiff brings an action upon the case against the parson, suggesting the custom of merchants to be, that if any merchant or trader, or other negotiating for him, procure or do draw any bill unto any other merchant, or other negotiating for him in England, that then, if he to whom such bill is directed, do refuse to pay, he that drew the bill shall be chargeable; and after not guilty

pleaded, and verdict in Guildhall for the plaintiff, Winnington in arrest of judgment, excepted, that it was not averr'd that he for whose use the mony was to be paid, nor he that drew the bill were merchants, sed non allocatur, such merchants referring only to the procurers, or such to whom bills are directed.

[637] De Termino Sancti Hillarii, 15 & 16 Car. II. B. R. Die Saturnij, Jan. 23 Anno 1663.

Hyde Chief Justice; Twisden, Windham, Keeling.

1. Bradley *against* His Wife. In Baron & Feme, Br. 1.

Baron & feme.

He procured J. S. to sue him and his wife in an action for goods taken away by her, and had judgment by confession of the husband, which the Court set aside as illegal: but if on issue it had been tried, J. S. might have taken both. 2. They ordered all such bonds and writings of the husbands, as she took away, to be re-delivered by her to him. 3. They refused to bind him to the peace at her suit, unless her life be in danger, because by the law he hath power of castigation; and the Bishop of London had certified he used to beat her, but that she used to provoke him; and that by reason of their wilfulness he could not end their difference, according to the reference of the Court last term.

[638] 2. Fords Case.

Prohibition.

He moved by Keeling for a prohibition to the Arches on 23 H. 8, cap. 9, being cited out of the diocess of London; but, per Curiam, there is an ancient composition by usage betwixt the Archbishop and the Bishop of London, that the causes in one may be sued in the other diocess, as in 2 Cr. But by Twisden, this ought to be pleaded, else the Court cannot take notice of it. Adjornatur.

3. Primate *against* Sir J. Jackson. *Ante.*

Perjury.

The Court will not suffer any new trial in perjury, although the parties do consent after acquittal, nor in this information, which was against the defendant for subornation of witnesses, to prevent the evidence for the King, will they suffer it now he is found guilty: but they committed him to prison (for the present), but ordered no action or execution to be charged on him whilst under the criminal side.

4. Mr. Attorny *against* Roch. *Post*, 639, pl. 7.

Ancient demean.

Stroud moved for an amendment of scire facias in nature of a writ of disceit, grounded on a judgment in C. B. of lands ancient demean, and the entry on the record was of judgment coram Johan' St. Johns, & sociis; but the original writ of disceit was right, coram Olivero St. John, &c. which being to disaffirm the judgment in dower, the Court (although otherways inclining to do it) would advise.

5. Bayly *against* Bunning.

Bankrupt.

In an action of trover against bankrupt by assignee of the commissioners, the visne may be laid in Middlesex, whence the commission issueth, or in the place of the cause of action at the plaintiffs election, per Curiam, the commission being the foundation of all.

[639] 6. THE KING *against* FORTH, DASHWOOD, &c.

Force. In Brief, Fitzh. 26.

Jones moved to quash an indictment of forcible detainer and entry, removed hither without any process for want of addition, there being one Elinor named intermediatè, and after others named nuper de L. yeomen, which cannot refer to all, as Dyer 46 b, pl. 2. Sed Curia contra, were Eleanor intended a woman (which the Court cannot do here) for that Eleanor may be as well meant a man. 2. The charge is of forcible entry into several parcels, and detaining only one, which, per Curiam, is well enough, being vi & armis; and they ordered a tryal on it, and wanting vi & armis in the ejection is not material.

7. SIR JOHN JACKSONS CASE. *Ante* 638, pl. 3. *Munday, Jan.* 25.

Perjury.

He now again desired a new trial at Bar, which the Court refused, and fined him 1000 mark, imprisoned for a month, and after to be of good behaviour with sureties of 500l. a piece for a year, and after at the pleasure of the Court; but that no other actions should be charged on him by other persons without leave of the Court.

8. COPLY AND DR. SHERROCK *against* BOUCHER. *Ante.*

Encumbent.

Wild moved for a prohibition to the Arches of London, as lessee of the Vicaridge of Langford in Oxon, the corps of the Prebendary of Lee de Lincoln, for that the right of freehold, viz. the place of the official, which the plaintiffs had granted to J. C. was in question, the defendant claiming as grantee of the Dean and Chapter of Lincoln. Windham conceived it strange that this jurisdiction should be grantable with the corps to a lessee, being a personal thing annexed in point of trust to the corps, which Hyde Chief Justice agreed; but by Twisden, the validity of the grant, as about 4 Jac. B. R. in the case of *The Register of the Admiralty* was resolved, is triable at common law: so by Keeling; and the jurisdiction being temporal, although the person be ecclesiastick, may pass by the grant of the corps, especially if it have been so used: also per Curiam, unless there appear sufficient ground for a prohibition, they will never put the party to take issue, or to demur to any **[640]** particular point: also general words of all profits and advantages will not pass, a commissary or officials place being a meer matter of jurisdiction, and not like a registers place, but rather, by Windham, is like a recorders, who cannot make a deputy without a special grant or custom. Adjornatur.

9. YOUNG *against* COLLET. *Ante* 634, pl. 122.

Aud. quer.

Serjeant Witherington on 1 Inst. 290 moved in arrest of judgment in aud. quer. brought on the Act of Oblivion, to avoid judgment thereby made void, as being had in the late times, issue being taken that the judgment was not given by virtue of any commission of the late powers; and indeed it fell out that the warrant was executed by a wrong officer, and the Act of Pardon extends not to any cases not warranted by the law of the times: also the Act of Parliament is only recited in the writ, not in the count, as it ought to be. Jones for the plaintiff, This was done colore of the law of those times, although not virtute; and the Act of Parliament comprehends both, and giveth a new remedy. Also in this Court aud. quer. is like scire facias where the writ is the count, which the Court agreed: the action of false imprisonment was in 1655, and verdict for the plaintiff, and judgment, but no execution; and by Keeling, the Act of Parliament did not intend to indemnifie the defendant, or any that could not have justified themselves by the law of those times; also whatever was done in

those times was then virtute, but now only colore, and the Meal Act is not material; Twisden accorded, because the party ought to have demurred, and by taking issue hath waived the advantage of the Act of Oblivion, but else he conceived him clearly relievable by the Act; so by Windham; and colore in the Act is of larger extent than virtute in the law of those times, and extends to the equitable parts, as this, the committee of indempnity, having protected the defendant against execution in those times: but per Curiam, on perusal of the Act, all judgments and executions are vacated which relate to any acts of hostility, or relating thereto, but only actions or suits are discharged by the latter clause, and all prosecutions and molestations, which per Curiam, præter Windham, extends not to judgments. Adjornatur.

[641] 10. POWIS AND HIS WIFE *against* MASKALL. Siderf. 172, pl. 2.

Baron & feme.

In trover by them of her goods lost dum sola, and converted since the marriage. Jones moved in arrest of judgment, because the wife is joyned, the conversion being the gift of this action, and the trover but an inducement to it, and this arising during the coverture (the property being vested in the husband and his executors) he only shall have the action; so on bailment before: so in case of replevin, Repl. F. 43, the husband only shall have it on a taking dum sola: so of detinue, Moor 25, pl. 85, *The Lady Audleys case.* Twisden agreed, these cases being in affirmance of the property in the husband; but trover doth disaffirm it, and by issue the husband hath admitted the thing out of the wife, and is only trespass upon the case, wherein not the thing it self, as in the former actions, but only damages are recoverable, which the Court agreed, præter Keeling, who agreed the difference. But this action affirms a possession, and not any tort, as demand and denial, although evidence is no conversion alone; but the doubt is from what time the property is disaffirmed, and he conceived only from the conversion; for the first possession is supposed by finding without wrong, and so is no trespasser ab initio. Twisden was staggered on *Heb* against *Lons case*, that trover was in B. R. brought by the executors of the husband of losing by feme dum sola: also by Hyde, the losing is but the general count and form not traversable; but the goods might be taken away by trespass and by command after converted, which Windham agreed. Adjornatur.

11. JEAKELL *against* PASCALL.

Administrators, Br. 37.

After the teste, and before the retorn of attachment of priviledge in action for fees, the defendant confessed several judgments on bonds, and at the retorn pleads plene administravit, and besides those judgments riens entre mains: to which the plaintiff demurred, as being judgment of the same term. The defendant joyned, and the plaintiff entred the record as from the teste, and not from the retorn, as he ought, because no bail or appearance can be till retorn, whereby the defendant was surprised; and per Curiam, were the bonds subsequently sued to the plaintiffs action, which is but indebitatus, they must be paid first, or else there will be a devastavit. The Court ordered the de-**[642]**-murrer to be waived, and the record to be entred as of the retorn of the writ; and the defendant may aver payment mean in bar. *Post.*

12. SWIFT *against* NORTH. Siderf. 173, pl. 3.

Heir.

In debt against an heir who was by guardian, after paroll demurr and resummons, & capias alias & plur. at 5 exact' the defendant appeared, and after riens per discent præter pleaded, confessed the action in the C. B. and now it was specially assigned for error, that the plea was discontinued, for that the writ was not continued on the roll,

as Co. Entr. Error pl. 7, & Rast. Discontinuance in Error. Also 2. The appearance was at the exigent, and no supersedeas nor utlary retorned, which, per Curiam, are all cured by appearance of the party. 3. There was no entry of the admission by guardian certified on record, nor diminution prayed, which after in nullo est erratum cannot be prayed, but the Court may grant it to affirm the judgment; also there being no retorn made now of this, the Court cannot intend that it is, or is not: but he that assigns this for error, per Curiam, ought to pray a certiorari, that the whole record may be certified; and if they retorn there is no writ of admission, the defendant may alledge diminution, for else the Court will intend rather that there is an admission, and now no certiorari can be granted to reverse the judgment, but affirmatur, nisi.

13. GUY *against* GODDARD, &c. Siderf. 173, pl. 4.

Utlary.

In action upon the case for mony on sale of butchers meat after verdict against one, it was moved in arrest of judgment, for that after the writ, and before the count, it is entred sciendum est quod one of the defendants are utlawed, whereby the plaintiff was not intitled to sue both, but only one, being a joynt contract; and per Curiam, had this been demurred to, it had been naught, but not so after verdict. But by Jones, this is a repugnancy, that two should be attacht, and yet one utlawed, the capias being only on default of goods, per quod attachiari potest. 2. It was not said that the defendant was utlawed super breve illud: nor, by Twisden, is this sciendum any express averment; and if it were, it must be placed in its right place, else it overthroweth all if demurred to, and the verdict will not help the other exceptions, **[643]** per Curiam, of the sciendum, which is but recital, and the not saying the utlary was in breve illo. Adjornatur.

14. CARPENTER *against* MARSHALL. *Tuesday, Jan.* 26.

Trin. 1659, Rot. 849.

Franchise. The same reasons may be urged of lands granted to the King, yet that by fait enroll passeth the estate without attornment. Br. 57, in Grants, Br. 82. 27 H. 3, c. 27, § 20. *Vide* Dyer 50, pl. 1. c. Fine of rent shall not be ingrossed till attornment, &c. 17 Ed. 3, 29, pl. 28.

In ejectment on demise of Philips by special verdict, it was found that Queen Elizabeth, in right of the dutchy, was seised of the mills in question, which lay out of the County Palatine, and by grant under the dutchy seal granted for lives, and the reversion discending to King James, he granted to the lessor of the plaintiff surviving the other grantee Ferrers; but there (by Jones for the plaintiff) was no attornment, but the grant was under the Great Seal, the dutchy seal, and of the County Palatine, by 3 H. 5, cap. Rast. Entr. 524, 636. No grants of any possession shall be under any other seal than the dutchy; so the rest are out of the case: but of lands that are out of the county, by 37 H. 8, cap. 16, they must be by the dutchy seal; but for lands within the seal of the County Palatine is sufficient: and at common law, lands which the King hath in his natural capacity, Pl. Com. 213, or in right of the dutchy, pass from the King without livery. And the statute of 1 H. 4, cap. hath made no alteration as to this point, but intended to preserve the dutchy inheritance, and the reputation thereof, distinct from the lands of the Crown; and although there be general words, that they shall be as if we had never taken the Crown upon us, yet doth these lands, where it stands with the intent, partake of the Kings prerogative, as the Kings nonage shall not prejudice his grant, in 13 H. 7, 16 b. pl. 5, and 15 H. 7, 17, aid shall be praid of him at any time for such lands; also an usurpation to such lands shall not prejudice the King, 3 Cr. 240. But I agree 26 H. 8, 9, and in 21 Ed. 4, 60. Livery and seisin is held necessary of dutchy lands, because the King may do it by attorny; but here, unless the lands pass with-

out attornment, the King will be in a worse case than a common person, in that the tenant is not compellable to attorn, for that the King can have no quid juris clamat, but he must levy a fine by way of grant and render, 11 H. 7, 12 b. pl. 7. And it's contrary to the supposal of the fine, that the deforcer should have a quid juris clamat, and therefore the makers of this statute never intended so much **[644]** to prejudice the inheritance, as to put him to attornment: and 6 Co. 68, for this reason the reversion is in cestuy que use without attornment, because he can have no quid juris clamat; also the expedient devised in 4 Inst. 210 is an equitable writ out of the Chancery of the dutchy to the party, whereby only his body shall be imprisoned; and this could not be by custom, for that the lands began but in Edward the Thirds time: also 4 Inst. 209 is Cooks express opinion, that the lands out of County Palatine doth pass at least as to the estate.

Weston for the defendant, The dutchy seal is a record, so as to conclude the party from pleading non est factum, but not so as to pass the estate without livery and seisin, which hath been adjudged necessary; and the reasons that attornment should be had, are as great as for livery, as that publick notice be given to the county, and that the tenant have some election in choice of his landlord. Also this is a quality that runs with the realty of the land, 1 Leonard 12. Moor 149, *Bonnys case*, not any personal thing, which he agreed pertook of the Kings prerogative, as the King must make a demand to re-enter into lands, parcel of the dutchy, that lye out of the county, for condition broken. And in Moor 153, its obiter held, that attornment is as requisite as livery, in that it hath as much interest on the freehold, 2 & 3 Ph. & Mar. cap. 20. Its requisite that the several lands exchanged for and annexed to the dutchy lands, that they pass by the same livery and attornment as others: also, per Curiam, No privities will pass without attornment; and the estate will be fruitless without them; but the constant practise since 1 H. 4 hath been, to pass them without attornment; and else, by Windham, It would be dangerous, that by the Kings death before attornment it would be void. Adjornatur.

15. TERRY *against* COUPER. *Ante.*

Slander.

Jones moved for judgment in action upon the case by lime-burner, for saying, de eodem querente, & arte sua, Thou art a cheater, which are actionable after a verdict, without colloquium of his trade; for this is but evidence to the jury to find the words spoken of his trade, as anciently it was doubted, that words in the third person were void, 2 Cr. 674, *Smith* against *Ward*, without colloquium of the person, as (he said, &c.). But this is supplied by verdict, and there adjudged good, & de arte is as good, 1 Cr. 515, as de per-**[645]**-sona. 2. That a lime-burner is such a profession as may maintain an action, in that its said he got his living by buying culm. Winnington for the defendant, Its not said that buying and selling of culm is incident to that trade. Hyde, His profession is but as a common carrier of chalk, and not within the Statute of Bankrupts; and so to say he is run away alone is not actionable; nor to say he is a knave, by Keeling, without a colloquium but else, the meanest way whereby any get their living, being scandalized, its actionable; and this colloquium; cannot be supplied by these flourishing words of the plaintiffs, without shewing the particular circumstances of the trade, whereby the standers by may understood the words scandalous, and verdict will not help. Windham agreed, scandal to any trade or imployment, as porter, apprentice, &c. being a means to take away his livelihood, is actionable; but I doubt this saying, de arte, doth necessarily require that the trade must be proved before a jury. And the design of the words, (although spoken occasionally without colloquium) was to wound his profession, and so actionable; and so is the case 1 Cr. 515, which differs nothing from words spoken de querente, for that the jury in both must be satisfied that they were spoken (de). Twisden agreed in omnibus: Hyde accorded with Keeling, that the action will not lye, because there is nothing in the declaration that concludes it a scandal of his profession, for that the buying of culm and stone, may be a distinct art; and so the words, de arte sua uncertain, to which they may be applied. Also these are no trades within 5 Eliz.

that may take an apprentice; but how mean soever, had the words been particularly applied to his dealing in such callings, they would have been actionable. Hill. 1655, in Rot. 2332, *Snape* against ——— in C. B. to say of lime-burner, with special colloquium of lime-burning with the plaintiff, and with some of his customers, said, He was a cheating knave, and a devil, and yet because he had not laid, that the plaintiff had not alledged it was said of the plaintiffs lime-burning, or of his dealing in lime-burning, adjudged not actionable; and the saying de arte sua doth not necessarily imply any necessary proof before a jury, without a special communication of his dealing in the trade. Adjornatur.

[646] 16. ALEWAY *against* ROBERTS. *Ante.* In Damages Br. 52.

Mich. 1658, Rot. 894.

Damages. March, 88, pl. 142.

The Court before, and now were of opinion, that the death of the heir or ter-tenant, after feoffment to J. S. before any inquiry of damages executed, doth discharge the damages, in that there is no person against whom this scire facias can be brought: but if the heir had been alive, his feoffment being pendant on the writ of enquiry, and after it was awarded on the roll, should not prevent them. Also the ter-tenant, as to the damages, hath committed no offence, but only the heir, by not rendring dower, which is personal, as an ordinary writ of enquiry in trespass: but Keeling doubted, in respect the feoffment is pendent on the writ, the feoffee is bound; and the damages are here only accessory, and the judgment binds the land. Adjornatur.

17. SALVIN *against* HERN & UXOR.

Baron & feme.

The plaintiff being intitled to administration, doth agree with feme covert by deed, that in consideration he would suffer J. S. to prove a will, and take administration, she would pay to the plaintiff, &c. which being a benefit to her, and at her request, and to her use, she might, after promise without deed, if the benefit continue. I agree this writing void in it self, but when she will when she is sole afterwards, as in our case, promise to perform the contents thereof, it's sufficient for the action, notwithstanding that Wild, the Kings Serjeant for the defendant, in arrest of judgment, had alledged this to be but nudum pactum, the promise being grounded on a void deed, and so no consideration: also the promise on the plaintiffs part was only to permit J. S. to take administration, and be aiding and assisting to the getting in of the debts of the testatrix Rebecka Salvin, but there is mention that the plaintiff was entitled to administration; also the promises on the part of the plaintiff are executed, and not continuing: also one promise in the deed was to pay mony, if received in six months, or else on request would procure her husband and J. S. to enter bond, which by death of the husband is become impossible, and the subsequent promise void. Adjornatur.

[647] 18. GUY *against* SWAILE.

Hill. 14 & 15 Car. 2, Rot. 665.

Arbitrement.

In debt on obligation, condition, that whereas there were several differences, &c. concerning accompts, &c. now pendant in law and equity betwixt Tho. Prince and William Santloe, which are referred to the final arbitrement of J. S. and J. N. &c. That if now the said referrees do make and give up their final award of and concerning the said matters now in difference, &c. that then if the said J. S. the defendant, his executors, &c. do truly pay, &c. to W. G. the plaintiff, the full sum of 100l. &c. out of the first 200l. that shall be received by the said T. P. of the said W. S. upon or by

virtue of any such award, &c. and in case no such arbitrement be made by the said referrees, nor the said 100l. paid as aforesaid, or otherways, that then if the said T. P. shall render his body in execution by the 25 of December, 1658, on a judgment agreed to be entred in B. R. against him, as of Michaelmas term next, at the suit of W. G. for 240l. in case T. P. so long live, &c. that then, &c. The plaintiff avers J. S. did not pay the 100l. to W. G. nor did T. P. render his body, &c. The defendant pleads that T. P. at any time after the making the arbitrement, and before the action brought by W. G. hath not received of W. S. 200l. nor any peny thereof, & hoc, &c. To which the plaintiff demurs.

19. FORD *against* WELDEN. *Ante. Wednesday, Jan.* 27.

Ordinary.

Powis against the prohibition, in that this citation for appearance is not out of the diocess, and the Arches have anciently sate here; and 1 Cr. 339, Gobbet. Mich. 6 Jac. C. B. 2 Brownl. 1, *Lewis & Porter* against *Rochester*, is express in this point, that by reason of the composition no prohibition was awarded; and that the 94th canon doth agree with the stat. 11 Jac. *Tye* against *Coxe*, such prohibition was allowed in C. B. because the suit was before the archbishop, as guardian of the spiritualties, but it was never denied when the suit is as metropolitan. Keeling jun. Composition to remit all causes, is expresly against the statute, Hub. 185, and however, such composition must be pleaded. Also this suit will prevent appeals, which in case of suit before the **[648]** archbishop can be only to the delegates: also compositions do not bind the successors, *Pricavers case*, Hub. 178, and where both jurisdictions concur in him, yet he must hold his court where the cause of suit is. Judge Keeling, The jurisdiction of the Arches is a peculiar one that the archbishop hath of fourteen parishes in London, 13 Co. 4, and not as he is archbishop; for the statute of 23 H. 8, 9 was made to limit and bind the hands of his legative power, 1 Cr. 97, *Smith* against *Poindrell*, a prohibition was denied, because the party himself had admitted the jurisdiction and appealed: but before such prosecution, 1 Cr. 162, *Cadwallider* against *Brian*, a prohibition was granted, and so it ought here. Adjornatur.

20. DUDLY *against* BYRON. Siderf. 173, pl. 5.

Variance.

In scire facias quare executionem non of a judgment before Oliver late Protector only, not saying of the dominions of England, Scotland, and Ireland, and the territories thereto belonging, nor &c. in the Court of Upper Bench. On nul tiel record pleaded, the record is certified before Oliver late Protector, with the stile full; also it is not said the Kings Bench in the scire facias, being then at Westminster, sed non allocatur: but by Twisden, The Act of Judicial Proceedings doth not confirm any record under such stile of Oliver Lord Protector, but only with addition of dominions and territories. Also had the defendant demurred, the second exception had been fatal, but by nul tiel record pleaded is waived: sed Curia contrà, The Act giveth no countenance to the stile, but only that such judgments shall not be reverst; and it's not fit to use his title at large, as the Kings, which is ancient and known.

21. HUTTON *against* FOWKE.

Wales.

They being patentees of the office of wardrobe of the grant of the lord president of the marches, and there being difference betwixt them and the former patentees about the profits, they prayed a prohibition, because the freehold is only in question, whether grantable by the King or the lord president; and although the party by dures hath consented to try it in the marches, yet that cannot alter the law, which the Court agreed, the accompt between them being but a consequent of the right. Adjornatur.

[649] 22. DUDLY *against* THE LORD BYRON. *Ante.*

Pardon.

By Keeling, the Act of Judicial Proceedings intended only to confirm the things transacted in the Courts, not the Courts themselves: but as in *Sir George Binions case*, late in C. B. on suit of Parliament man by original, it was held good. It was also held, that notwithstanding the Act, any man may plead there were no Courts of the King then at Westminster, nor any other legal Courts, which the Court agreed: and this scire facias, saying only coram Olivero, &c. is true, although the record be larger. Hyde Chief Justice, Had the judgment been coram Olivero nuper Protect. it had not been confirmed by the Act, and therefore the recital of it in the scire facias is materially variant, & postea judgment for the plaintiff.

23. SIR CHARLES STANLY. *Ante.* Execution, Br. 98.

Priviledge.

Coleman, after his pardon allowed, prayed leave of the Court to charge him with an action, which Twisden and Windham agreed, as *Banister* against *Trussel*, Co. Entr. the Court being discharged of him by his attainder; and if the King will never pardon him, there is no reason a common person should suffer: Hyde Chief Justice contrà; He cometh here only to plead his pardon, and therefore ought to have the priviledge of the Court eundo & redeundo, which Keeling agreed, this being purely the Kings suit; but the exigent is mixed with the suit of the party, and therefore he may be charged. The Court agreed none shall charge him now in Court, nor eundo or redeundo: but for such charges as were entred against him in the marshal's book, there is no reason, by Twisden and Hyde, but they should continue; but yet if any be charged whilst the Court doth advise, they will punish the attorny that dareth to lay it on, but they will not discharge the action, unless the process be continuing against him criminally.

[650] 24. MR. ATTORNY *against* STARLING, &C. BREWERS OF LONDON.

[See *Mogul S.S. Company* v. *M'Gregor*, 1889, 23 Q. B. D. 631; *Allen* v. *Flood* [1898], A. C. 88.]

Conspiracy. Siderf. 174, pl. 6.

Weston moved in arrest of judgment in information against them: 1. Because it is for factiously, unlawfully, and seditiously assembling themselves, &c. not saying vi & armis, or riotose or routose. 2. The defendants were charged for conspiracy to deprive the King of his customs and excise, and to depauperate the fermors, which is not material, the defendants being found not guilty of all the overt acts alledged in pursuit of the conspiracy, and of any hindring the Kings revenue, and therefore it cannot be said they factiously, &c. meet together to depauperate the fermers: but per Curiam, the very consultation is an offence, as *Poulters case*, without any overt act. Mr. Attorny conceived vi & armis not necessary in an information, especially being for conspiracy, which is an act of the will, and not for any personal force, and after verdict especially it's good. 2. The very conspiracy to do a lawful act to the prejudice of a third person is enquirable and punishable in B. R. inter les Articles, 27 Ass. Also by finding they did conspire illicite prout per informat. they do implicitely find their agreement to contribute mony to take away the gallon trade, and that they made orders to brew only small beer for three months: also by the solicitor, as in all the informations for lessening the Kings revenue; and as in that against the Duke of Northumberland for conspiring with Sir J. D. to illegitimate the Lady Anne Dudly, because no process of utlawry lieth, it's sufficient for the King, that Mr. Attorny only prayeth debitum legis processum. 2. The not guilty quoad

omnem aliam materiam may be supplyed in the other acts alledged, as the endeavour to raise mutiny among the people to pull down the office of excise, and the first finding would be sufficient, were the rest contradictory to it: the Court agreed the vi & armis not necessary, in that no breach of the peace is complained of, or if it were, as for death of man, it were needless, by Hyde, especially this complaint being of a crafty wilyness. 2. Also the very conspiracy to raise the price of pepper is punishable, or of any other merchandise: and by Twisden, If any of the particular facts, which are but evidence of the design charged, be found, it's sufficient to support the information, and the not finding the particulars (for which, by Hyde, there was as great evidence, as the general charge) is not material. But by Windham, All the particulars of making orders and contributing mony, are discharged, and not involved in the **[651]** general finding the conspiracy, modo & forma: but whether this be a sufficient crime to meet and consult to depauperate the fermors, 655, pl. 35. Adjornatur.

25. FORD *against* WELDEN. *Ante.*

Ordinary.

Windham conceived this composition matter of law, and so need not be pleaded and left to the mouth of the jury, but is left to the civilians in 9 Car. C. B. on the affirmation of Judges of conference with civilians, whether the composition were according to the civil law; a prohibition was disallowed, because this ancient usage amounts to a licence; and 1 Cr. 339, in *Gobbets case*, Dr. Duck was then Chancellor, by whose information the Court denied a prohibition. And in Pasch. 10 Car. 1, B. R. the civilians present in Court did affirm an ancient usage, and that libel for defamation was allowable, 1 Jac. by the 94th canon. These three cases I was a reporter of. 2. Twisden contrà; The statute is negative, and taketh away suits for other causes then mentioned, without licence, which cannot be made illusory by their usage; for the archbishop anciently held his Court in Southwark, which is as near; but because, as Isles and his wife against Cobbet, libel for calling the husband cuckoldly knave, it prevents appeal, it was taken away, and that case of *Cobbet* was only on the suddain affirmation of Jones, and a composition may be alledged in all cases, as well as here, and therefore the party ought to have pleaded the ancient usage, and shewed that it amounted to a licence. Hyde conceived a prohibition in discretion, and therefore ought not to go, and hath been often denied; and in *Cobbets case* the prohibition was denied by the whole Court: also this cannot be tried here, and therefore in vain to be pleaded. Also the Bishop of London hath benefit of this composition, in that by reason thereof the archbishop visits not in his diocess. Adjornatur.

26. PAITON *against* HUMPHRYES. *Thursday, Jan.* 28.

Proof.

Mr. Solicitor Finch excepted against testimony of Mrs. Humphryes, because she was a legatee of the testator, the plaintiffs father, from whom the plaintiff claimed 2000l. And the defendant in this suit, after several verdicts against him, and payment of her legacy, did make her de-**[652]**-fendant in a bill in Chancery, whereby he prayed a rebatement of the legacy by this accident, as breach of covenant, &c. But, per Curiam, There is no cause for it without collateral security taken; so if the executor will pay legacy, having notice of debts; but if the mony were paid pendant such bill by the executor, whereby to let in her testimony without any decree, she is no sufficient witness; but because it was pleaded before, they would not admit any exception, so much as to her credit, & juratur.

27. SPENCER AND AMY *against* HUSON. *Friday, Jan.* 29.

Indictment.

Stroud moved to quash an indictment for being common players at cards, and defrauding the plaintiff of 40s. not saying vi & armis: but, per Curiam, its needless. 2. To say, Angl. a trick at cards, without a Latin word, there being none for it, is good.

28. DAVY *against* WATS.

Common.

In replevin of two beasts taken in A. on avowry as son frank-tenement, the plaintiff rejoyns by custom, for all the copyholders of Blackacre in the manor of D. to have used to have common in A. to which the avowant demurred, because he should have prescribed in the lords name, A. being out of the manor; but the truth being that A. was anciently parcel, and lately severed by the lord, this doth not destroy the common; per Curiam, But the copyholder ought to prescribe specially that talis consuetudo fuit till such a day, and that after the lord granted ouster, &c. as on change of a corporation in *Luttrels case.*

29. STOCKE *against* FITZHARRIS.

Assumpsit.

Wild for the plaintiff assigned for error of judgment in the Pallas Court, that the action was in consideration, that the defendant had promised not to molest, & sursum redderet, which was conceived a mutual promise, and it need not be averr'd that he did surrender, the words being as well, as if it were sursum reddere, and notwithstanding it was not to sue or molest any Jesuit coming into England on bond by the colledge to pay, &c. whereby he claimed his debt. Judgment affirmed, nisi.

[653] 30. HARDIE *against* TAYLOR. *Ante.*

Trespass.

In an action for several trespasses done in several closes in the vill of D. the one is for chasing his cattel ad tunc & ibidem, into the house of J. S. whereby they were indammaged, and it was assigned for error after judgment by nil dicit in C. B. and several damages, because in the executory judgment there is intire damages given pro transgr. prædict. in clausis prædict. not saying any thing of this chasing, &c. which, per Curiam, is incurable: and although damages are intirely given for the trespasses in clausis, and so good, for that all being distinctly mentioned in the final judgment: yet, per Curiam, it's all one, & reversatur.

31. PASCAL *against* JEAKEL. *Ante.*

Covenant.

The Court on affidavit by the attorny, that the bonds are for performance of covenants, will order the defendant to deliver a copy of the covenants to the plaintiff, that he may reply there are none broken, but not else but by consent.

32.

Peace.

Twisden in his charge to the grand jury, said, that it's the duty of every man in the country where he lives to serve them, especially of you who must look especially to such offences as concern the King in his natural capacity, as all treasons; its the duty of all to give light of what soever they know may concern the hazard of his person, of what the law is so curious, that it makes the very imagination the treason, of which the act is but an evidence; but in other cases, although the imagination be punishable, yet it doth not alone make any offence. 2. Such things as concern his politick capacity, all raising arms, palliated with what pretence whatever, either of religion or removing evil counsellors: its horrid to publish in print that any magistrates may be resisted, for which they can cite no law-book or statute in England: and men are grown to that hight, that they value not their lives in treasonable enter-

prises; and therefore above all, you must take care of this: but you must not forget the counterfeiting the Great or Privy Seal. 3. Petit treasons. 4. All manner of felonies and murders, when there is a bill for murder against any for killing men, I like it not, that the grand jury should find it only manslaughter, for you have good warrant to find murder, if a man be kil-[654]-led, and your verdict neither accuseth or excuseth. 5. All robberies you ought to be very careful of. 6. All thefts and larcenies, and all accessories, before or after, to any of these offences. 7. You are to enquire of other offences, which if neglected, will gangrene, although not capital, as all oppressions and force, by what title soever. 8. Of all unlawful assemblies, as all such are that are not warranted by law, under what pretence soever. 9. Of all injuries done to mens persons. 10. Of all corruption of Judges, Spiritual or Temporal; and of all other officers, which is a great perverting of justice, especially of bailiffs, who ought not to keep alehouses, nor detein men in their hands under any pretenses. 11. Of all champerters, buyers of titles, and maintainers, who are since the Star-Chamber put down, much more frequent; and so are forgeries and perjuries. 12. Of all common barretors, and all deceits in trade in measures, or forestalling the market, which is now frequent; particularly in butchers, who use grasing about the town, who clog the market, when the country send theirs up, and this is a great offence; the fault of which rests on you, who are their landlords; but this is contrary to your oaths. 13. Of defaults in all officers of the watch and ward, and suffring vagabonds, which is the constables chiefly, whom you ought to present: as, 14. All nusances of sellers, and other inlargements in the street, and stoppages by draymen, and how the streets are cleansed and paved: also all idle livers, all bawdy and gaming-houses, and all unreasonable prices; and of all inmates, and of all bridges, according to the late statute, that they be railed or walled; and all that cast nusanses into the high-way, or dig pits. Of all alehouses not licenced, or that keep disorder, or are seated in obscure and unfit places; these concerning the lay part of the Government. And as for the Church, all sects, if continued, will foment rebellion and disorder, you must therefore preserve the peace of the Church, enquiring of all such as deprave by books or rhyme the Book of Common-Prayer; of all that refuse to come to church, who are to forfeit 12d. every Sunday, and on forbearance a month he loseth 20l. a month of what perswasion they be soever: also of all libels, called lampoons of any mens persons, which tend to a breach of the peace of the kingdom.

[655] 33. THE KING *against* HEREFORD. *Munday, Febr.* 1.

Mandamus.

On mandamus to restore him to the town-clerks place, they retorn'd that he was never debite admissus, and so they could not restore; which per Curiam is a flat ground of action upon the case; contrà if it had been nunquam debito modo admissus, by Twisden; but the rest agreed that also well enough.

34. LE-FANS *against* MOREGREEN.

Execution.

The defendant justifies as marshalls men of Southwark, for execution for 6l. the plaintiff confesseth the execution, but saith that one piece of silk taken was sufficient for the debt, and that there was other things taken to the value of 50l. and as to that de injuria sua propria, which, by Windham, is an ill plea: but, per Curiam, Its a great misdemeanor, and examinable by the Court: Twisden conceived, that if the plaintiff doth tender the debt, its a wrong for the sheriff to sell the goods; but else he may sell at what rates he can.

35. THE KING *against* STARLING, &c. *Ante* 605, pl. 28.

Conspiracy.

Newdigate for the defendants observed, that the point of destroying the fermors of the excise is not found, but only that they did factiously and seditiously assemble

and conspire to depauperate the fermors; but it doth not say in the excise, which being incertain, as Moor 302, pl. are not to be made good by any intendment, being penal as well as indictment; also conspiracies, that are punishable without overt act, must be such as concern the publick, *Williams case* 5 Co. which doth not appear here in this general charge, as *Fremans case* 1 Cr. 579, but an injury to the fermors by particular name. Also though the information might have been good in such general terms, yet not when the particulars thereof are mentioned, and found for the defendant, as *Meers case*, Hub. 173. Wild for the King, Its an inevitable consequence that the King must lose his rent where his fermors are depauperated; and although it may mitigate the matter, that the particulars are not found, yet it remains a great offence, and of publick concernment, it appearing by **[656]** the information that it was given to the King by Parliament, and by him for 118,000l. per annum for three years setled on fermors: also the jury have found it seditiously done, which cannot be in cases of private concernment: also in the oyer and terminer de falsis coadunationibus, is one article of enquiry. Also by Mr. Attorny, as by 21 H. 7, 39, to assemble his friends for his defence against H. that lay in wait in passage to the market, was held unlawful, although to a lawful end. Also the conspiracy, although an act ad intra, yet the communication thereof is an overt act 27 Ass. 44. Briefe, F. 926. Moor 786, *Grayes case*, and 756, *Staffords case*, and punishable, although nothing ensue thereon, and the conspiracy is the crime, and thence the visne shall come, as *Smith* against *Thrusher*, 20 Jac. B. R. the other acts are but particular instances of it: also that such conspiracy must appear by some prosecution, this is to be intended evidentially to the jury, not otherways: and in *Midwinter* against *Scrogg* in the Star-Chamber 1636, in which Sir Edward Tourner was conusee, the butchers of London were fined 3000l. for glutting the markets, to the impoverishing of several country fermors, because it was of publick concernment, and consequence. Adjornatur.

36. THE KING *against* LOVE.

Trespass.

Keeling moved to quash indictment of battery, taken ad generalem sessionem pacis (not saying domini Regis) which, by Twisden and Keeling, is ill; contrà by Hyde and Windham: but they agreed, such exception may be amended in the caption the same term, but not after. Adjornatur.

37. SHERROKE *against* BOUCHER. *Ante.*

Emcumbent.

Twisden and Keeling, Whither this jurisdiction of commissary pass, or not, by lease of corps of prebend cum pertinentijs, is quæstio juris, and therefore a prohibition ought to be granted, whither it pass or not: but by Windham, This is a trust annexed to the person, and so will not pass, by lease of the corps, which being apparent, that it cannot go to assignee, or executor, as the feme defendant is, the Court, it being in discretion to force issue, or demurrer, or over-rule the prohibition, which he conceived ought not to be awarded. But by Hyde, The right of the jurisdiction being in question, the party ought to take issue, **[657]** or demur, especially the Court being divided: also the deteining the kees of the church by spiritual person, or whereby any spiritual person is hinderd to enjoy his office, is a spiritual offence; but in hindrance of a lay-officer, as commissary, &c. its a temporal offence.

38. SIR JOHN JACKSONS CASE. *Ante.*

Arrest.

Tourner on *Ognells case* 3 Cr. 164, and *Trussels case* 3 Cr. 516, prayed, that he might be charged in an action by affidavit, affirming he could not be taken: but the defendant lay in prison for him, 1 Cr. 389, *Stephensons case;* the Court conceived that

eundo or redeundo to the Court, or the Chief Justices chamber, they ought not to grant leave to any to charge any: but by Windham, Co. Entries, Error, the Court may give leave to charge person attainted or that lieth in prison for crime; and so ought. Sed Curia contrà, they ought to leave men as they find them free, as well as witness, or party going about his buisiness to the Secondary, and retorning: also its part of his judgment, that the party lye without bail; but if at the months end he make default of giving sureties of good behaviour, they will give leave to charge him; and so if there be any practice in him to lye in prison.

39. THE DUKE OF YORK *against* LINSTRED.

Admiral. Siderf. 178, pl. 9.

Jones opposed prohibition, because the ship was floating 3 miles in the main sea, and so secured by the dukes servants, and a libel in the Admiral, and a primum decretum, whereby the property is not altered, but only the possession secured; and the sole question here will be, whither floatsam or not; and the defendant, as vendee of the mr. of the ship, after the decree on suggestion, that the ship was in the river, prayed a prohibition: also the ship is in custodia legis till the party answer in the Admiralty; also this property is but an incident question, and floatsam the main, and so the Admiral may try both, but the sale was before notice of any seisure, as floatsam: but this suit was made to avoid the sale. Also, by Wild, for the defendant, The law giveth a year and day to claim the floatsam: the Court agreed, that floatsam properly belongs to the Admiralty, and they may try whither it be so or no; but this suggestion being of a dereliction within the body of the county, it ought to be tryed by jury, and the decree in the **[658]** Admiralty will be allowed a good plea in trover for it: also, by Windham, Floatsam is that which is totally derelict, not that which is avoided in the sea for fear of danger, to which the owner hath still an eye, and only goeth out to pray help, which Twisden agreed: but this is triable by the Admiral. Also the claim of the property by the party must be in the Admiralty within the year and day. Keeling conceived, that floatsam within the county is of the Admiral jurisdiction, divided with the common law, but here an owner appears, within the record within the year and day, therefore they ought here to demur, or take issue on the suggestion. So on libel of fact done super altum mare, the party may have prohibition on suggestion, that it was done on land; and so if on the trial his floatsam be found in corpore comitatus, the prohibition is good; but if it be found done on the sea, the Court will award consultation. Twisden, Keeling, and Windham conceived, that in causes where the Ecclesiastick Court have no jurisdiction, a prohibition ought to go de jure; but by Hyde, Its in discretion, and that Windham agreed, but only where they never had any jurisdiction; as if once they had, but now have not, its in discretion; but Windham and Keeling being for the prohibition, and Hyde and Twisden against the prohibition, except only quoad corpus comitat', no prohibition was awarded, but only as to the fact in corpore comitatus.

40. TREMAIN *against* SANDS.

Error.

Per Curiam, an abatement of writ of error by death of parties, or of Chief Justice, or by act of Court, doth not hinder, but that the second writ be a supersedeas.

41.

Costs.

The Court refused to bind the prosecutor in an action tam quam in recognizance to prosecute with effect, and pay the costs of the defendant, as is used in the Exchequer, although moved to it by Williams.

42.

Costs.

Nota, The Court refused to remit costs on nonsuit ad motionem paulet, although it were caused by two witnesses that were since perjured in the point, they proved, viz. that J. S. whom they said to be dead, was alive.

[659] 43. THE KING *against* TOWNSEND. *Ante. Wednesday, Febr.* 3.

Trades.

The retorn was, that the defendant contrary to his indenture (which was enrolled according to custom) had married within two years, and that afterwards he took wages, rather as journey-man then as an apprentice, which, by Holloway, is ill, in that its not positively averr'd that he served as a journey-man, but only potius, &c. Also if a married man bind himself an apprentice, he ought to be made free, which the Court agreed, and awarded mandamus to admit him. Nisi.

44. SIR CHARLES STANLEYS CASE. *Ante.*

Priviledges.

The Chief Justice conceived all actions laid on a person attainted are to be discharged, but not executions on judgment had before; for although the Court will not give leave to lay on such executions, yet they will not discharge them, because then he can never be taken again: but by Windham, The person cannot plead his attainder in barr of any action, and therefore they ought not to be discharged, but the party may be punished for laying them on without the Courts leave, which Twisden agreed. Adjornatur.

45. THE KING *against* BREWIN.

Mich. 14 Car. 2, Rot. 263.

Trades.

Eakins moved to quash an indictment for using a trade contrary to 5 Eliz. not having been an apprentice in the trade of cooper, which is no trade named in the statute: and this indictment is not grounded on the clause of any manual art or mystery now used in England, but on sect. 3, the clause of departure out of the city without testimonial and retainer, &c. Adjornatur.

[660] 46. THE KING *against* HEREFORD. *Ante.*

Mandamus.

The Court, Keeling absente, conceived, that the retorn nunquam debito modo admissus, as in the case of *London*, 8 Co. was good, and goeth only to the custom and usage of the city, not whether he were legally admitted, the law is not hereby left to the jury: but however, by Twisden, The legality of admission may be directed by the Judge before whom the trial is; and it may be that he never took his oath, as he ought, by their charter before admission, and adjudged the retorn good, debite or debito modo.

47. COCKMAN *against* SYMONDS.

In Escape, Br. 37. March, 92, pl. 157.

In debt on a judgment, the defendant pleaded that the plaintiff took out capias against him, and arrested him, and thereupon, that he was discharged by protection shewed, allowed to the bailiff as servant to the E. of Bath, not saying infrà menia, but

only in his affairs: to which the defendant demurred, because priviledge is not allowable to an execution, 1 Inst. 131, also it ought to be under the Great Seal: but Curia contrà, such protections being cum clausula volumus only, but 4 Inst. 23. Latch. 48, by Raymond for the defendant, The law doth take no notice of the servants, and therefore he ought to have a writ; also this writ cometh too late, being purchased after the teste of capias; but per Curiam, this is meant of general protections, not of this supersedeas of priviledge, Dy. 59 b. pl. 17. But the Court conceiving the plea in barr naught, they waived the replication on 1 Cr. 75, and by Windham & Curiam, it's no sufficient plea that H. was taken in execution, and suffered to escape, the party hath election to begin de novo by action on the judgment, or against the sheriff, unless he be set at large by the parties assent; so 1 Cr. 240, pl. 282, *Robinson* against *Clayton*, & 1 Cr. 255, *Mayson* against *Clayton*, pl. 299, accordingly, for the sheriff may be dead, or insolvent, and the party might else have advantage of his own wrong in breaking prison. Judgment for the plaintiff, nisi.

[661] 48. PINKARD *against* LAWRENCE.

Pasch. 14 Car. Rot. 245.

Amendment.

Stroud jun. prayed an amendment of a judgment in another term, which in entring the special verdict in debt on a bond, was made quod plaintiff recuperet debitum (ad damna for) ac damna, &c. which was granted per Curiam, Keeling absente.

49. DIMMOCK *against* HANSON.

Arbitrement.

Whereas the defendant had spoken treasonable words of the plaintiff to Oliver Protector, there was in 1661 a submission to arbitrators, who awarded the defendant to pay mony at South Kine prædict. no such vill being mentioned before: but, per Curiam, it's needless, prædict. being void, South Kine shall be intended a vill: also it was alledged by Pelham, who had demurred to the replication, that the matter is pardoned by the Act of Oblivion, and so no ground for the award; but Curia contrà, for the defendant may be one of the persons excepted. Judgment for the plaintiff, nisi.

50. BLEKE *against* GROVE. Siderf. 175, pl. 8.

Apprentice.

In an action of battery, the defendant pleads that the plaintiff was his servant, and for negligence in his business he corrected him, & ulterius the plaintiff also had released, not saying by deed; for which cause the plaintiff demurred for doubleness, alledging such pleas as are in abatement to be so, 11 H. 4, 10 b. by Thirning, where neither are sufficient barrs, if distinct matters on which issue may be taken are offered, 3 H. 6, 31. 9 H. 6, 61 b. 15 Ed. 4, 1 b. the reason of which is 40 Ed. 3, 45, per Thorpe. Twisden conceived an ill plea none at all, as this at Bar is, without shewing the release; but it's double: so by Windham, It's a plain double plea, without offering it by writing; for if it be such a plea, as if it were sufficiently set forth would be double matter, although an insufficient plea, it's double: and by Twisden, Plea generally quod exoneravit is good, before assumpsit brought, but after it must be alledged for special cause. Hyde agreed it's double and both, if true, good pleas. Judgment for the plaintiff, nisi.

[662] 51. PAIN *against* FOSTER.

Covenant.

In an action of covenant for not repairing a house, the defendant pleads performance, and after rejoyns that he was ousted by a stranger, which, per Curiam, on demurrer of the plaintiff, is a departure. Judgment for the plaintiff, nisi.

52. THE KING *against* ARUNDELL.

Church.

The Court refused to quash an indictment for disturbance of a minister in burying a corps at Exceter, till pleading: but because that it was said the defendant had by riot hindered the parson to use the Common-Prayer Book of 1 Eliz. 10 Decembris, 14 Car. 2, which being since a late Act that enjoyns the use of another Act of Ed. 6, the Court held it ill, although it doth not conclude contrà formam prædict. stat. (as is the conclusion in case of private statutes); but contrà formam statuti in hujusmodi casu inde edit. & provis. which is used in general statutes; but because an offence appeared, the Court would not discharge the defendant, but ordered him to appear and answer a new indictment before this be discharged.

53. THE LORD MOLINEUX *against* NELSON.

Error.

In scire facias ad audiendum errores, and scire facias retorned, & quod præmonitus non venit, the Court without pleading will examin the errors, and here reversed judgment by confession for want of original and warrant of attorny in C. B.

54. LUCAS *against* HARLOW.

Administrator.

In error of a judgment in C. B. in debt on a contract, the defendant pleads payment at a place certain: to which the plaintiff replyeth non solvit ad locum, and so the place, which is not material, but must be alledged pro forma, is made material by the plaintiff, for whom the verdict is found; and therefore it's error, by Jones for the defendant; and there ought to have been a repleder in C. B. which the Court agreed, had the defendant specially demurred; but after verdict it's well enough, payment for the matter being a sufficient plea: so by Twisden on fully administred pleaded, the day of the writ purchased, if the plaintiff replys assets the day of **[663]** the writ, if verdict be on issue, its good enough, without saying nec unquam postea. Judgment affirmed, nisi, and the common difference is, when such issue is insufficient for the matter, and not only in the circumstances and form as here.

55. KING *against* THOMAS. *Ante. Thursday, Febr.* 4.

Wales. Siderf. 179, pl. 15.

Williams Senior for the defendant, reflected on the auncient constitution of Wales, which in its original, was an absolute and undependent kingdom; and by the Saxons, they were made tributary and feodatary, since which, it was said held of the Crown, as *Calvins case*, and Pl. Com. 129, but not parcel of it: then by the Normans, William the First, the marchers were set up, not only in the countries, but in the very body of the kingdom, in most counties, except those that were auncient Welsh counties, which knew no such name as marcher till his time, although they were extended to the Severn, and governd by the Malmutian, which were their common laws, as also the laws of Howel-Dah An. 928, but the lords marchers set up another arbitrary law, and confined themselves not to these, 12 Ed. 1. A new form and reformation was made of their laws, but no provision is made for criminal matters, but they remained according to their auncient usage and laws, till the union: but there have been several Chief Justices made, and commissions issued to try felons, from the King of England, but by the union, 26 H. 8, it was provided, in respect of the marchers partiality, that all felonies and murders tried there, and acquittal had, or fine made, shall be no bar to a new trial in the next English county within two years, Pl. Com. 79. I agree that there doth remain a concurrent jurisdiction, but the cause of acquittal goeth only to

trials in the court of the marchers, in that its said, Or fine making, which never was in any other Court. Also had the King sent a commissioner to try any felony there, if he had been acquitted, he could not have been tryed in the next English county. And by 27 H. 8, 26, the courts of the marchers is taken away, at least as to their power of life and death, although their temporal power may remain. Also Wales are by 27 H. 8 to have the same immunities as English born, who on acquittal cannot be tried again. Also 34 H. 8 doth confirm a power of trial, if the next county be possest of the **[664]** cause; but there is no clause that gives trial after acquittal: also this statute doth erect a Grand Sessions, with power to hear and determine, which they cannot do, if after acquittal he may be retried; and there is no president of any such trial since this statute: Jones for the King, The preamble of 26 H. 8 giveth light to the cause of its making, which was to prevent the contempt of the Welsh, in not dreading the laws of England (to which they were then subject) and to inflict a punishment on the people, not on the lord marchers only; for in the next clause the people are commanded to apply to the marchers courts. Its true, the cause of acquittal here mentions only the marchers, but the subsequent Acts speak generally of trials in Wales, and there is not pretended, that by any clause of subsequent statutes, that do expresly repeal the clause of acquittal, and that they do not impliedly take it away, by taking away their jurisdiction and dominions, is apparent; for the places that before the statute of 27 H. 8 were marchers, do still retein their franchises and liberties in reputation. Also Monmouth is by this Act made an English county to all intents, and the Kings writ runs there, and such trials and acquittals must be where it runneth not, 3 H. 7, cap. 1, is almost as sharp as this law, that giveth an appeal within a year, notwithstanding a precedent acquittal on indictment: also this clause is remembred and continued by all subsequent Acts of Parliament that concern Wales, and 27 H. 8 doth expresly say that nothing shall be derogate from 26 H. 8. As to the trial of murders, which being the most common phrase and term to express, as well the trial as acquittal, and all things dependant thereon; but 34 H. 8 doth by new enacting clause (not only by proviso) expresly and fully establish this trial of murders in the next English county, and every article of 26 H. 8. Also the saying fine making, doth refer only to the indulgence of the people, who often found the offences less than they were, and so caused only a fine: but, by Keeling, its perfectly pointed at this court of marchers by fine making, which acts are the acts of the Judge, not of the people. Also by Twisden, the confirmation by 34 H. 8 is not of every article in 26 H. 8, for then the marchers would be up again still; but it confirms all enquisitions and trials, which before could not be of facts in several counties, and every article thereof: but nothing more contrary then to say, this extends to the clause of acquittal. Twisden & Curia conceived that Wales were subject and tributary in the Saxons days, as Spelman and Math. Paris. Adjornatur.

[665] 56. THE KING AND PATRICK *against* QUEENS COLLEDGE. *Ante.*

Mandamus.

Jones for the plaintiff, that the retorn is insufficient, conteining no answer to the writ, which commands the fellows to admit, or shew cause why they did not admit; and they retorn only that he did not appeal, which is no cause, without saying the election was controverted, or that another pretended right, like 34 H. 6, 31, or that it was void: but admitting the retorn to the jurisdiction, as (if any thing) it is, then as it stands at common law, without the letters patents of King James, so its no more but licence is given to erect a colledge ad studend. & orand. without any special visitor, in which case, according to the resolution of *Bags case*, this Court hath jurisdiction 11 Co. 97, as reformers, as well of private, as publick injuries; for the law doth not make the founder visitor; or if it did, there is none here, the line of Queen Margaret, temps H. 6, being extinct, and the retorn shall not be taken by intendment, as plea, that H. was seised in fee, which shall be intended to continue, because the other party may answer thereto, as they cannot do to a retorn. 2. The Ordinary cannot be visitor, unless appointed by the foundation, nor was it ever pretended in any university; also the letters patents of King James were added, as

a supplement, not to take away jurisdiction which the law established: also wheresoever the head of any corporation is elected, and cometh in without consent, or appointment of the Ordinary, the Ordinary hath no right to visit, be it spiritual, as in F. N. B. 42 b. of an hospital, or F. N. B. 52 b. a free chappel founded by a private person by donation, 6 H. 7, 14, pl. 2, or a dean, Premunire Br. 21, which is a donative, or of an abbot, who is visited, or not according to the manner of his coming in, if without institution of the Ordinary, 9 H. 6, 32 b. pl. 3, only by elections of the monks, the Ordinary cannot visit, or 2. Be it temporal, which our case appears (for ought is shewed to the contrary) to be, for the Mr. is not bound to be a spiritual person; a free-school or work-house is as much bound ad orandum as colledge, and therefore by the common law this Court hath a proper jurisdiction. 2. As to the letters patents, they make no alteration, having no restrictive or negative words, as in the statute, that saith all informations shall be in the Court below, had not excluded these Courts without the words (and not else where) and so in the common case of grant of co-**[666]**-nusance of pleas. 3. Its not incident to the office of vice-chancellor to visit, for the chancellor is to do it by the patent, or to make some special deputation, which is not here mentioned: also there is more reason to grant mandamus to such corporation as this, which concerns many persons immediately, but far more in consequence then a mayor and fisherman of a petit town in Cornwell. It might have been objected to *Bags case*, that there was no president; also to say it lieth not for a schoolmaster, I agree, if only by licence, but if uncorporated, it lieth well enough; also the reason of this remedy is for corporation, whereof one member cannot sue the rest, but sole corporation may have an assize. Finch, the Kings Solicitor for the Colledge, The writ doth suppose Dr. Patrick out of his place, which the retorn agrees; and therefore to say he hath not appealed, its sufficient as to the matter. I take it as a rule, that wherever the foundation be elymosinary, be it spiritual or temporal, the Ordinary of common right is visitor, Linwood verbo Ordinarius cap. de religiosis domibus, except hospitals, of which by latter statute, the chancellor is made visitor: this is a right unalterable; but if it were not here, yet the founder is visitor, whose line ceasing, the right, for preservation of peace and order, devolveth on the King, and from him passeth by the letter patents, and till appeal, to such an Ordinary as the law appoints: none can come hither per saltum, nor can he come then; but be the sentence of the Ordinary a droit ou a tort, 13 Jac. *Huntlyes case* in evidence to a jury in ejectment, its binding, as of deprivation, foundation, as of Magdalen Colledge, that is absque appellationis ullo remedio, do not exclude an appeal to the visitor appointed by law, as was resolved betwixt *Price* against *Yarbery* last vacation in the councel, præsente Rege, Judges, and many civilians, 4 Inst. 340. But this is meant, that the appeal shall not have the same effect, as else it would, i.e. so as to suspend the sentence, or adnul any mean acts betwixt the first sentence and appeal, and it is celeberrima voluntas donatoris, that he be visitor whom the law appoints: also the stopping of the mandamus is the best way to preserve the government of the universities, and the fellows have as much right to this writ as the head; and this is the way to entitle the Court to all petit controversies in universities, which is below the dignity of this Court. In the case of *Lewis and Day*, the only question was, who was the proper visitor only. Keeling said *Huntlyes case* was discontinued, and never adjudged in this point, which **[667]** the Court agreed. Windham conceived it no good rule, that this Court may reform all abuses, but that the King, as the fountain had divided the streams from which one cannot appeal to the other: and doubtless, here the Ordinary may intromit; but the doubt is who is the visitor that should put in a fellow, not who shall judge of his deprivation when he is once in. Keeling conceived it was never pretended that election of master of colledge was of spiritual cognizance, and unless this Court may restore, or send writ at least, to know why H. is not restored, there would be a jurisdiction of which the King hath no cognizance. Also as well as the Court may expound will of the testator, so they may the will of the founder: but Hyde contrà; a colledge is founded by the Kings licence. Twisden conceived the King, in this case, visitor; but, by Keeling, not qua founder, but qua Rex, for the foundership was in privity; but by Windham, where the foundation is spiritual, it comes to the King, as Supream Ordinary, not into B. R. Adjornatur.

57. SIR GEORGE SANDS. Siderf. 179, pl. 13.

Administrator. 3 Co. 40. So of the mother.

Mr. Solicitor prayed a prohibition to the Prerogative Court to suit for repeal of administration taken by the father on the death of the son; and eight years after, one Peck, as wife to the son, now sueth for administration to him, on 21 H. 8, 5, for that the Ordinary hath election to grant it, to which he will; and having executed his power to one in æquali gradu, as in one *Browns case* hath been adjudged before the delegates, he cannot cite the party after to repeal it: and *Rosier* against *Langdale*, in B. R. it was adjudged, that the Ordinary hath election, to which he is to be remitted only, and not to any right. Twisden conceived a prohibition would lye on *Fotherlyes case*, Hut. and 1 Cr. 62, pl. 68. Adjornatur.

58. MOURCH *against* LAUND. *Ante.*

Trials.

The first venire being not filed, the Court conceived that the plaintiff may take out another venire facias, *Stellyman* against *Aylet* was resolved by advice with all the clerks: but if it had been filed, it could not be changed: but, by Keeling, its a practice sufficient to set aside a trial, for H. to take out the second venire facias without filing the former, when he retorns it, but just be-**[668]**-fore the assize below, which the Court agreed also, and referd it to the Secondary to examine.

59. THE KING *against* GASCOM. *Friday, Febr.* 5.

Force.

Symson prayed an indictment of forcible entry, being taken apud Bedford infra jurisdiction by justices assigned to keep the peace, infrà villam de messuagio infrà villam, it might be quasht: but Windham and Keeling, this being a private sessions, enquisitio capt. &c. they conceive it ought not to be said tent. pro villa, no more if it were ad general. sessionem: but it was agreed, that general sessions of the county ought to be said pro comitat. and so, by Twisden, it ought here, although a private sessions. Adjornatur.

60. WINWOOD *against* TOTTE.

Assumpsit.

In action upon the case, in consideration that the plaintiff would forbear the defendant a month next ensuing the promise aforesaid, no promise being before mentioned, the defendant promised to pay, which, by Williams, in arrest of judgment, is void: yet the count was on indebitatus of the defendant to the plaintiffs wife dum sola, and that the plaintiff and his wife intending to sue the defendant thereon, the defendant promised prout, &c. The Court agreed this void; but by the record it appear'd to be next ensuing the promise of the said defendant superius mentionat', which is well enough. 2. The consideration was, if he would forbear, whereas the cause of action is by the wife, who must be joyn'd; and she, if surviving, may sue for the debt de novo: but, per Curiam, this is a good plea in bar that the husband hath recovered, although it be collateral, and, so its a good consideration. Judgment for the plaintiff.

[669] 61. FOURD *against* WELDEN. *Ante.*

Ordinance.

Hyde on conference with Evesque London, said, that this place Walden is one of the places that is part of the peculiar of the archbishop, and so the party is not cited out of his diocess: but the suggestion being that the parish is Great Walden, and out

of the diocess of the archbishop, the Court ordered cause to be shewed why a prohibition do not go, ex motione, Keeling, who prayed attachment for proceeding contrary to a former rule of Court, although the Court had been divided after.

62. BAXTER *against* JACKSON. Siderf. 178, pl. 12.

Assumpsit.

In action upon the case against the defendant on promise quod warrantizaret pecuniam due by J. S. in consideration that the plaintiff would carry beer to the house of the defendant, it was assigned for error of judgment in the Marshalsea, that the plaintiff hath not sufficiently entitled himself. 1. Because he hath only averr'd the mony not paid by J. S. and not that the defendant had not warranted it, which by Barwell he ought to do, as if it had been that he would secure, the breach ought to be that he had not secured nor warranted; but had it been that the defendant would see the plaintiff paid, or had warranted in præsenti, then non-payment had been a sufficient breach: sed Curia contrà, that it's well enough. 2. The averment is only that he delivered it to the defendant, and the promise is to carry, which being to the person, and not to any place, it's well enough per Curiam. Judgment for the plaintiff.

63. PAUL *against* KENT.

Lieu.

In action upon indebitatus infrà jurisdict. of the Marshalsea, for wares and merchandises prius venditis, not saying adtunc & ibidem, or where, which was assigned for error: and judgment reverst per Curiam, nisi.

[670] 64. SIR GEORGE BINION, &c. *against* ROBINSON, &c.

Rent.

In debt for rent against assignee, who pleads non est factum, which 21 Ed. 4, 4, is held void, notwithstanding it is not specially assigned for cause of demurrer; and 10 H. 6, 7, riens passe per le fait is held naught: and, per Curiam, estranger cannot plead non est factum. Judgment for the plaintiff.

65. COLLINGWOOD *against* PACE. *Ante. Saturday, Febr.* 6. In Denizen, Br. 7.

Alien.

Baron Atkins for the plaintiff in the Exchequer Chamber, that the heir of one brother shall inherit the other, although the father be an alien, for he hath sanguis civilis, although not naturalis: and to be born in England is not sufficient to make any inheritable, if the father were not also born within the Kings legiance; nor need the brother in this case mention the father in his conveyance, but only for pedigree, Littl. sect. 24, also as Littl. sect. 708, one brother may be auncestor to the other, as well as the father: so 1 Cr. 434, *Broadstock* against *Scobell;* so *Edwards* against *Rogers*, 1 Cr. which reasons are sufficient answer to Cokes opinion, being here only as commentator, & præter textum, Denizen, Br. 9. The King by patent cannot make an alien inheritable; so 1 Inst. 84, 129, and the difference betwixt alien and attainder is none, (*King* against *Boreston*, Noy 168, the same with *Hobbies case*), but if there be, it's strongest against the attainder; and in that case it was put by two Judges, that the younger brother may inherit the elder, notwithstanding the father be an alien; but it was denied by Serjeant Leonard then, but I rely on the case of *Godfrey and Dixon*. 2. Patrick the elder brother being an alien, can be no impediment to the heir of the youngest to inherit the middle brother, being as non ens & impedimentum quod in jure non sortitur effectum, also à privatione ad habitum non datur regressus,

he hath no priviledge himself, 42 Ed. 3, 2, and so cannot hinder any that hath, Dr. & St. 7. 22 H. 6, 28, and the difference is betwixt natural and civil or hereditary blood, that is disabled by the fathers being an alien, but not this by the brothers being so, 11 Co. 1. The Lord Delaware, the younger brother, sate as peer, the disability of the elder being not only accidental or temporary, but perpetual: also the words **[671]** of the Act of Naturalization are full in the enabling part, and not relative only, as is objected, being electio Regis patris regni de aliquo in subditum suum jure adoptionis, and therefore these acts of grace must be so construed, as may effect such intent.

2. Hales Chief Baron for the plaintiff, dismissed first as plain, that neither Robert, Nich. or the descendents of Nich. or William can put in for any claim in this case, their father being an alien, although dead; nor shall William the son of Nich. be any impediment: but I conceive it will be the same question, whether George shall inherit to John Earl of Holderness, as if the son of George, who is jure representationis, shall inherit. By the way as premise, there are three terms to be cleared: 1. The term of inheritance or discent; in which is to be considered, 1. What is to be their rule and measure, which is not the natural love of parents to children only, because the laws of every country hath expounded those according to the laws of the country. In the sacred law the father might as well succeed the son, as he to the father; and by the civil law, the father, brothers and sisters succeed. By the laws of Norway, the father succeeds not if his son hath brothers or nephews, but only preceeds any uncle; and therefore, when we examine any discents in England, it must be by the laws thereof. 2. What is the division of discents, which is lineal or collateral, both either sine medio, as betwixt father and son, or per medium, as grandfather and the son, Lit. Co. 10 b. or betwixt uncle and nephew, 17 Ed. 4, 5, or contrà, it's a mediate discent, not in respect of the degree, but in respect of the mean of the discent; for if father be dead, the succession to the son is immediate; but the right of discent is mediante patre. In the immediate discent there can be no impediment, but it must be in the persons themselves, as attainder or alienism of the father, quoad the sons: but in mediate discents, if there be an impediment in the medium, it will hinder the discent, as of the father, the medium deferens betwixt the grandfather and the son, or betwixt the uncle and nephew, and therefore his attainder or disability shall hinder the discent, although both extreams be able; but in our case the father is not the medium betwixt the brothers, and so Noy 163, his impediment is none to the discent of one to the other. 2. For the disabling term of alienship, most certainly it doth not hinder, but that his son or brother is as much a son or brother, as of denizen in regno naturali, but in civili there is a difference in the common law, which 21 H. 8, 1 Cr. doth allow alien to be next of **[672]** kin. This disability is either personal, which as to discents is not favoured; for though he may contract or purchace till office found, yet he cannot transmit any thing by discent, nor doth the law allow him to take any thing as such, as to be tenant by courtesie, or tenant in dower, the law will never give him what it doth not enable him to retain, and therefore he cannot take by discent; he is taken notice of as person non existens, as person attainted is. 2. For the consequential disability ponere obicem to the hindrance of another, as the father alien dieth in the life time of the grandfather, leaving a son a natural subject or denizen, although the blood of the son be not corrupt, yet because the discent is mediate, the disability of the father doth hinder his discent, *Ed.* against *Rogers*, 1 Cr. 543, is quite out of this case, there being a wide difference betwixt a disability and a barr, 1 Cr. 435, both are alike; and although the fine will not barr the uncles son being estranger, yet if the uncle (as Appeal, Br. 104,) had been an alien or attainted, it would have barr'd. The third term is the naturalization, which is restoring, and removeth the personal impediment, which denization removeth only in part as to issue after, not of what was before, nor cloatheth them with any hereditary power, but the naturalization is more intire and intimate. The French King may naturalize, but not to the prejudice of him that was a denizen before. By naturalization an alien son of denizen being made in vita patris, he shall inherit. So in *Godfrey and Dixons case*, had the naturalization been pend as ours is, it would not have devested the discent before happened, although by particular retrospect it might have devested the discent, but it shall not by construction devest any discent or escheat

actually vested. 2. As to the naturalization it self, which is to be used only as an explication to let me into the question in hand, but is not any distinct point; Johns was in 1 Jac, when he had no auncestor lineal or collateral; George's was, 7 Jac. when he had some kind of auncestor, viz. John. Before their naturalization there could have been no discent betwixt them, by reason of their personal disability; and although they had had none, yet by reason of their father Roberts being an alien, admitting there be a consequential disability, it is not removed by this Act of Parliament, but only the personal; the reasons are, because there was a disability in the brothers that was personal, which may satisfie the Act, therefore it's not necessary it should be wrong, so far as to take off the consequential disability; but if John had been a denizen, the Act could not have been satisfied without taking off the consequential disa-[673]-bility. 2. The Act takes no notice of the fathers disability, but only of the disability in the sons, which is personal: and 3. The scope of the Act is only to carry the benefit unto the sons, and their children, not to their father, or grandfather, as if they had been born in the kingdom. As this naturalization is, it is not applied wide enough to cure all defects by alienship, but only as to the brothers, who by the Act are as much liege people as subjects born, although the father be still an alien: and the scope of the Act is, that they be as free as any born in the kingdom, (not that their fathers, or grandfathers, shall be so:) so to be inheritable to any auncester, being a general clause, doth make things as found, not that are not: so that if he hath no auncestor he cannot inherit: also none will say that by this Act G. may inherit to Patrick, who is a denizen, because his father Nicholas was an alien, the scope of the Act is only to make him inheritable to such auncestor, as if he had been natural born he might, and no other; there might be reason enough for the resolution in *Godfryes* against *Dixons case*, without laying any stress on the Act of Naturalization, as some of the Judges then did. As to the question in our case upon the verdict, it must not be intended the wife is a denizen, in which case her blood would be sufficient to make an hereditary transmission betwixt the brothers; the issue of English woman, by alien beyond sea, are aliens, because she is sub potestate viri, and the husband is as a mean betwixt the King and her; but issue of alien feme by English man beyond sea, is denizen. Its said, the husband in our case was an alien; and he shall be intended to reside there, unless the contrary appear: but however, on full examination of Cooks opinion, on Lit. 8, I do conceive one brother shall inherit the other; the discent betwixt the brothers is immediate; the consequence whereof is, that if there be no impediment in themselves, no impediment in any other will hinder: that it is immediate is evident, in that from brother to brother makes but one degree, as 1 Inst. according to the common law, although by the civil law they are in the second degree, which being collateral obtinet vicem primi. By the grand custumary, no such discent collateral can go beyond the seventh, computing according to cannon and our common laws, Lit. sect. 20, Gard. F. 116, as in frank-marriage, which looketh not on the common root in the father, but immediately leap and transire from one brother to the other. 2. The discent betwix brothers, differs from all other collateral discents; for although a bro-[674]-ther of the halfe-blood, be nearer, as *Browns case*, and to be preferd in administration before brothers son of the whole blood; also such brother of the half-blood, hath more bloods in him then the uncle; yet the law will rather carry the discent to him, though he hath but half the blood of the nephew, because this is no discent mediante patre, but an immediate discent. The due comparison of *Courtnyes case* 3 Co. and *Hobbyes case*, and *Grayes case*, Dy. 274, will clear these reasons, 17 Ed. 4. 1. Also if the natural blood be well derived, the hereditary or civil blood is superinduced: as if the alien hath issue by English feme, none doubts but such issue may inherit one to another; yet upon the reason objected, they should not, for they derive no civil blood from both, but only from the feme, and so they are but half-brothers; so if grandfather and his feme were attainted, it hinders not, but the son may inherit the father; yet is not the hereditary blood derived from them, but superinduced by construction of law. This was the reason of *Hobbyes case*, where the mother not being attainted, the obstacle of the fathers attainder would not hinder; yet if such attainder were an obstacle in its own nature, as 49 Ed. 3, 12, the blood of the mother would not preserve the discent, because the blood of the father shall inherit to the purchaser and the true reason of this case was,

because it was an immediate discent; and the father only the medium deferens sanguinem, not hereditatem. And laws have in all times been tender of extending this disability farther then it needs must; but as in *Bacons case*, on 25 Ed. 3, have always made favourable interpretations for the denization, especially of birth or naturalization, although denization by patent would not be sufficient, and many postnati in England have inherited to their brothers antenati in Scotland; and therefore, as far as by warrant of law I can, I will shew favour. Our case differs from that of *Godfry* against *Dixon*, in the reason of it, whither the naturallization have retrospect to the birth of the brothers, or whither only it refer to the time of naturalization. Judgment for the plaintiff.

[675] 66. THE KING AND HURST. *Ante. Monday, Febr.* 8.

Attorny.

The Court conceived an attorny in corporation, being but a private profession, no such officer as is removeable by the Act 13 Car. 2, of Corporations; and if he were, its insufficiently retorn'd that the commissioners made an order only to the mayor to remove him, and he did it accordingly. Restitution awarded, nisi.

67. THE KING *against* STARLING, &c. *Ante.*

Conspiracy.

Keeling was of opinion for the King, that this bare conspiracy is a great crime, where it is to do that which is evil, although to private person; so is *The Poulterers case;* but 26 Ass. 44, what ever concerns the Kings revenue is publick: and for this cause a monk, 2 H. 4, 7, pl. 26, by being former is thereby made capable to sue. Also this impoverishing the fermors, cannot be intended otherways then in that whereof they are fermors; and the loss of the Kings revenue is a necessary consequence, which the King in favor of his people hath accepted in liew of wards and the purveyance, which legally were of great value.

2. Windham conceived it a point of weight and difficulty, but had the persons been found guilty of the whole declaration, they should have been ransomd rather then fined, because it tends to rebellion; but we have no conviction of the crime, as the Star-Chamber, but only the assessing the fine, and by this verdict the defendants are acquitted of an unlawful assembly, which ought to be alledged vi & armis; and for want thereof, many indictments after verdict have been set aside. Also 2. They are acquitted of conspiracy, which properly is where its to indict men for their lives, and this is that whereon the writ lieth; but the false alliance and union by mutual swearing to maintain quarrels, is rather a confederacy also, as 29 Ass. 45, if it were a conspiracy, there ought to have been some overt act expressed; as if H. be indicted for forestalling, or being common thief, or barretor or conspirator, and as to this, there is no difference betwixt indictment and an action or information; I do conceive the defendants found guilty of confederacy, as in *The Poulterers case;* also the ends for which these crimes are alledged to be done are discharged, as the defeating the King of his **[676]** customs, and pulling down their houses, except only the depauperating of the customers, whom I think publick persons, and so they appear to us by their imployment set forth in the declaration, and in this respect we ought to aggravate the fine, as if the end were to beat a sheriff as a private person, yet he being a publick officer, it will aggravate the offence. I agree that general confederacy, without designment to publick or private end, is punishable by action upon the case 3 Ed. 3, 19, or by indictment, in 19 Rich. 2, in *Poulterers case* is according; and therefore I do conceive here is enough found to give judgment against them for a confederacy, by their assembling together, their consultation and conspiracy, which is as much a false alliance, as if they had bound themselves by oath, &c. But this is cause to mitigate the fine, that its only private; for 26 Ass. 44, the confederates were ransomed for this confederacy.

3. Twisden ad idem, held them found guilty of an unlawful assembly, and of a

conspiracy, and vi & armis is not necessary, the offence being particular misdemeanor, which doth not require it no more would information for assembly, for service of God contrary to law: also this impoverishing of the fermors, doth implicitly find the diminishing of the Kings revenue, which is the chief consequent of it; also intent, whilst private, is fluctuating, and so cannot be punished, but when its declared by Act, its punishable; also voluntas non reputabitur pro facto, 3 H. 7, cap. 14, that is, it shall not be punished so fully, but it is still punishable: the false alliance or binding by oath, is but a farther degree of conspiracy, which is all one, and synonimous with confederacy, and of which the assembly and consultation is a sufficient fact, also the Kings treasure is publick.

4. Hyde ad idem, that they are found guilty of conspiracy and unlawful assembly, and vi & armis not material, especially not now the jury have found it was factiose illicitè and unlawfully assemblaverunt & congregaverunt, which is sufficient for us to give judgment: also such assemblies are punishable because prohibited by law, although no other act be done. Old Mag. Chart. cap. Iteneris, there is one article to enquire of such as seek to diminish the Kings revenue of wards and marriages, which shews it's a publick treasure, and the very indeavour and intent to abate it is punishable; and so it were to confederate to deprive J. S. or any private person, of his rents or lands, although not so great, Poph. *Sir Baptist Hicks case*, (which I vouch, because I heard it, not for the authority of the book, which is none) was an offence pu-**[677]**-nishable, although a private letter, because it tended to dishearten men from publick works of charity, and to the breach of the peace; and Moor *Scrogs case*, men were censured for a bare conspiracy (without vi & armis) to prefer bill in Chancery against private person without his privity. So *Jeffs case*, an indictment in B. R. for a libel against the Lord Cook and the rest of the Judges, on giving their judgment in *Magdalen Colledges case*, by which he had loss, and his plea was special, and worse then the libel, and the Court ordered him to set his own hand to it, and gave severe judgment against him for the scandal to the profession of the law, wherein Noy vouched *Bruses case*, Trin. 18 Ed. 3, Rot. 162, a private letter to a private person, saying, the four Judges would do nihil inane at the Kings command; and because this might be misinterpreted, he was fined and ransomed; judgment for the King: but for the fine, it must be according to the several persons capacity severally. Adjornatur.

68.

Ejectment.

Nota pro regula, that he that desireth to be made defendant in ejectment for so much as is in his possession, must give a note what the particulars are of which he is in possession, to prevent delay at the Assizes.

69. THE KING *against* FARRE.

Priviledge.

If one be committed on criminal charge, as for forgery, &c. till bayl found, he may be charged with actions; contrà if he were committed by judgment of the Court on any crime, which was agreed by the Court.

70. THE KING *against* THOMAS. *Ante. Tuesday, Febr.* 9.

Wales.

Keeling conceived that at common law there was no question, but an acquittal at the Kings suit was a discharge against him, but not of the appeal; and the effect of 26 H. 8 was only to remedy those kind of trials there used, which were not according to the common law, as is evident by the proviso, that no acquittal or fine making in the marchers shall be a barr, although the body of the Act say generally, that all murders done in Wales shall be tried in the next English county, and by 27 H. 8

these marchers are taken away, and this clause virtually repealed; and 34 H. 8 doth only confirm the body of the Act for trials in the **[678]** next English county, leaving a concurrent jurisdiction in Wales and England at the election of the prosecutor, but it doth not confirm this proviso of acquittal, and therefore the plea of the defendant is good. Windham ad idem, conceived Wales a distinct independent kingdom till made tributary by the West Saxons, and so have been ever since England hath been a monarchy; and since Edward the Firsts time there have been justices of the King there, and a quare impedit lieth in the Grand Sessions, and they may write to the bishop, which the lords marchers could not do; and 26 H. 8 made no alteration of the courts, but rather confirmed them; but that took away that arbitrary power which they exercised before tempore belli; and 27 H. 8 took away the courts and places of marchers, but left their cognisance as court baron or court leet and private seniory also: if since 34 H. 8 the King had sent a commission to try any that were thereon acquitted, such acquittal is a discharge; and the Act was not made in jealousie of the Welsh men, but of the marchers courts only: and although the King erected no courts according to his power given by 27 H. 8 within five years, yet this defect is supplied by 34 H. 8, which erects the Grand Sessions as the Kings Court. Twisden and Hyde according, that the prisoner ought to be discharged. Judgment for the defendant.

71. BROOKS *against* LAKE.

Covenant.

In debt on obligation, the defendant pleads covenants performed; the plaintiff replys by breach, in not delivery up of house: the defendant rejoyns, that before the end of the term, the plaintiff gave him leave to continue it longer; to which the plaintiff demurred, and by Twisden & Curiam it's a departure: but the case was, the condition was for delivery up of the house, and the paroll agreement pleaded in the barr, which, per Curiam, is well enough, and not like 3 Cr. 697, *Hayford* against *Andrews*. Sed adjornatur.

72. MORGAN *against* MAN. In Departure, Br. 15.

Arbitrement.

In debt on award, the defendant pleads nullum fecerunt arbitrium: the plaintiff sets forth the award; the defendant rejoyns that the submission was generally of all matters, and there was cause, whereof the arbitrators had notice, and yet no award on it; to which the plaintiff sur-rejoyns, that they did make an award on that thing, to which the defendant tenders issue, and demurred generally, which **[679]** as *Dean* against *Eason*, is a departure, had there been a particular demurrer to it, for nullum fecerunt arbitrium cannot be after maintained by award, that is void in law, but after this general demurrer it's good enough; and per Curiam, if it were not a departure, the defendant could not take any advantage of such ill form. Judgment for the plaintiff.

73. INMAN *against* PATIE. Siderf. 180, pl. 17.

Lieu.

In an action on indebitatus infrà jurisdict. for wares before sold (not saying where) which per Curiam is ill, although the thing be not local, and judgment reverst, because it being an Inferiour Court, they must alledge in fact, and not only by implication of law, that the consideration ariseth infrà jurisdict. and, by Windham, such a difference in the locality of the consideration, as carrying of tymber, &c. hath been formerly taken; but the opinion of late is changed, and hath made all one for the inconvenience, that all other Inferiour Courts would follow such bad president of alledging fact, which is never examined there. But by Windham, The party may alledge for wares before sold infrà jurisdict. which is not traversable: sed Curia contrà. Adjornatur.

74. HELLIAR *against* CASEBROOK. In Debt, Br. 94, seu 93.

Rent. Dyer 247 b. pl. 77.

In debt for rent against executors in the detinet, who pleads an assignment by them to an estranger; to which Jones for the plaintiff demurred, because this is brought only on the privity of contract, which (*Overton* against *Sydall*) doth remain notwithstanding the assignment, which only destroys the reality, which Twisden agreed; and so had the testator or administrator assigned before the rent incurred, as here, *Ironmonger* against *Nusam*, Latch. 260. Tr. 3 Car. 1, is so; and *Ungle* against *Glover* hath been denied, which the Court, Hyde Chief Justice absente, agreed, and no judgment was in *Marrow* against *Turpin*, 3 Cr. 75, pl. 39. Adjornatur.

[680] 75. BARCROFT *against* DOUTY.

Condition.

In debt on obligation, condition, to have all the debts, and that the defendant should not release any in a certain schedule mentioned; performance is pleaded generally, but doth not set forth the schedule; to which Wild for the plaintiff demurred, because as *Parkers case*, Co. Entries, he should have shewed what were the debts in the letter of attorney mentioned, and then have averr'd performance de omnibus & singul. & quod non relaxavit, &c. And the mentioning the particulars, averring them to be all, is not sufficient, without setting forth the schedule. The Court agreed, that in such negative covenants the deed need not be set forth; but if some be in the affirmative, as here, it's well enough: for the condition is to be according to a letter of attorney, in which is mentioned that the defendant should receive all debts due by several persons mentioned in a schedule annexed, and that he should not release or discharge any, which is well enough. Adjornatur.

76. ELLIOT *against* RICHARDSON.

Assumpsit.

In an action upon the case, on promise to redeliver a lurcher sold toties quoties he should retorn; the plaintiff alledgeth that Dec. 29 after, he came home, and that he did request him, and the defendant refused: the defendant saith postea that the dog went home, viz. prædict. 29 Dec. the defendant offered to redeliver him, and the plaintiff refused: to which Jones demurred, because the postea referring to the plaintiffs request, although the same day, it's no answer to the count without a traverse, which the Court agreed: but the postea on reading the record, appeared to refer to the coming of the dog to the defendants custody, and not to the demand: but, per Curiam, as 12 Ed. 4, 4 & 6, the justification being the same day, needs no traverse; contrà when at another place, 5 H. 4, 2, pl. 5, & 2 b. pl. 9. Adjornatur.

77. SCOT *against* GOODMAN.

Dower.

Ad ostium ecclesiæ proclamari feci juxta from. stat. secundum exigentiam brevis, retornd to a writ of summons in dower, was assigned for error by Jones; but judgment affirmed by Windham and Keeling, contrà Twisden, & postea pur auter error assigned by Jones was reverst.

[681] 78. ELI *against* ROBERTS.

Admiral.

The defendant covenants to pay the plaintiffs and other mariners their wages; and the plaintiff avers that 5l. was due for a month after his departure in the ship such a day from Blackwall, but avers no notice given to the defendants of his retorn, or going

out, nor what was due; for which cause the defendant demurs, and, per Curiam, the defendant hath bound himself, and must take notice of it, as well as if it were to do any thing in his own cognisance. Judgment for the plaintiff.

79. RICHARDSON *against* MUSGRAVE.

Lieu.

The Court agreed that indebitatus in Inferiour Court of any sum of mony said infrà jurisdict. although the lending be not said there, it's well enough: but on reading the record, it was ibidem prius accommodat. Judgment affirmed, this being assigned for error in assumpsit.

80. ALCOCKE *against* MERRY.

Error.

Error was assigned of a judgment in the Pallas Court, that the venire facias was held on Thursday, according to letters patents, which is contrary to the patent, which giveth a power only to hold courts on Friday: but the Court can take no notice of that, nor the tent. die Veneris is not estople to say the court may be held any day beside Friday. Judgment affirmed.

81. SMITHS CASE. *Wednesday, Febr.* 10.

Administrator.

Coleman prayed a prohibition on 21 H. 8, 5, because he took administration cum testamento (which was nuncupative, but reduced into writing according to form) annexo, he being named also an executor therein; and now one Walmlesy a legatee comes in, and prayeth the first administration may be repeal'd, which was granted notwithstanding the statute pleaded, and probate of the will nuncupative, after which, per Curiam, he cannot refuse executorship, and therefore cannot be set aside; but sentence being past, they conceived it proper to appeal, **[682]** because the original is in the ecclesiastick power: but if their jurisdiction be regulate by Act of Parliament, then when they do wrong, the Court will do them right, by Keeling, by prohibition; sed Curia contrà; this repellance is a nullity; and the executors may have trespass against such administrator for any goods, and he can do the executors no more hurt then a stranger, for such must be named and sued as executors. And by Hyde, Had the probate of the will in writing been repeal'd, as is often used, there is no remedy but by appeal, and there is no difference of that from will nuncupative. Also by Windham, that there is an executor named, is a good plea, and issuable, as *Gresbrook* against *Foxe;* all agreed; that on due execution of the power of the Ordinary, by granting administration to the next of kin, a prohibition is grantable on libel by another legatee to repeal it; but prohibition was here denyed.

82. TRUSSELS CASE. Siderf. 181, pl. 20.

Tythes.

Wild, the Kings Serjeant, prayed a prohibition to the Bishops Court of Worcester, because an executor was proceeded against on death of the defendant, pendant suit against him there, on 2 Ed. 6, 13, for the double value, with which an executor is not chargeable, especially where the debt ariseth ex delicto, and not ex contractu: the Court held an executor of a rector may sue, or be sued for the double value. And because the statute giveth liberty of suit, and Court, and there feme covert may be sued, and we will not prohibit, no more will we here, per Curiam, præter Keeling, who doubted because the executors, as of hostler for any delictum, are not chargeable; but the case of executors of hostlers is a quære.

83. THE KING *against* STARLING. *Ante.*

Conspiracy.

The Court fined him 300 marks, and the rest 100 marks a piece, as the first warning.

84. FEME A. ONE OF THE EXECUTORS OF BENNET, *against* BAUD.

Executors.

The plaintiff, as administrator, during the absence of the executors, and J. S. a legatee residuary, brings action, and avers only the absence of the executors, which 2 Cr. 590, by Symson in arrest of judgment, after general issue and verdict for the plaintiff, is not sufficient, unless all four be averr'd absent: sed Jones for the plaintiff contrà, that **[683]** after verdict, as hath been adjudged of executors during minority, not averring the minority, its well enough: also his authority is not determined by the return of one, unless all return, and therefore the averment of absence of three is sufficient: the Court agreed such administrator not within the statute of 21 H. 8, and *Brudnells case* by Windham is, that by the return of either, the authority is determined, as lease during lives of A. B. and C. Also, by Keeling, this is but a provisional care, and therefore the Court did well to put in the residuary legatee, who of right in default of the executors is to have the administration, which the Court agreed. Sed adjornatur.

85. SIR G. SANDS *against* PECKE. *Ante.*

Administration.

Baldwin opposed the prohibition on administration, Br. 47, because the father is not next of kin. Sed Curia contrà; that book was denied in solemn argument at Oxon, at Bar and Bench by civilians and common lawyers, that the mother was next of kin, and the father is in equali gradu; and that book was then, and hath been frequently since denied for law, and in 3 Co. 40, and *Browns case:* also the Spiritual Court are not Judges of the next of kin, nor can they revoke administration commit to the next of kin, if he refuse to account, or exhibit inventory, but may excommunicate him. Also the law doth more incline to the widow, then to the children or kindred, but leaves the election pure to the Ordinary; for a wife may have a great joynture in which case the children, that have nothing, ought to have it; and *Browns case* 1 Cr. is express, that a prohibition lieth; and so by Hyde, Chief Justice, hath it been resolved here, and in the C. B. And although he suggested there was no widow, who then, because not married by a justice of peace, durst not appear, yet vigilantibus non dormierit, &c. and prohibition awarded, per Curiam; but in suit for repeal of administration granted to one not next of kin, no prohibition ought to be awarded.

86. PAGES CASE.

Excommengement.

Finch Solicitor, prayed a supersedeas of excom. capiend. offering plea, that it was not for any of the causes contained in the significavit: and that he might be discharged of the imprisonment: the Court agreed that the excommunication is not discharged, but the penalties of 10l. for not ap-**[684]**-pearing on capias, &c. are discharged; which words, 15 Car. 1, Cr. extend only to the mulcts, but not to the imprisonment, and so it hath been (contrary to Hugh. 5 Car. 1) resolved solemnly by all the Judges: also, per Curiam, the party hath no day in Court (although this be the day of the return of the writ) to plead, but ought to come in by hab. corpus, or in propria persona, and then although the statute allow his plea, yet the imprisonment is at common law; and there are other penalties given by the statute; and although this be no question of conformity, but only taxe to repair of the church, which if too high, may be so pleaded in the Spiritual Court; yet the Court refused to bail him, or allow the plea.

87. BLACKWELL, &c. *against* CLERK.

Admiral.

A prohibition was prayed to the Admiralty in suit there for mariners wages (which is not ordinarily to be granted) but because it was founded on specialty made on land, and the custom of merchants, that unless the ship come home, no wages is payable to them, and consequently not to their executors or administrators, and this plea was disallowed in the Admiralty, and so its suggested, and therefore the Court granted a prohibition, notwithstanding sentence and appeal, it being contrà to a verdict at law, and not had on due proofs, but contrary to the plea pleaded.

88. LONGVILL *against* LONGVILL.

Judgment.

The Court according to rule before made in C. B. amended judgment, that the plaintiff shall (for do) recover after error brought, ex motione proctor.

89. RICHARDSON *against* FAUCONBRIDGE, FALLOWFIELD, &c.

Tythes. In Dism. Br. 11.

Lindly prayed prohibition to the Spiritual Court in Carlisle, on suggestion that the tenant of Blackacre did prescribe in modus of payment of 3s. 4s. in lieu of the fourth part of all hay in another place; and as Moor 483, pl. 685, was resolved in case of the lord of a mannor, with a prescription for the fourth cock in that place in lieu thereof, which is but as a profit apprendre; and the libel is general for taking away so many cart loads of hay, not shewing whither the tythes are of the tenants lands, or of other: but by the [685] last article it appeard he took away the ninth as well as the tenth part, which must be intended his own. Twisden conceived, in regard there was difference in opinion whither such custom were good, that prohibition may be awarded. Windham, I see not how it can possibly be, that one that is not lord, but a tenant, can make such a prescription: and by Twisden in 1638, in Exchequer ex relatione Bridgman Chief Justice of C. B. it was contrary to his opinion and argument, adjudged a good prescription, because it ceaseth to be tyth, but is a profit apprendre; which Hyde and Keeling denyed, for the libel is for tythe, and a reteiner would be a good modus, or this for the lord, who is privy, and so is 44 Ed. 4, 5, but for the doubt, prohibition awarded, and demurrer thereto.

90.

Poor.

Ex motione Crofts, the Court refused to confirm order of sessions made to charge another parish to contribute to the poor of Hinkely, because the two next justices, who by the statute are made Judges within the hundred, as in case of bastardy by 18 Eliz. and till their default, the sessions cannot meddle originally, because the appeal is taken away, and therefore the next justices ought to certifie there is no parish sufficient in the hundred; so where ever any statute appoints the two next justices, none can go to the sessions originally; contrà where it appoints any two justices, the sessions may originally determin it: and, per Curiam, the order quasht.

91. SR. MARTYN NOWELS CASE. *Thursday, Febr.* 11.

Proof.

The Chief Justice refused evidence of depositions in Chancery, because no rule was made on the hearing to allow them, but only a subsequent order of Court after dismission, and it appeared not whither they were taken here, or beyond sea, nor in

English or forreign language, but only affidavit that the witnesses were foreigners, and could not be found: but the Court conceived, if the depositions were according to the course of the Court they ought to be allowed. Sed concordatum est inter partes.

[686] 92. TREMAIN *against* SANDS. *Ante.* Error Br. 55.

Error.

Error allowed, but not certified till the death of the Chief Justice is abated, but if no notice be given to the attorny, nor the roll marked, there is no contempt in them, by suing execution, but the hands of the Court is foreclosed by allowance of the error, and the praying a supersedeas is only to make the attornies in contempt. 2. Execution was sued out on a second writ of error brought after the retorn of the first, which was precedent to the death of the Chief Justice, and yet, per Curiam, its a supersedeas; although it were in ejectment on verdict for the plaintiff at Bar, and so apparently for delay; and the Court restored the possession to the plaintiff.

93. BONDLESS *against* GRIFFITH AND NORWOOD, &c.

Cinque Ports.

Sir Ed. Tourner demand cognizance on behalf of the Duke of York in ejectment of lands in the Cinque Ports, before any other imparlance then is commonly used on the new rules in ejectment, which is only the clerks entry, and the party cannot come in to plead: the Court ordered entry of it, with special imperlance, salvis omnibus, &c. and that according to the warrant shewed to the Court, he pleaded his patent, with the special roll of the Court; but they would not grant cognizance on his motion only, because Windham doubted their power was only tenere placita.

94. MR. PRINS CASE. *Ante.*

Mandamus.

The Court were of opinion that the mandamus ought to be directed to the commissioners, who are supposed to have done the injury, and not to the mayor of the town, who cannot put him again into possession; and it would be dangerous for the insufficient retorn of the mayor the act should be thus made void, and what they have done and executed, undone; yet the Court, præter Keeling, agreed the retorn insufficient, for the not setting forth he was recorder in 1661, as the Act requireth; although the fact were, that he was then actually in: the Court granted him a writ to the commissioners, but privately advised their retorn would be sufficient, if only that they thought it expedient: also the writ must be directed to the persons that did the offence, and not to the commissioners generally.

[687] 95. BORROUGH OF SHASTAW.

Ways.

The Court ex motione Proctor, to quash order of sessions, conceived that the burroughs are contributory to repair of bridges, as inhabitants of the county, on 22 H. 8, cap. 5, unless they have a bridge within their burrough, and then they cannot be doubly charged; yet being the latter end of the term, the Court would not affirm the order of sessions made against them. Sed adjornatur.

96. COXES CASE.

Trials.

Williams prayed a Secondary might retorn the jury before the Judge of Assize at Glocester, because Coxe, who was entitled to the reversion, had forbid rent to be paid by the tenant, and took on him the defence of the ejectment brought against the tenant, was of kindred to the sheriff and undersheriff, and trustee for them; which the Court, contrary to their ordinary course, granted for these reasons.

97. TRIMMER. *Friday, Febr.* 12.

Bail.

Keeling moved to bail him, which Twisden and Keeling refused, because he cometh in by render, and not by retorn of the sheriff, who had retorned a rescous, and so there is no person in Court, nor any seisin of the cause.

98. SELWIN *against* HERN. *Ante.*

Assumpsit.

Maynard for the plaintiff prayed judgment, because although this agreement be relative to one made when covert, yet its all one as if she had now promised in consideration that Robert would be assisting to get in debts due by the will of Rebecka, which Windham agreed; as if feme covert make a will, if J. S. undertake to perform it, its good. But by Twisden, in consid. præmissorum, the first agreement being void, there being no obligation thereby on her, is not sufficient, which Keeling agreed. Adjornatur.

[688] 99.

Prohibition.

Nota pro regula, such as move for prohibition here, ought to enquire and enform the Court whither such motion hath been before made in the C. B. that the Court may the more consider it; (and the like rule is given in the C. B. on motions there, if it hath been before moved in any other Court) and to relate truly the success thereof, when moved for before this time in B. R. But because the Court conceived this commune placitum within Mag. Chart. they did not regard the Exchequer conceiving they had no power to grant any.

[689] DE TERMINO PASCHÆ, 16 CAR. II. B. R. DIE MERCURIJ, APR. 27, ANNO 1664.

Hyde Chief Justice; Twisden, Windham, Keeling.

1. HUMPHRYES *against* PAGET.

Officer. No assize lieth for such having no freehold, but only an action upon the case 51.

Coleman moved for the plaintiff to be restored to fees taken by the defendant, as custos brevium from the plaintiff, who was his clerk: and, per totam Curiam, The clerks bred up in the office, as in the Crown-Office, ought of right to succeed each other according to their ancienty; so in pronotaries place of C. B. and they cannot be turned out without cause, although the chief officer be responsible for their misdemeanors; and any imployment, out of which one cannot be turned without cause (as this of transcribing records) may be called an office. Ordinatur, that he pay back the fees, and restore possession according to the last rule, without any allowance unto the custos brevium's son for his transcribing as grantee of his father.

[690] 2. THE DEAN OF ST. PAULS *against* CAPELL.

Execution.

Wild prayed a supersedeas for suing out execution, notwithstanding special bail put in (as it ought) before my Lord Chief Justice, in writ of error, which although it be but de bene esse, yet its good, if no exception against them, and, per Curiam, till over-ruled, no execution ought to be made: the notice of bail put in, is only to excuse the party of contempt, but not necessary, so the bail be put in: the Court awarded supersedeas and restitution.

3.

Bail.

The Court ex motione of Justice Twisden, conceived bail de bene esse an innovation; but so long as it stand, it is to be conclusive to the parties, and filed (which the plaintiffs attorny hath liberty to do) if no exception be taken by the plaintiff in twenty days, and the defendants attorny do not pay 10s. or file it, which being an old rule, was ordered to be revived, per Curiam.

4. THE KING *against* MAYOR OF BRISTOW KNIGHT, &C.

Corporation.

They coming in upon attachment on disfranchising attorny, for refusing to swear (as is used in London), not to sue another freeman at common law out of the town, because he had taken a latitat against him, the Court conceived this part of the oath illegal; but in regard it had been before used, the present mayor was excused of contempt. 2. They conceived that there, or in any Inferior Court, they cannot make rules to confess lease, entry & ouster, as in the Courts at Westminster, but they must actually seal the lease at common law.

[691] 5. AILNER, &C.

Copihold.

Ex motione Newdigate, for a new trial in Glocestershire, Windham conceived that copyholder of inheritance, where custom is to cut timber for repairs, nor lessee, cannot imploy trees feld with the wind unto any such use, in regard that hereby his special property ceaseth; much less can lessee, or copiholder for lives, by any such custom take trees.

6. GERRARD *against* LYON.

Slander.

H. said to Bell, You and the plaintiff made J. S. drunk, and pickt his pocket; which, by Crofts, in arrest of judgment being uncertain, is not actionable. Sed Curia contrà.

7. THIN *against* THIN. *Ante. Tuesday, May* 3.

Recovery.

Finch for the plaintiff, that the tail is dockt by recovery of this reputative parcel, and although it hath been otherways adjudged, 3 Cr. *Mallets case* 524, yet *Sir Moil Finches case* which was later judged, was contrà, that it was dockt, and first, a mannor in reputation will pass by the Kings grant; but I agree, reputation of a mannor is not sufficient to hold a court baron, if the King bring a quo warranto, as *Stavertons case* in Yelverton p. 190, but it is sufficient for a customary court to grant customary estates. To the objection, that though a reputed mannor may be recovered, yet in this case, where there is somewhat to be recovered, in the recovery upon which it may work, that which is but parcel in reputation shall not pass: I answer, that the reason is the same, in both cases; for a common recovery is but a common assurance, and if what is parcel in reputation, shall not pass in a common recovery, it shall not pass in an ordinary conveyance, which would be very mischievous. 1 Cr. 308 is a judgment in this point. Glyn for the defendant, Admit if a fine or recovery be had of a reputed mannor it doth pass, notwithstanding *Mallets case* to the contrary; and so is the law ruled in *Sir Moil Finches case:* but when there is a mannor to pass, I agree you shall not bring in any thing by reputation, because the party had well **[692]** exprest himself; and his meaning shall not be extended beyond the words. If a man devise his

lands, and in truth he hath nothing but tyths, those tyths shall pass; but if he hath both lands and tyths, the tyths shall not pass: Stiles 261, pl. 294, so if a remainder be limited to the son of J. S. and he hath no true son but by reputation, 3 Cr. 509, pl. 34, the remainder shall go to him; but if he had other sons, the reputed son shall not take, Moor 10, pl. And agreeable hereto was the resolution in *Hill* against *Grange*, Pl. Com. The Court inclined for the plaintiff. Sed adjornator.

8. GLASCOCK *against* MORGAN. *Ante.*

Execution. Siderf. 184, pl. 5.

Whatever may hinder a new execution, by Jones for the defendant, will hinder the bringing a new action, and at common law there was no elegit, and the statute regards not what fruit comes of the writ, as 2 Cr. 339. But however, the plaintiff cannot have judgment, for on record there appears, that three elegits were sued out into several counties, and the defendant hath shewed one of them only retorned, but nothing appears as to the rest, which therefore shall be intended not retorn'd, and till then no new action can be brought, as Dy. 299. Sed non allocatur; per Curiam, the defendants plea shall be taken strongest against himself, and even at commom law, the party, although he could not have taken out any new execution (which the Court conceived he may, unless something be retorn'd as extended) yet he might have a new action at pleasure. Adjornatur.

9. PRIDE *against* ATWICKE.

Devise.

On special verdict it appeared H. devised all his freehold-land to his wife for five years, and farther by codicil, that if any of my three sons W. O. or J. dye before the five years be out of the freehold, then to be divided among those my sons that shall be then living; and then two of them dye within the five years. Wats for the plaintiff argued on 1 Cr. 158, *Audleys case* and 368, *Sprit* against *Bence*, and that for want of the word (it) this latter clause could not relate to the lands given to his three sons, but rather to a chattel, viz. the remainder of the five years in the freehold, and so much as should be unexpired, should be divided between the sons. Jones for the defendant, The word (it) must neces-**[693]**-sarily be intended, and must relate to the lands given to the three sons, and not to the five years, because those are the last antecedent, and the five years by a direct and positive clause, are given to the wife, and she to pay some legacies out of it; and therefore it could not be the divisors intent to destroy her interest, 2. To be divided among the sons, makes them tenants in common, and not jointenants. But I admit, that by death of W. and the division of his part betwixt O. and J. this clause was satisfied, and when O. dyed, his part by this clause could not go to J. but should descend to all, which the Court inclined to, præter Keeling, who conceived the remainder to refer to the five years, and not to the lands given to the three sons to be divided. Adjornatur.

10. SAUNDERS *against* POWELL.

Trover. Siderf. 183, pl. 3.

In action upon the case the plaintiff counted quod cum the plaintiff was possest of goods ut proprijs, which were then in custody of Smyth; and the defendant knowing the said goods to be the plaintiffs, malitiose by pretext of plaint in the Sheriffs Court in London, caused then to be attached, as the goods of Bawden; and notwithstanding he had notice they were the goods of the plaintiff, and that thereby the goods were kept out of the plaintiffs custody, (in the custody of the law seventeen weeks) ad damnum, &c. Wild in arrest of judgment excepted that this is but only the use of the process of law; which although done without cause, is not actionable, as F. N. B. 42 c. and if the goods of any be attacht, he may have his proprietat. proband. or the

attachee may come in, and swear by custom of London, that he hath none of the goods of the defendant in the action there; and the malitiose is not material, the subject matter being lawful. Jones for the plaintiff: If one will sue a replevin against B. and cause the goods of A. to be delivered thereupon, although he hath no notice, an action upon the case lieth; and so here, this not being like the case of F. N. B. because here the plaintiff cannot have costs, as he may in the action there, because he is party to it, and the plaintiff here is a third person: also he that useth the proces of law to anothers prejudice, is liable to an action upon the case. Twisden on fieri facias against J. S. who hath goods of A. on sale of these goods, trover or trespass will lye against the sheriff, and to prevent this, all the sheriffs of England take security: also the party hath no authority to take these **[694]** goods by suit against another person, therefore ill; also the count being quod scienter fecit, which must be proved in evidence; judgment ought to be for the plaintiff, which the Court agreed, *nisi*.

11. THE KING *against* DARCY AND ROBINSON. *Wednesday, May* 4. Siderf. 186, pl. 10.

Peace.

Information against them for sending a challenge to one Aslaby, which was carried by R. and sent by D. They being found guilty, were committed to the marshal, and the next day fined 100l. a piece, a months imprisonment without bail, to acknowledge their faults to the King, and party in Court, as they shall prescribe, and bound seven years to good behaviour.

12. BENNET *against* BAUD. *Ante.* Siderf. 185, pl. 8.

Executors.

On issue that one of the executors of the will had administred, which is collateral, without demurrer or plea in abatement, that there were more absent then by the administrator were named. Twisden conceived that by oyer prayed, this is made parcel of the plea; and so although verdict be on collateral point, if on the whole record, (as here) the plaintiff hath no cause of action, he shall have no judgment, as in debt on obligation the defendant pleads, as Hub. 19, 8, it was to affirm award, and no award made, if the plaintiff set it forth, without assigning breach on issue found that there was such an award, on nul tiel pleaded, the plaintiff shall not have judgment, there being no default in the defendant. Windham contrà, on the same grounds; for here is no default in the plaintiff, nor hath he any cause administred by the defendant to set forth the truth, but is forced to follow the defendants plea, and take issue, that there is no executors; but if in debt on bond, the defendant prays oyer, and it is to perform an award, and then the defendant pleads release, which is found against him, the plaintiff shall have judgment. And if in our case in the count there had been two only named to be alive, or absent, and there were three, the plaintiff had clearly failed; but he being lead away by the defendants plea, its good enough. Hyde Chief Justice accorded with Windham; but by agreement the count was amended, and trial this term.

[695] 13. THE KING *against* COZENS GLOC. Siderf. 186, pl. 9.

Peace.

Orliker excepted to indictment for riot, 6 July, taken 5 Aug. by justices on 13 H. 4, cap. 7, thirty days after the fact, in absence of the parties, being above a lunar month; but, per Curiam, in statutes that are for execution of justice, the longest time shall be taken, and a kalender month is sufficient, although on 6 Co. 61 b. and 5 Co. 1 b. it was urged that 20 days is intended the months for enrolment of bargain and sales; and this is a penal law, which ought to be taken more strictly, the Court would not quasht it by motion without plea: also the Court agreed, the

sessions may take indictment at any time after, and that if private justices do impannel a jury within the solar month, they may inquire after. Also by Twisden, The justices by vertue of their commissions, may enquire of riot: but by Hyde, That is of offences at common law; but when the statute makes any, they must pursue it as prescribed; so of riots.

14. LOCK *against* ETHERINGTON. *Ante.*

Pardon.

In sc. fa. brought by assignee of patentee, quare execution. habere non debet against the defendant, as obligor of Toomes felo de se; the defendant pleads the Act of General Pardon, which by Wild on demurrer, is not good, because this forfeiture by enquisition before is vested in the King. Jones for the defendant, The sole question now is, whither a debt vested in the Crown, by reason of such an offence, be not pardoned; and clearly there is no exception of such judgments, and in the Exchequer its usual to plead the pardon, to assignment of debts made to the King, by his debtor, before the Act; and there is no ground to distinguish between original debts, and debts that come by assignment or forfeiture: it hath been adjudged, that the administrator shall not have this judgment, because its vested in the King, but we affirm that judgment. Wild agreed this is pardoned by the general words, and so shall be taken most liberally for the subject: but by Windham and Keeling, by the clause that dischargeth all judgments, statutes and executions, just debts of the Kings, as if he had such security for mony lent, are not pardoned, but only criminal judgments, or for any offences, are thereby intended. Hyde and Twisden conceived pardon a proper word to discharge debt, as **[696]** a release, and is here sufficiently made by the King to discharge the defendant of this debt. Adjornatur.

15. THE KING *against* THE CHURCHWARDENS OF ST. CLEMENTS.

Poor. Siderf. 30, 81, pl. 2.

Ofly excepted to an indictment on the Act for making corporation in Middlesex for relief of the poor, for refusing to collect according to order of the justices, which mentioned the Act only, without any time or place, because its only a Private Act to this purpose. But by Windham, The indictment is for neglect, and the other is but inducement, and so good enough; also the law is a general law, by Twisden, being for the relief of the poor; also the conclusion is not contrà formam statuti prædict. but contrà stat. in hujusmodi casu provisi, and so may be intended on 43 Eliz. 2. Keeling conceived, that as to this place, this Act is private, and no indictment lieth of it, but the remedy therein must be pursued: also by Hyde, This indictment ought not to be removed without security given to try and plead, and till then no rule. *Post.*

16. RHODES *against* SMYTH.

Error.

On judgment by nihil dicit in Pevrell Court, Wild assigned error in continuance which was not said, per Curiam, sed not allocatur. 2. The judgment was quod recuperet damna quæ sustinuit, whereas there was two plaintiffs. 3. The count was queritur, only judgment reverst.

17. WILLIAMS *against* THE TOWN OF UPWOOD, &C. IN HUNTINGTONSH.
Thursday, May 5.

Common.

After a writ of distringas, as on Westm. 2, for throwing down fences, and a writ of enquiry of damages retornd, and mony in Court, the towns came in, and desire to plead, and on issue, that it was not noctanter found against them, and only 2d.

damages. Coleman prayed the mony on the former enquiry out of Court, which the Court denied, because on this last issue the damages are not in question, and therefore as to them, the verdict is not material. Adjornatur.

[697] 18. DEVEREUX *against* MOOR AND UNDERHILL.

Execution.

In evidence to the jury in ejectment by Twisden clearly, if lands extended by elegit be evict, it being a satisfaction for the time, there can be no new execution; but, contrà by Windham, since the statute of 32 H. 8, c. 5, to which the rest inclined. 2. The sealing and delivery of the will as his deed, in the presence of witnesses, is a sufficient publication, although the witnesses know not that it is the will of the maker. 2. Possession of the defendant contrary to deed of feoffment, is presumption of surrender, being fraud, and by verdict for the plaintiff, it was so found.

19. THE KING *against* PAULIN CHURCHWARDEN OF ST. CLEMENTS. *Ante. Friday, May* 6.

Poor.

Keeling moved to quash an indictment for negligent execution of their office, in not obeying an order of justices for relief of the poor of the kingdom, by a late Act of Parliament, which as to this, is but a Private Act, and they having set up a workehouse of their own, conceived they were not contributory to any other by that Act; and however, being a Private Act, none can be indicted, by Keeling, contrà Hyde: but by Twisden, Where the Private Act concerns Government, or publick business, or persons, and no other remedy be prescribed, H. may be indicted, which the others agreed, contrà Keeling; but on private statutes betwixt A. and B. all agreed, no indictment lieth: so on Act of Charitable Uses, which in its own nature is not matter indictable: the Court ordered Keeling to demur on the indictment.

20. ATKINS *against* DOWN.

Slander.

In action upon the case quod falso & malitiosè crimen feloniæ ei imposuit & quandam billam indictamenti scribi fecit continens hanc falsam materiam sequent, viz. &c. Wild excepted in arrest of judgement, in that the malitiosè is not added to the latter part of the preferment of the indictment, sed non allocatur; but malitiosè, being in the beginning, goeth to the whole sequel; although one part do not depend on the other, as here it doth. Judgment for the plaintiff, nisi.

[698] 21. NICHOLL *against* KILLIGREE.

Bail.

In an action upon the case, Paulet excepted in arrest of judgment, that the count is, that whereas in curia manerij de B. the plaintiff was pledge for the defendant, &c. he was forced to pay, which is ill, that being to be intended court baron where pledge is not requisite, sed non allocatur; for it may be the Kings Court, although it be the court of the manor, as in Southwark. 2. It's said the plaintiff became pledge in placito debiti, and so it may be only for appearance, sed Curia contrà, for no plea can be till after that, and so it must be intended to pay the condemnation; and although no pledges be requirable, yet if in fact it be required, and the pledge suffer, he may hereby recover, per Curiam. Judgment for the plaintiff, nisi.

22. PENTON *against* BROWN.

Trin. 15 Car. 2, Rot. 1092.

[Commented on, *Brown* v. *Glenn*, 1851, 16 Q. B. 257. Considered, *American Concentrated Meat Corporation* v. *Hendry*, 1893, 62 L. J. Q. B. 390. Followed, *Hodder* v. *Williams* [1895], 2 Q. B. 666.]

Execution. 1 Cr. 537, pl. 628. March, 3, pl. 7. Siderf. 186, pl. 11. Sheriff entring peaceably may force inward doors, 2 Cr. 555, pl. 19, anonymous. 23 H. 8, c. 1, § 3. 1 Bulstr. 112.

In bill of trespass, the defendant justifies as bailiff by virtue of fieri facias directed to the sheriff, who per vias usuales entred the barn of the plaintiff where the goods of Welstead, against whom Williams had recovered, were, &c. To which the plaintiff replyeth the doors were shut, absque hoc that there was request; on which the defendant demurred specially; the only point agreed on both sides, whether without request the sheriff may break open a barn on *Semains case*, 5 Co. 93, which doth not appear to be parcel of a dwelling-house. Windham conceived that it's not material in case of a barn, whether the doors be open or shut, and so the traverse taken by the plaintiff is immaterial, as in case of a close, there being no particular place where the sheriff may make demand, and so the defendant ought to have judgment, which the Court agreed; but contrà if the barn had appeared to be parcel of a mansion-house: although by Keeling there is some difference of opinion, Hutt. 33, Coron. Br. 180, (179), from my Lord Cook, 3 Inst. 64, that the breaking it is not burglary, and so no demand necessary. Also by Hyde, This traverse is void, being matter of law, and also double judgment for the defendant, nil capiat per billam.

[699] 23. JONES *against* PRITCHARD. Siderf. 187, pl. 12.

Trespass.

Error was assigned on judgment in trespass in C. B. quare bona & catalla (not saying ipsius or sua) but in the writ the quod cum was bona & catalla ipsius le plaintiff, and it is not like 1 Cr. the difference of ad valentiam, which ought properly to be in the writ, but here it ought as properly to be in the count, which is not helped by the recital of the writ, which Twisden agreed, and that it's ill after verdict: but Windham contrà, that it's well enough, as the case here of taking a hawk, not saying sua; Hyde and Keeling ad idem; and the difference is between B. R. and C. B. in regard here is no writ at all, but only a recital on which the complaint is grounded, and that is on the count which relates to the writ. Judgment affirmed, nisi. But in C. B. the writ it self is at large.

24. COLLINGWOOD *against* PACE. *Ante.* Siderf. 193.

In the Exchequer Chamber.

Denizen.

Bridgman Chief Justice of C. B. for the defendant, as before in C. B. it hath been agreed by all, 1. That neither the daughters of Robert the alien, nor Patrick the son of Nich. cannot inherit, nor hinder the discent to George, being as persons not existing: also the son of George, as to the discent, is the same with his father, which brings the question only to whether one brother may inherit to the other, there being no essential difference betwixt brothers born English or naturalized, there being no alteration made by this Act: and to this the rule 1 Inst. 8, is good, that there was never any inheritable blood in the auncestor, and so can be none betwixt them; the preliminaries argued hath been of the nature of discents. To which I answer, that in propriety discents are termed mediate or immediate, in respect of the estate or right discending, not of the auncestors; as discent from grandfather to grandchild, or from

the uncle to nephew, is immediate in the per only, and not in the per & cui: also as to the blood only, which is natural, the discent is immediate; as to the pedigree, when the son succeeds the father, and in collateral discents, when the blood is necessary, although not in pleading. 2. As to the alienship, his incapacity is not properly termed a disability, but a non-ability, and so is like *Edwards* against *Rogers*, 1 Cr. of a barr, also the consecutive disa-[700]-bility is not large enough for this case, which looks as well to the persons to whom the discent is, as terminus ad quem, as to the donors or terminus à quo, and disability in either is alike; as sons of an English man born beyond sea, and made a denizen, have only a right of discent from the right line, not to inherit to their brothers that are English born; and in our case there is a disability in both John the earl, and George the son: and the Act doth only cure the defect of John, but leaveth the right of discent as it was before. 3. If an English man have a son born beyond sea, who is naturalized, he hath now commune vinculum; but contrà of an alien that is originally a forreigner born, and some of both these conditions were naturalized; and although the heat of the Act be the same to both, yet it works on alien of forreign extraction one way, & on English extraction another; and it hath a several operation according to the capacities of the parties that are naturalized; a French man, although naturalized, is still a French man; and on wars betwixt the two Crowns, the obligation of nature precedes. And so by the words of the Act, that they shall be as liege subjects, is only to make him a subject, not to create any auncestors, as if he had been of English extraction: it's true, an Act may be quoad blood or discent, but the law is the same in both as to the collateral auncestors; and although the elder brother be first naturalized, that doth not make him any more an auncestor to the younger then he was before, without words that should make him convey as such. 4. By natural blood in law is meant no more then the line, medium or vehiculum of the kindred, as cosins are of kindred in respect of the grandfather; and civil blood is that which applyeth this in particular discents to each person; and as to aliens that dye, the lands escheat, quia obiit sine hærede, and therefore the distinction of civil and legal blood must still be retained; and all agreed, that by attainder of one brother, the other cannot inherit to him: but the difference is, that they hold that the derivation ought to be no higher then the first purchaser; but this is answered, in that it's the blood natural of the auncestor that makes them brothers, and the same blood made civil doth convey the discent and estate to them. There is a civil personal and a civil auncestrel blood which is tied to an auncestrel estate, the other only to the first purchaser: these things premised, the reasons of my opinion shall not be any demonstration à priori, or from principles which have not been agreed among us: but by enforcement of Cook's reason, 1 Inst. 8, there is not one case in law that can be instanced, where brothers may inherit each [701] other that cannot inherit the father, and none but children born after pardon, Stamf. 195. 13 H. 7, 17, Utlary 44 of a man attaint; nor shall brother born after pardon inherit, because he that was pardoned had a personal blood left, but no auncestrel blood, because they could not inherit the father: *Hobbies case* is within this reason, for both brothers continue still as to the mother undisabled. As to the cases of nonability, 1 Inst. 376, 244, if bastard eigne dye without issue, the mulier shall not inherit, yet shall be bound by warranty conveyed through him. Alien made denizen by patent, 7 Co. 6, that he and his heirs shall be denizens, his children shall inherit, because he hath a personal blood, but his brother 1 Inst. 2 shall not take; yet all the objections lye in that case as in ours; so if his brother had been English born, no commencer of his family, as the brother in our case is, can have other then lineal heir. 2. As in the auncestrel blood cosins are heirs, because they derive from the same auncestor, Litt. sect. 4, which is necessarily required in collateral discents: also Litt. sect. 6, it's impossible to take notice of the whole from the half blood, without looking to the auncestor; and for this cause bastard eigne cannot transmit to mulier puisne. 3. The operative words of the Act which enables John to convey discent, 9 Ed. 4, 8, is the same with letters patents of the King of denization, and therefore shall give no farther power then if they had been letters patents, and it shall no more extend to give the brother a capacity then to the uncle, which all agreed it doth not. Acts of Naturalization are not so properly Acts of Parliament, as a grant in Parliament, or a charter, 1 H. 7, c. 2, which will carry the same sense in as out of Parliament: so

in pardon of attainder, the blood remains still corrupt, unless there be special words of restitution, which cannot be done by patent. Also by Act of Parliament all men are estopt to say the contrary, which is more effectual then letters patents: in all cases of collateral blood the ability to inherit each other is vice versa, as whenever the nephew may inherit the uncle, the uncle may inherit him: so where one brother is naturalized, the other that is a denizen cannot inherit to him; therefore Sir John Ramsey, that is an alien of forreign extraction, can make no use of this clause, that he may resort to any auncestor, lineal or collateral, but if he had been of English extraction he might, and the Act doth not make any auncestor. Also the consideration of the person is another reason why these brothers shall not inherit each other, and they being of forreign extraction, their naturalization shall be taken strictly, which appears by 7 Co. 18, from the poli-[702]-tick reasons of the State, and from the person, who as Scotch, are little concernd in this case; but were they French, they alter none of their relations or affections by this, and therefore not to be looked on as so intire a subject as alien of English extraction; 1 H. 7, cap. 2, doth look at this difference; so 22 H. 8, cap. 28 Pasch. 3 Car. *Gret* against *Woods*, such shall pay double customs. The Romans had degrees of naturalization, Moor 791, but among us, all at once do accrue to him, therefore its not fit to extend their priviledge, no more then our neighbors the French, who suffer not any collateral auncestor to inherit to such, and 15 Car. 2, cap. of pole-mony, take notice of this difference, 11 H. 7, cap. 14, the word denizen in statutes being of the same effect with naturalization; as to the comprehension of those persons, there is great difference betwixt grants of denization by wholesale, as to Scotland by union, those, as the case of postnati, shall be taken favourable; contrà, where priviledges are granted by retail to particular persons; the instances on 25 Ed. 3 hold not: and this statute was never taken largely, but strictly; also this speaks of forreigners of English extraction, who are but quasi restored; but however, this statute made nothing to the case of *Bacon and Stephenson* 1 Cr. 3 Inst. 108, for merchants at common law might trade as ambassadors; but if other English man should go without licence to live beyond sea, causa religionis, or otherways, without legal priviledge, his issue is alien, 21 Ed. 3, Cosinage 15. 1 Inst. 129 a. and so are the books, and common experience, in the granting denizations to such; and the contrary, would make more subjects then the King would like of, for this would extend natis natorum, &c. Also where father and mother are both English, and go over sea without licence, in fact or in law, (as 3 Cr. 3, confirmed by opinion of learned Judges) their issue is alien, and there is more law for it then against it, which sheweth this law is taken strictly. The objections made contrà, are answerable; as 1. The discent betwixt brothers in respect of the land, is immediate; but that is not ment here, but in respect of the pedigree, and so it is mediate by mentioning the auncestor; so although it be an immediate discent, yet being collateral, it must mention the common stock, because brothers receive no blood from each other, but have it by communication; and because he must say in pleading frater & hæres, doth not necessarily make him so, but it shall be tryed by jury: also the law hath appropriated this word hæres to the brother, although in cosinage it might as well have [703] been pater & hæres, Hub. 233, the omission of coment cosin is aided after verdict, which sheweth its not substance; so when then the uncle makes tytle to the nephew, it is as frater patris, Pl. Com. 443, in *Cleres case*, the passage is made through all the line, which is well, but not necessary. Also this rule will not hold generally on either side, for as the naming of the father will not hinder the discent betwixt uncle and nephew, nor will the omission of him advantage it, especially in estates of fee; contrà of estates tail by the statute of 32 H. 8, and this was the reason of *Edwards* against *Rogers case*; and so Patrick might as well inherit to his uncle, 17 Ed. 4, 1, Coron. 385, 1 Inst. 25, as one brother to the other: also that frater & soror are the first degree, is agreed by common and canon law, as to marriage but not as, to discents; and the reason hereof is, their different computations of degrees by the canonists by couples, because both are at once by marriage concerned; but the civilians compute by one to one; and Pl. Com. 451, our law, as in challenges, agrees with the civil law, but the plaintiff gains nothing by either computation, for both upward and downward take in the common stock in discents betwixt brothers, 1 Inst. 24, the law respects as well the mother as the father, therefore it is that brother or uncle of the

half-blood shall not inherit, for their links are fastned but at one end, and hereby its proved that the law looks at the auncestrel blood, in regard of which they are made distinct. 3. For authorities on this point I relie on, 1 *Hobbyes case*, Mich. Noy 158, 40, 41, Eschequer, Rot. 292, *The King* against *Boroughston and Adams* was an information, the same as *Altonwoods case*, and adjudged after argument of Fleming Attorny, without argument at Bench, and pended but three terms, and the Queens Council was against it, and so was Popham and Anderson Chief Justices, and on writ of error it was entred on the roll five days after the Queens entry, by vertue of *Altonwoods case*, that the attorny would not prosecute the writ of error for that cause, not in respect of the matter of law; and it hath since received countenance of law, only obiter, not directly: however this, and the case at Bar are not alike, for that there was once inheritable blood, which is only corrupt as to the father, but our brothers derive no blood from the auncestor, and so is like where baron & feme are attainted, and have issue, in which case they cannot inherit: also I agree, the uncle shall hinder the resorting of a brothers to the mother only, but here the brothers have both the same blood, Brit. 15, **[704]** Bract. 13, *Ratcliffs case* Co. 41, it being wholly disabled, they shall not inherit each other; and so I think of the sons of a person attainted, as *Courtneyes case* 1 Inst. 241, about three years before Hobbyes, where it was resolved, that without an Act of Restitution the heir collateral could not inherit, but only lineal, Stanf. 191, 195, by the same reason that the person attainted can have no other heirs, his son can have no other; and there is much more respect to be had to the kindred of the person attainted, then of alien. As to *Godfry* against *Dixon*, Rot. 374, Pasch. 10 Jac. B. R. the naturalization was the like with this, but there the father was no alien, as in ours, but a denizen, and so a sufficient person for both sons to derive blood from, although the youngest son was naturalized after the death of his father, because the father was first made a denizen; but had the younger been naturalized before his fathers denization, there he should not inherit: also the words of the Act are from hence forth, not from any day certain, in which case the discent before is well executed, and the latter is a posthumus child, which hath the same blood with the other son, it being not necessary that the line of communication be drawn from the father in his lifetime; but yet this Act gives an elder son no benefit of his blood, but only from hence forth, as to what is executed; but as to the uncle dying afterwards, the eldest, may claim as heir. So when alien hath two sons English and dyeth, his second son shall inherit to him after his naturalization; but if that the youngest dyeth, the eldest being naturalized shall inherit to him: the reasons of the Court in *Godfryes case* were on the difference betwixt denization, which enables the father to be an auncester, and alienship, where resort is by naturalization to be made to any auncester; also Dodridge would not deliver any opinion in this point, but Jones did, that they could not inherit, and Haughton did not gainsay it; and if ever there were reason to take naturalizations strictly, it must be now their numbers increase, and in cases doubtful, and of consequence pro bono publico, the best shall be taken for the King. 2. The Act of Naturalization adds nothing; for when it saith, he shall be to all intents as liege subject, it doth say he shall have no other benefit then as such; nor shall he have the priviledge of every subject; for so he would be a peer, and freed from capias, &c. Also this Act cureth only the persons defect in want of birth, but the fathers disability of being alien auncester continueth.

[705] (2.) Hyde Chief Justice for the plaintiff, agreed the discent to be in the right of blood, but it is not necessary that the natural and civil blood should concur to make a man inheritable, for the natural blood cannot be altered or corrupted, but is always in all men, aliens or denizens, the same: so this defect is not in blood, but in place; change of air alters the capacity, Lit. 198, and it being agreed they are brothers, F. N. B. 195, Register 274, 1 Inst. 93, the one is auncester to the other, Lit. sect. 132, as is proved by the words of the writ of cosinage of mordancester, Lit. sect. 350, which declareth the law: and it is agreed, that where alien marrieth with English feme, and hath issue two sons, 1 Inst. 80 b. here the one shall inherit to the other, for the blood they derive from the mother; so much the law favours the natural, where there is good civil blood; and here neither can inherit the father: so the rule 1 Inst. 8 is not throughly good: also an Act of Parliament shall not relate (without special words) to alter the estate vested in the younger son. The reason of

posthumus is, that to many intents the law looks on the son in utero matris, from the time of his being begotten by his father: also the Act of Naturalization doth add nothing, although I conceived in C. B. it did; but it looks only to the person, and their children after born, to make them as subjects.

25. KEYES *against* BREDON. *Monday, May* 9.

Ejectment.

After error here of judgment by default in ejectment in Ireland, the defendant here obtains a release of his casual ejector, and pleads it to the writ of error; and on motion of Mr. Attorny for speedy trial, Keeling conceived, that this way of ejectment is a new device since the late troubles, and ought to be set aside, rather then be prejudicial to any; and by Hide Chief Justice, so it was in C. B. in the case of *The Lady Anne Holburn and my Lord Leicester*, because the right never came in question; and although the issue were, that he that made the release was not the same person, as was casual ejector, yet, per Curiam, it ought to be set aside, and the errors assigned.

[706] 26. ROCH *against* PLUMPTON, CASUAL EJECTOR OF WITHERINGS.

Ejectment.

Nota, as course of Court in ejectment, if the owner of the land cometh in, and prayeth to be made defendant, the declaration shall be entred as of this term, although it were of the last term, against the casual ejector, but yet being by favour of the Court admitted, he shall have no new imparlance beside that which the casual ejector had: but by Windham, The new defendant may plead ancient demean after the former imparlance, because it is not any ouster of the Court of jurisdiction; sed Curia contrà, he ought to plead not guilty presently: also by Hyde, there is difference betwixt the tenant in possession, who is defendant ex debito on his prayer; contrà of H. that is only concerned in the title. And the defendant here being both, the Court only ordered him to plead at his peril.

27. WILLIAMS *against* THE INHABITANTS OF UPWOOD AND RAVELY. *Ante.*

Common.

Coleman prayed the mony on the damages found by the first enquisition out of Court for the defendant, and that the plaintiff may be content with the second found by the latter jury on the traverse, that it was done tempore diurno, and not tempore nocturno, 1 Cr. 280, although it be found against them, for the former is but original process, and the party may be helped by plea, and therefore may not be conclusive. Also this distringas is but enquest of office, 3 Cr. 589. 1 Cr. 529, Mounson, and not like a writ of enquiry of damages, for this cometh after the right determined; whereas in our case we may be after admitted to plead the right, and the damages are but incident; and by W. 2, cap. 46, the party should be no more concluded as to the damages, then he is to levy the hedges again: and if the defendant is relievable without plea, his pleading doth not hurt nor hinder, but that the same jury that trieth the right may give damages. So the petit jury on traverse of presentment made on the statute of engrossing, shall ascertain damages, although they be so on the oath of the enquest in the presentment; also the plaintiff hath yet remedy for the making up his fences notwithstanding the damages. Also the defendant hath saved the damages by protestation, which by Jones for the defendant, as in debt for tythes, the defendant may save the value by protestation, and plead to the right, and the jury shall enquire of it. Wild agreed for the plaintiff, Had the defen-**[707]**-dants come in before the mony levied, and fieri facis retorned, they might be relieved as well as to the damages as fact, but now it's too late, the other being by consent to inform the conscience of the Court that a wrong was done, and the finding of damages by this jury was idle and void, for there is no other judgment in this case then the

retorn of this alias distringas and fieri facias. The Court agreed this last jury hath nothing to do with damages on this issue, but the party ought to come in on the alias distringas, præter Windham, who doubted, in regard all this process is executed behind the defendants back, he coming in and traversing the main fact, new damages may be assessed. Adjornatur.

28. THE KING *against* RING. *Ante. Tuesday, May* 10.

Pardon.

He now brought in a coronation pardon after conviction of forgery, and judgment thereon, which, per Curiam, is not good, unless particular notice be taken of the conviction; but to any that sueth it out before it is available by pleading; but by pleading not guilty the benefit of pardon is waived. Adjornatur.

29. AYRES'S CASE.

Accompt.

Dennis prayed a prohibition to the Archdeacon of Barstable for not allowing his plea, that he being churchwarden had accounted before the justices of peace, and so by the Act of Judicial Proceedings ought not now to be questioned again for his year, which was 1659. The Court agreed the plea good in case there were any former ordinance that gave power to justices to confirm the accompt, which doth not appear here, and so not within the Act of Judicial Proceedings, but it being after shewed, prohibition was granted per Curiam, nisi.

[708] 30. SMITH *against* TILLY.

Admiral.

Powis moved to stay prohibition to the Admiralty, in regard that libel was against the ship for promissions and mariners wages, which hath been in these cases so constantly used, but in other cases its against the parties: but, per Curiam, this is but a device, and the parties may come in, and be admitted pro interesse, as if the original process were against them, 1 Cr. 296 is an anomilar collection; and by this course if the butcher or baker sue, or be sued for meat sold to the master, it should be in the Admiralty, which would be inconvenient. But there not appearing any rule for prohibition, adjornatur. 712, pl. 38.

31. COOK *against* BELLAMY.

Chattels. In Devise Br. 6.

Special verdict find Power possessed of 1000 years devised to Meryan his wife for life, after to Martyn in tail, remainder to himself, then made Meriam his wife executors, who enters generally, and after married to the plaintiff, and after assented to the legacy, but before assent the legatee by indenture assigned to Ormond, and died. Powis for the plaintiff conceived, that the grant of Martyn in the life of Meriam is good, although but a bare possession, 10 Co. 47. 4 Inst. 60 b. for being by indenture its sufficient to estop, as Pl. Com. 434. Its clear that the grantor could never have avoided this grant himself, and its no reason his administrators should avoid it; also here is a kind of right passed, which shall be assets, and may be released. That the defendant is stranger (he coming in by wrong) doth not hinder his being estopt; if this were a lease, it would be without scruple; and so this is rather then an assignment, being a new term, and hath all the proper words, and unless it operate this way the grant is void. 2. That feme covert may assent to this legacy there being here sufficient assets found to pay all debts and legacies (but else I agree she cannot

assent) this shall be intended on all cases, 9 Co. 94, *Vanes case* where the contrary is not found in special verdicts or counts, (which the Court agreed in special action upon the case on promise or debt against executors, but not here) she may give acquittance, 16 H. 7, 6 a. 21 Ed. 4, 14, or pay just debt or legacy: also 1 Cr. 490, she is compellable to assent, and here is no wrong done to the husband; also where an infant may assent, a feme covert may. **[709]** I agree (5 Co. *Russels case*) of all things done in pursuance of their trust, 3 Cr. 43, and in 5 Co. 27 b. its imployed they have the same authority, and all the books mentioned both alike, and in reason there is no difference 17 Ed. 4, 4. Also she may pay a legacy, therefore she may assent, Perkins 2 sect. 7. 7 H. 4, 13 b. is a judgment in this point. Lindly for the defendant in that the legatee hath used general and proper words to pass that interest he had, granting all his term and estate, as well as all the lands, it cannot enure as estople but rather as an assignment, 1 Inst. 352, the defendant is administrator to Meriam, and cannot be any way concernd, being a stranger, and the administrator de bonis non of the intestate Power is entitled to the interest as divisee, 1 Cr. 110. But the main point is, that the feme cannot, being covert, assent to a legacy; she is executrix so as to have goods left by the husband at his death, but during his life the power of administration is committed to him, Dyer 4, she cannot give away the goods, and therefore cannot assent 3 Cr. 718, *Sympsons case* is of infant after eighteen, which doth imply that before eighteen he cannot assent. Keeling conceived as Moor 831, *Price* against *Atmore*, by death of the legatee before the wife his interest is gone, and so retorns to the devisor, which the Court agreed, if the death were before assent: also Windham held it a strong point, that the feme covert cannot assent, there being an interest vested in the husband; contrà of a bare authority given her to sell, which the Court agreed, and by Keeling this grant is void, in that this devise is a bare contingent, and never vested in the grantor in point of interest, as Milwards title in C. B. where lease was made to two for life, and of the survivor, the remainder to the executors of the survivor for 41 years (which Hyde remembred entred Hill. 1658, Rot. 518, *Pool* against *Haske*) both by deed indented joyned in grant for life, and 21 years over to A. and adjudged that this possibility in the executors shall go to their administrator, and is not destroyed by the grant, which yet enureth as an estople: judgment on the point of assent for the defendant, nisi. Windham agreed this assent, and the husbands not contradicting it, is good evidence that he did agree, as in the case of *Manby* against *Scot*.

[710] 32. WHITINGHAM *against* BROOKS. *Wednesday, May* 11.

Trover.

Trover de sex capitalibus fibulatis Anglicè laced coifs, which, by Baldwin, in arrest of judgment, is ill, there being a proper word crinale, sed non allocatur, capitale being by the dictionary of Westminster School shewed to the Court a good word. Judgment for the plaintiff.

33. LINCH *against* D'AMORE. Escape Br. 37.

Escape.

Nota pro regula, that if H. in custodia appeareth by attorny, if he obtaineth supersedeas for non-prosecution within three terms, without notice of the plaintiffs attorny, the marshall is not chargeable; contrà if he be delivered after declaration given to the clerk of the prison, or of the papers, but bare entry in the marshalls book in the Kings Bench Office, or delivery to the turn-key, is not sufficient to charge the marshall with escape. 2. Any attorny for prisoner must give notice to the plaintiffs attorny, and make oath thereof when he cometh before the Judge, to file a common bail.

34. THE KING *against* MORRIS.

Peace.

In information against him for unlawful assembly; and breaking the house of Jones of Comblette, not shewing where the house is, which, by Williams, in arrest of judgment, is ill. Adjornatur.

35. THE DEAN OF HEREFORD *against* POOL.

Leases.

In trespass for taking away tyths, the defendant justifies as lessee: the plaintiff replieth 13 Eliz. and that the lease was with a building not formerly let; to which the defendant demurred: also as 2 Cr. 133, 111. Rast. Entry 32, 34, 83, its not said that the dean, predecessor of the lessor, was debito electus & præfect, and removed: also in the per nomina of the lease there are tyths mentioned in the defendants plea to be granted, Hub. 82, 233, but not where, which is ascertained by the replication, which is not sufficient in regard this part is not mentioned in the grant, but in the per nomina. Jones for the plaintiff, 1. Its not necessary **[711]** to shew the predecessor was removed, because the defendant hath pleaded to us as such; but however, this demise is only of tyths, and so it must now be averred that the lessor continueth dean, for its ipso facto void by his removal; also when its said the present dean was rightly elect, its good here on general demurrer. 2. The defect in the per nomina, if any, is the defendants own; but its good, and must agree with the lease; whither it hath name, where, or not, the Court regarded not this exception; but as to the former, had the plaintiff said nuper decanus least to him, he had agreed him not to be now dean, by Windham and Curiam; but being quod tunc decanus least, &c. its well as to that: but, by Windham, the continuance of the life of the dean ought to be averr'd, H. 3 Jac. 2 Cr. 111. Moor 778, as well here on lease for years, although the contract remains as in case of lease for life. Judgment for the plaintiff.

36. APPLETON *against* BRIAN.

Usury.

In debt on obligation, with condition of bottomree to pay 130l. when the ship should return from Norway. The defendant after oyer pleads corrupt agreement for lending 50l. to pay according to condition; to which the plaintiff demurred; and, per Curiam, its no usury, as in the case of Grene attorny in C. B. hath been lately resolved. Judgment for the plaintiff.

37. ALEWAY *against* ROBERTS. *Ante. Thursday, May* 12. In Damages, Br. 52.

Dower. Siderf. 188, pl. 15.

Judgment had in dower in C. B. and a writ of enquiry is brought, then the tenant brings a writ of error, & pendent ceo, the tenant dyeth before damages ascertain'd, and now in scire facias, Stroud for the plaintiff conceived the damages were not lost, the damages being no parcel of the judgment at common law, nor on Stat. of Merton in dower, unde nihil habet; this being a remedial law, and so liberally expounded to prevent the mischief at common law, viz. the detainment of dower; here being delay only by act of God in two discents, without any default of the plaintiff: also the purchasing a writ of error is an act of the party, and shall be intended for delay when the judgment is affirmed: also by this statute tenant in dower of copyhold shall have damages, which the Court denied, unless there be special custom, **[712]** as 4 Co. 34, *Shaw* against *Thomson*, to have the dower, 3 Cr. 557, *William's case*, Yelvert. 112, the executors shall have the recovery of damages, which sheweth the statute is not taken literally: but per Curiam, this is after recovery of damages by the tenant in dower. 2. The enquiry of seisin is to inform the Court, 14 H. 8, 25, and to it the defendant can have no answer, and the damages are included in the first judgment, Moor 80. 1 Inst. 33, and the writ of enquiry is only to ascertain them; and so though the land be changed by shifts, discents, or alienations, yet being charged with the judgment, it shall be charged with the damages. Keeling said there is no judgment, but only an award for damages, and so not differing from the common case; and Moor 80 is nothing to this case, for if the death be not pleaded by the deforceor, it cannot be taken notice of: Windham ad idem, The heir cannot be bound for that which never vested in the auncestor; also had the tenant died before judgment, all had been gone

against him, and being after as to the heir, who is no party to the writ, it cannot bind him without particular judgment of damages, which binds the land. Twisden and Hyde for the same reasons accorded. Judgment for the plaintiff, nil capiat per breve.

38. SMITH *against* TILLY. *Ante* 708, pl. 30.

Admiral.

The Court were divided, Hyde and Windham against Twisden and Keeling, that this libel against a ship for provisions is as good as for mariners wages; but by Keeling, This is but by sufferance, because they are poor men and going to sea: also Windham doubted that a ship may be pawned in England: but by Keeling, Clearly it cannot be pawned in England, but only by distress beyond sea. Also by Hyde and Windham, This is in discretion to grant, or not, which Twisden and Keeling denied, and that it is of right; and yet after the party hath proceeded a long time there, this Court may by discretion deny it, but not where the original act is out of their jurisdiction. Adjornatur.

[713] 39. CARPENTER *against* MARSHAL. Siderf. 189, pl. 16.

Cinque Ports.

In ejectment of mills lying out of the County Palatine, by special verdict the grant of remainders was found by the Crown to Ferrers and Philips, after a lease for years, and that there was no attornment; yet by Maynard for the plaintiff, It's well enough; he agreed, as setled, that such lands will not pass without livery, as 21 Ed. 4, 60, for that the freehold remains as before it came to the Crown; but this is good without attornment, else the King will be in worse condition by 1 H. 4, cap. that intended him a benefit, then a subject is, for the King hath no means to procure attornment without circular contrivance, not by any direct assurances, as quid juris clamat, for he cannot levy any fine now as he might when duke, Pl. Com. 220, therefore the law shall supply the remedy, or quod remedio destituitur ipsa re valet si culpa absit; for this cause his grant is good, though infant, and this is the ground of all remitters, 48 Ed. 3, *Goodcheaps case*, though the tenants do not attorn, the lands shall be devested out of the King without matter of record, because it can be no otherways done: so 5 Co. 113. 3 Cr. 354, although conusee shall not distrain without attornment, yet the lord by escheat shall: also if this be granted, the King cannot directly alien (without recovery by contrivement) without leave of the subject, 4 Inst. 209, is positive in this point on several reasons expressed and implyed. The writ under the dutchy seal to compel the tenant is but an equitable, not legal way. And by Walter in the case of Sir John Temple in the Exchequer, it was said to be ruled, that an attornment by compulsion of a decree in equity, was no attornment pleadable.

2. Coleman for the defendant, It is found as well that there is no seisin nor attornment: and as to whatsoever doth affect the estate, or assurance, the King is in the same case with a subject; but as to personal disabilities; as infancy, &c. these are aided by his being King: also the dutchy seal, as to matters out of the County Palatine, is no record, for to make it so is necessary a Royal impression, which is true in all cases, and the essence thereof; and for this reason, within the County Palatine, the prince having jus regale, it is a record, but not so of things out of the County Palatine, for these the King grants not jure regali, but in a distinct capacity, Moor 167. The dutchy seal will not make a corporation out of the county, 5 H. 7, 24. Nul tiel record cannot be pleaded to any deed in Curia prolat. and therefore this is **[714]** no reason for Cooks opinion; but if the Kings personal prerogative do excuse him, as that he need not deliver the deed, yet this shall not affect the estate, 26 H. 8, 9. Moor 194. Attornment is as material to the passing of the estate in reversion as livery is, when in possession, and no difference between them, Pl. Com. 215 b. I rely on for this point, 2 & 3 Ph. & Mar. cap. 20. 37 H. 8, cap. 16, do agree; and the presidents are this way, as well for passing the estate as privities, and the King at worst is but in the same case with a common person: also this equitable writ is by

4 Inst. 206, as effectual as quid jur clam. viz. to imprison the party till he attorn, and as to that quod remedio destituitur valet si culpa absit, this is true not only to pass the estate alone (as here is urged) but also all the privities incident.

1. Keeling conceived it a strong case for the plaintiff, as to the passing the estate only, for whatever is dishonourable to the King, shall be dispenced with in the Kings grant, as nonage, &c. and the difference betwixt livery and attornment is clear; for as to that, it's in his own power, and he may do it by letter of attorny; but here it would be dishonourable to the King, that a subject should have check to the Kings grant: also since the accession of the Crown, the dutchy seal is a record here, in respect of the honour of the person of the King, and by any record the transferring the estate was sufficient, 1 Inst. 314 b. Droit, Fitzh. 33, although no privities pass. Also without attornment the prejudice is the grantees, but no inconvenience shall lye on the Kings assurance; also the King may make a corporation by the Great Seal: so Moor 167, it's not necessary it should be so construed under the dutchy seal. Also we shall not judge according to a compulsory means in equity, for then it would be in the tenants power to destroy the interest of the grantee, which in quid jur. clam. he cannot; the presidents have been always this way, and there is no president where the Kings grant is avoided for want of it, although many there be that attornment was had.

2. Windham agreed the opinion of the books with the defendant, but on the great inconvenience seen by froward tenants refusal, 1 Inst. 215, the Judges found out this distinction betwixt the passing of the estate and privity to reconcile the books to the setled practice and law. Twisden and Hyde ad idem; and that this is a matter of record, as well as the Privy Seal or Sign Manual, being done in his politick capacity. Judgment for the plaintiff.

[715] 40. BROWN *against* WARD.

Abatement.

Winnington prayed to set aside a plea in abatement and special imparlance, as being too late after declaration, being delivered before the essoin-day of the latter, as of a former term, which the Court agreed; and that on the essoin-day the party cannot pray special imparlance, but ought to enter it at the same instant with the delivery of the declaration, although he know not the cause of action, or before the essoin-day, and because he had not, the Court set aside the plea.

41. WRIGHT *against* BRIGHT. *Friday, May* 13. Siderf. 190, pl. 18.

Trespass.

In trespass, the defendant after general imparlance pleaded that he, and two others not named, did the trespass, and so prayed judgment de billa. Coleman prayed judgment final, because the trespass is confessed, although the plea be but with conclusion, judgment quod billa cassetur. But, by Windham, The party may after this plead release of the plaintiff in chief, which the Court agreed; and it's not like a plea in barr which concludes in abatement. Respond' ouster awarded.

42. WEBSTER EXECUTOR OF COLVERT *against* BOT EXECUTOR OF GRAVENOR.

Executors.

In scire facias suggesting the executor had wasted (after judgment in debt) on issue that they had not found, against them, and judgment, they brought error in the Exchequer. Williams prayed leave notwithstanding, this being no scire facias, to have execution, and so not within 27 Eliz. as 1 Cr. 464, 286, which the Court agreed, had this scire facias been as original action; contrà where it's only in pursuance of the first judgment: but this writ of error being tam in redditione of the original judgment, as in the execution and scire facias, the Court conceived it was

within the statute: but the writ of error not being allowed, (which per Curiam, ought to be within four days after the suing of it out, and within four days after that the bail ought to be put in, or else) the plaintiff may take out execution; and this being an action for special tort of the executors, they, by Wind-[716]-ham, must put in special bail, which shall answer all the first judgment: but by Keeling, The bail is put in before the judgment, and ought only to be of the value of the waste found, not of the original judgment, by 3 Jac. Twisden conceived executors only liable by 13 Car. 2, to pay double costs, but not within 3 Jac. unless debt be brought against him on the first judgment, which he hath by devastavit made his own debt, which the Court agreed.

43. THE KING *against* HEREFORD. *Ante.* Siderf. 209.

Attorny. So to say H. entred lawfully is ill. 34 H. 6, 4 b. pl. 9.

On mandamus to restore him to his town-clerks place of Hereford, they retornd that he was never debito modo admissus, which by Twisden & Keeling & Curiam, is ill, in that hereby no particular issue can be taken: but there being another cause of the same nature of Maidstone pendant, this was adjorned till that determined.

44. In Disms, Br. 11.

Tythes.

Winnington prayed a prohibition, suggesting a modus by paying 1d. per annum for a calf, so for a horse and cow, in discharge of the tythe of all gross cattle; and by Keeling it is ill, which the rest agreed.

45. THIN *against* THIN. *Ante. Saturday, May* 14. Siderf. 190, pl. 19.

Hill. 12 & 13 Car. 2, Rot. 448.

Recovery.

Hyde Chief Justice delivered the opinion of the Court, that this moor-meadow, and Lanerton Lezo, which since 4 & 5 Ph. & Mary, have been reputed and demised by copy as parcel of the mannor of Buckland, but revera no parcel, yet they pass by the bargain and sale, and recovery of the manner had against tenant in tail, because the bargain and sale which leads the recovery, sheweth, that the intent was to pass all lands, parcel or reputed so, and the recovery being pursuant thereto, and having sufficient lands, will pass this the rather, being common assurance. Judgment for the plaintiff.

[717] 46. WIN *against* LLOYD. *Ante.*

Wales.

Error by vouchee of a common recovery in Anglesy, in quod ei deforceat, with protestation to prosecute a writ of entry in the post; the quod ei deforceat is teste, July 1659, ret. the next sessions which was 7 Aug. the ded. pot. is teste 17 Aug. retorn. 19 Aug. the caption of the warrant of attorny for this ded. pot. was before the retorn, but after the teste 28 July the sum. ad warrantizandum teste 20 Aug. subsequent to the retorn of the ded. pot. The one error, by Wild the Kings Serjeant, is, the copy of the warrant of attorny of the vouchee, but this being setled in *Argentons case*, 3 Cr. Hut. *Champernoons case*, he would not insist on: but the error he insisted on was the insufficiency of the ded. pot. bearing teste before the summoneas ad warrantizand. which, per totam Curiam, is ill, Dyer 220, and where the fine is taken by dedimus, Yelverton 34, the dedimus is parcel of the record; contrà where the fine is in person. And 27 Eliz. cap. 9 of Misentry, doth not aid where there is no warrant of attorny, as in this case there cannot, there being no plea dependant: also there can be no other warrant of attorny intended than is certified on the writ

of error, although there be a general warrant entred at the end of the roll, for this is revera the same, and not distinct from the ded. pot. Jones for the defendant, The placita is entred as of 17 Aug. that this warrant of attorny coming in in time before the ded. pot. or summoneas ad warrantizand. which is as the original betwixt the vouchee and demandant, is well enough; and the summoneas ad warrantizand, void; for if the tenant will answer without it, its good. Voucher F. 230. Also he may come in so by attorny, 22 Ed. 3, 7 b. without process, Voucher 197. 13 H. 7, 24, and therefore its like venire facias teste out of term, or before issue, which is void, and hurts not. 2. Admit the summoneas ad warrantizand. be only voidable, it will not hurt this recovery, in that the foundation of the recovery depends not on it, but its an interlocutory proces, 4 Co. 45, to bring in the vouchee, and is as in mean proces, error, which is cured by appearance of the party; however this first warrant be ill, or not, yet its cured by certification of the latter on the record, in a different manner from that certified in the ded. pot. And had such a new warrant been delivered into Court, its good by the party himself, although a stranger cannot bring in any warrant of attorny without **[718]** ded. potestat. And without question, had there been no warrant of attorny in the ded. pot. the latter would be intended good; and why in a record the Court should intend a repetition, being a thing indecent, I cannot see: but however, the latter differs in the entry of it, and its conclusion and intendment shall never destroy a recovery; as in case of two originals certified, the Court will take the best. The case of Dyer 220, there was but one warrant of attorny certified, which was impossible to be good, because the mittimus out of Chancery came in to C. B. after it; but here is no mittimus, but it may be intended to come in in time. Adjornatur.

47. ELLIS *against* JACKSON. In Jours, Br. 84.

Days.

In trespass of assault and battery by special verdict, it appeared that the defendant, as bailiff of the sheriff, arrested the plaintiff the 10th of February, on a writ of non omit. out of C. B. which was retornable octabis Purific. which was after the first, or essoin-day, but the days of grace to the retorn of the writ is two days after: and the Court conceived, that although the sheriff may retorn his writ after, yet his office quoad arresting, is determined on the essoin-day, which being no moveable feast, the Court may take notice of the day of the month. Adjornatur.

48. PARTRIDGE *against* WALTER. In Error, Br. 186.

Leet. Britt. 208. 1 Inst. 17 b. Distress, Br. 18. March, 161.

The defendant in trespass for taking goods justified as bailiff of the Bishop of Lond. who prescribes to distrain the goods of any person amerced within the said manor, that are on the lands of such person, and do not shew in this case what estate he had, and this must at least be intended the freehold, and the distress is taken on a tenant of the party amerced: but as more material, the prescription was to distrain by his bayliff of the manor, and here it's said only quod def. ut ballivus episcopi, and saith not manerij; for which causes Jones for the plaintiff demurred, and this defect the Court conceived incurable, but (ut ballivus manerij, although similitudinary, is sufficient. Bract. 264). Also this offence is intended in court baron, Hutt. 212, being incroachment on the lords waste by building cottage: the Court agreed also that prescription to sell a strangers goods is ill, but only to distrain is well enough: also this justification ought to sever at which court, whether at the leet or court baron the offence was done, and not to say generally ad curiam vi-**[719]**-sus & baronis, &c. And 48 Ed. 3, 13, a pain cannot be laid on a private trespass to the lord; contrà on a nusance; but if this concern all the tenants, a pain may be set, as on digging in a common, which must be intended by tenant, not on stranger which oweth no duty to the lord.

49. BOWMAN *against* MILBANKE. Devise Fitzh. 30.

[S. C. 1 Lev. 130. Disapproved, *Smyth* v. *Smyth*, 1878, 8 Ch. D. 567. See also Jarman on Wills, 1893 ed., vol. 1, p. 682.]

Devise. Siderf. 191, pl. 20.

H. possessed of burgage lands animo testandi by testament devised (all to my mother, all to my mother); which appeared by special verdict, in ejectment; and the Court inclined that no houses or lands passed hereby. Glyn for the plaintiff the heir at law, conceived though the words be general and uncertain, yet having no precedent discourse of any lands, nothing shall pass: also if it were a good will at common law, yet it cannot be said according to the custom, however the words are most rationally satisfied in the passing the personal estate. Jones for the defendant, The custom is found, that lands may be devised by paroll, and is as strong as if the words were at common law in writing, in which case there can be no more extensive gift then all, qui omnia dicit nihil excludit; so all his estate of all kinds is comprehended, or nothing, 1 Cr. 450 was liable to the same objections as here; so Bendlows 6, and Owen 30, devise of all my livelihood passeth real and personal estate: so 2 Cr. 144. And the words of our will cannot be satisfied with less; nor shall the Court intend there were goods, here being none found: and in *Kerman* against *Johnsons case* B. R. by Twisden it was adjudged, that by devise of his estate, the real as well as personal, passed, and so he conceived here. Windham conceived, the jury ought to have found with what intent, in relation to the burgage, the devise was made, and not to have left it to the Court. Keeling, The verdict is good; so Hyde: But this all is an adjective, and not to be satisfied without a substantive, and so not like the devise of all estate, but too general to pass any thing, but at least to pass any lands. Judgment for the plaintiff the heir at law, nisi.

[720] 50. LEE *against* BOOTHBY. *Ante. Monday, May* 16.

Copyholder.

It having been adjudged that a lease for years of particular name of copyhold, together with the manor by the King, hath not so extinct the copyhold (although by the surrender of it, it is parcel of the manor in the King) but that after such lease the patentee of the reversion of the King may regrant it as copyhold now on feigned issue out of Chancery, whether the lands were copyhold, and belonging to the defendants, or one of them. Keeling said it had been adjudged, that although several tenures be reserved on the former grant, yet the copyhold is not destroyed, but passeth as included in the manor, cum pertinentiis, in the premisses: also surrender of a copyholder to the King, lord of a manor, was there adjudged good, without other matter of record. Also by Windham now, as in the case of Sir John Rogers, copy of a lease which the lord had in his hands, whereby the tenant had power to make leases, is good evidence without swearing it a true copy: so is copy of roll under the stewards hands, who was counsel for the lord plaintiff, was admitted good for the copyholder; but contrà of short notes by way of breviat, which the Court agreed; and also that finding by special verdict or admission on former pleading, is good evidence unless the contrary appear. The Court on the evidence here conceived, that without express grant the copyhold cannot be sever'd by any different reservation or tenure, yet the intire manor may hold by different services of different persons as to the demesns, although not the services, as well by the grant of the King as of a common person, without disjoyning any part of the manor, as reservation of one service on the grant of the manor, another of the advowson, which was before resolved in the case of *Chinkford and Pauly*. Also a grant for life by the King is only a severance of copyholder pro tempore.

[721] 51. BATTIE *against* SMITH.

Ordinary.

Coleman prayed consultation on shewing letters of request by the Bishop of Norwich to the Arches, dated before the prohibition, which was granted on 21 H. 8, c. 9, § for citing out of the diocess. Keeling prayed it may be pleaded according to *Jones's case*, Hub. because if the case were not within the canon law, they cannot grant letters of request, as in this case, which was a suit for tythes arising in the inferiour diocess: but, per Curiam, they will intend the case within the canon law, unless the contrary appear, wherefore the consultation was granted without pleading, unless by civilians by a day it be made appear it's no such cause as is allowed by the canon and civil law; for prima facie, it appears by the letters of request to be within that law, because tythes generally are so.

52. SMALLBROOK *against* SLAUGHTER. *Friday, May* 20.

Encumbent.

Wild the Kings Serjeant prayed a prohibition to the Archdeacon of Lichfield, in a cause where the defendant libelled for forging letters of ordination of priests and archdeaconry: sed Curia contrà; for this may be enquired by the Spiritual Court, and the party deprived as merè laicus: but by Twisden and Keeling, they cannot criminally proceed; sed quia copy of the libel was denied, prohibition was awarded quousque.

53. BLEWIT *against* PERKINS.

Ejectment.

If the declaration in ejectment be delivered after the essoin day, it's but entred as of that term (and not of the term before) and the plaintiff in such case cannot have judgment the same term; but if he doth not move the following term to have judgment, especially if any Assizes intervene, he cannot have it without new notice left at the house of the defendant, and the default made as at first, per Curiam, ex motione Keeling for judgment, &c.

[722] 54. SPENCER *against* VENACRE.

Bankrupt.

J. H. by special verdict appeared to be a bankrupt, and was committed two months in 1651, and recommitted for another act in 1657, and then the term for years whereof he was possessed was sold to the defendant by the bankrupt, and in 1660 the commissioners sold to the plaintiff. Baldwin moved to stay judgment, because this commission shall relate to the first act in 1651, which was the most notorious, being by imprisonment; although had the first act been by concealment or utlary, I agree the party creditor need not take notice of it by 21 Jac. which shall not be taken favourably against the purchaser, but only against the bankrupt himself. The case of Gove in C. B. although after five years, yet the sale of the bankrupt being after the last commission sued out, was adjudged void, because in such case it shall relate to the last act; so the case of *Bradford* against *Bludworth* on the bankruptsie of Harrison: sed Curia contrà; for the words of the Act are not after he shall first be a bankrupt, for then the earlier being a bankrupt, would after five years be a perpetual supersedeas to all tradesmen; but if one hath sold, and then five years pass, without any act of bankrupsie, the purchaser is safe, and no after act can hurt him: but where the bankrupt continueth in possession, any after act is sufficient to bind the term. Judgment clearly for the plaintiff.

55. THE KING *against* ARNOLD.

Trespass.

In arrest of judgment, it was excepted that the indictment was on 5 R. 2, cap. 7, for entring (ubi ingressus non datur) into unam parvam peciam terræ with abuttals, but doth not say how many acres: but per Curiam, after verdict it's good, as in clausum in an indictment; contrà in ejectment. 2. It was further for pulling down posts, &c. contrà formam stat. which, per Curiam, is well enough, and only aggravation. Judgment pro Rege.

[723] 56. THE CREDITORS AND SIR CHARLES STANLY. *Ante. Saturday, May* 21.

Priviledge. Execution, Br. 98. Pardon, Br. 44. 3 Cr. 516, pl. Noy 1, pl. 3.

Wild the Kings Serjeant prayed he, being the Kings prisoner for murder, might be discharged of all actions laid on him since his conviction, which the Court refused, the original cause of his being so being a rescue of himself from arrest, which shall not be extincted, as to him, by his after murthering the bailiff: but however, there being several causes laid on him before, that is sufficient to lay any after.

57. SMITH *against* BROWN, &C.

Executors.

On non assumpsit pleaded by the executors in an action upon the case, Stroud moved in arrest of judgment, because the costs are given de bonis propriis, there being no assets, sed non allocatur. 2. The county was in the margent, and A. without in com. præd. in the count, which in C. B. is well enough. Judgment for the plaintiff.

58. THE KING *against* CROSS AND DABBIN.

Coron. Siderf. 204, pl. 1.

Siderfin moved to quash an enquisition super visum corporis, said to be taken at Axminster, of the body of John Brocas, without saying it was a vill, or next adjacent, which per Curiam ought to be, but not in the retorn; but per sacrament. J. Witny & aliorum parochiæ Axm. prædict. But by Keeling it ought to be in the retorn said, the next adjacent vills by 4 Ed. 1, pag. 28, de Officio Coronatoris. 2. This was for deodand. of a bell in a steeple, whose rope hung the ringer, F. Coron. 405, 389, which the Court doubted, being fixed, is no deodand; contrà if by falling it had killed any, for then it's a chattel, as milstone falling from the mill. Adjornatur.

[724] 59. POTTER *against* MANUCAPTORS OF LLOYD.

Bail.

Eakins prayed to discharge a judgment in scire facias against manucaptors, both being delivered after the day of the retorn of the last, and so they had no time to plead; sed Curia contrà; for the bail is liable by the judgment, and if they be freeholders in the same county where their recognizance is made, then they must have notice and time, because sc. feci may be retorn'd; but if they be strangers, the sheriff is not bound to warn them, and so need not give notice, but retorn nichil on both together at any time; for this is but a favor to the bail: who therefore at their peril ought to bring in the principal within 30 day: and thus on search of presidents in C. B. ex motione by Justice Keeling then serjeant, and on conference with sheriffs and clerks of B. R. it was resolved and setled.

60. HOUNSELL *against* ADAMS.

Assumpsit.

Stroud moved in arrest of judgment in action upon the case on promise by the defendant, that if the plaintiff would not compound with one Fouk, who entred on land of the plaintiff, claiming title, and cut furze, here appearing no benefit to redound to the defendant, nor loss to the plaintiff: but, per Curiam, it shall be intended benefit. 2. The promise was farther, to save the plaintiff thereon harmless, though it cost him 100l. the plaintiff sheweth the entry, and that certain furze was by him cut and carried away, & ad usum suum proprium convertit, which per Curiam is sufficient breach, without shewing other special damage. Judgment for the plaintiff.

61.

Church.

Williams prayed a prohibition to in suit of A. for not repairing the church, who pleads that J. S. the vicar hath time out of mind chosen churchwardens, and that the plaintiff was unduly chosen by the impropriator, which by the common law hath right. Hyde and Wyndham refused to grant it, because this was an incident question; contra if suit were originally by one officer against the other: so Kel. in suit for legacy, as son and heir, the defendant saith he is not son and heir, it shall be tried by them, which the Court agreed: but by Keeling and Twisden, were the matter only common law, it might be there triable, but special custom of election being alledged, its no **[725]** more triable by them then bonds of parish, or parson or not parson in suit for tythes. The Court being divided, no prohibition.

62.

Trespass.

Error of a judgment in assault and battery, by Newdigate, assigned in that the record is, J. S. nuper de Kelsey in com. Warwick, the writ of error is J. S. de Kelsey in com. Lincoln, the Court inclined it was no variance, but doubtfully dividing, the plaintiff agreed to take out new writ by consent.

63. CASEBROKE *against* HELLIAR.

Execution.

Nota, by course of the Court, after verdict on the writ of enquiry, the next day the plaintiff may have fieri facias retorned, before the rules for speaking in arrest of judgment be out at the first day in Bank, if this be in to London or Middlesex, and only to entitle the party to a testatum fi. fa. ex motione Serjeant Windham, reported by Linesy Secondary: also the testatum may be teste the day of the retorn of the former scire facias.

64. HALL *against* UPPINGTON. *Ante.*

Ejectment.

Serjeant Broom prayed that Norwood might be admitted to plead in abatement, that the lands in the ejectment are within the Cinque Ports, the rather because she is made defendant by rule of Court, with a special imparlance, to which Twisden did incline: but by Windham and Keeling, unless auncient demeans, no special plea hath been allowed; and there only, because the land would be prejudiced by trial at common law: so in Durham, such trial would be void; but, there is only an ouster of jurisdiction, but clearly if one pray to be admitted defendant, he cannot have such plea: and Twisden said, It had been contrary to Dyer held, that a writ of error at

this day lieth at common law on judgment in the Cinque Ports, there being no such Court as Shepway, as they there, by feigned suit in Chancery of Dover, in nature of a writ of error before the Lord Warden, supposed. The Court, Hyde absente, ordered him to plead in chief.

[726] 65. SCURRE *against* THE OFFICIAL OF YORK.

Prohibition.

Says, after excommengement of the plaintiff, prayed a prohibition for not delivery of a copy of the libel, which the Court granted; but conceived that on delivery of the libel, the excommengement stands in force.

66. BRIGS *against* BRECKNOCK. In Disms Br. 17.

Tyths.

Bigland prayed a prohibition to the official of Litchfield, on title made by letters patents, and the dissolution of monasteries, as impropriator in suit for tythes on seisin del abbot, which the Court denied on 12 Co. 66, *Whiskers case*, this being nothing different.

67. THE KING *against* REYNER. Siderf. 214, pl. 14.

Peace.

Shelton prayed a capias pro fine pro Rege, the defendant being convicted of barretry, and no errors assigned, though a writ of error was brought of that judgment, which the Court granted unless within four days errors be assigned, although no rules were ever given in the Crown Office by the prosecutor to assign them; for by Waterhouse Secondary, and all the clerks of the Crown, no rules are ever given on the criminal side to assign them, but it must be done at the peril of the plaintiff in the writ of error.

68. *Monday, May* 23.

Endictment.

H. endicted for practice in withdrawing an apprentice; after not guilty pleaded, and verdict, demurreth generally on the indictment, on the president in Co. Entr. 363, which the Court disallowed, and Twisden conceived that was some scire facias against the party. Judgment for the King ex motione Brewer.

[727] 69. THE KING *against* HINKLEY.

Trades.

Offly prayed a procedendo on default of putting in bail in certiorari, on removal of an indictment, for using a trade contrary to the statute of 5 Eliz. which the Court refused, being necessary only on removal of force or batteries.

70. THE KING *against* SIR PURBECK TEMPLE. *Ante.*

Peace. Siderf. 192, pl. 22.

He was fined one thousand marks, imprisonment during the Kings pleasure, good behaviour for a year, and the next assize to acknowledge his offence publickly, on conviction of extortion, and compounding to give new licences to unlawful alehouses, and take away good ones, and for discharging recognizances for appearances at sessions, he being a justice of peace in Surry; and the archbishop claimed his fine.

71. PRITCHARD *against* JONES. *Ante.*

Error.

Error of judgment quod recuperet damna sua præd. ultra mis. & custag. ad 14l. pro misis 40s. the verdict finding the defendant guilty of the trespass, & 12l. ultra mis. & pro misis 40s. which per Cur. on assignment by Wild, the Kings Serjeant for error of judgment, is ill, and should have been generally, quod recuperet damna sua prædict. per juratores prædict. in forma prædict. assess. ac etiam de incremento. Twisden on the case 2 Cr. *Mason* against *Fox*, conceived this amendable, being but a mistake in miscasting the sum, 2 Cr. *Grenvill* against *Smith* in the postea, this being a writ of error, the Court said it ought to be amended in C. B. where the original is: but by Twisden, By diminution alledged it may be done here, and certified hither, and here amended accordingly; and so was the case of *Mason* against *Fox:* but there being other errors, the plaintiff prayed to reverse the judgment for expedition.

[728] 72. THE KING *against* SELBY.

Maintenance.

Bigland moved to quash an indictment, being removed hither by certiorari, for the generality of it being grounded on 32 H. 8, 9, and saith only quod manutenuit sectam J. S. not shewing how, which, by Windham, is needless, and it's well enough without: the Court would not quash it, but directed this exception to be moved in arrest of judgment after pleading.

[729] DE TERMINO TRINITATIS, 16 CAR. II. B. R. DIE VENERIS, JUNIJ 10, ANNO 1664.

Hyde Chief Justice; Twisden, Windham, Keeling.

1. THE KING *against* ROCHE. *Ante.*

Deceit.

The Court now allowed the writ of scire facias on the motion of Mr. Attorny, in the nature of a writ of disceit; but the parties had before compounded that she should have 16l. per annum in lieu of 42l. recovered by her for her dower on Mr. Attornys arbitration.

2. BAILY *against* HARDIN.

Error.

Ball moved to quash a writ of error directed to the bishop, of judgment in his Cheyny Court, because the retorn was of record and pleas of our Sovereign Lord the King of his Cheyny Court in Winchester, and so variant, to which Twisden accorded; and the plaintiff moving it for expedition, that he might proceed de recordo quod coram vobis residet, the Court quasht it.

[730] 3. MARTIN *against* GREEN.

Admiral.

Wild the Kings Serjeant prayed a prohibition to the Admiralty on a libel against a ship for destroying another ship by negligence, being driven down by the tyde, being only a common action upon the case, which Hyde doubted, in regard the part owners of the ship cannot be known, and so no remedy at law. But by Twisden and Keeling, This is no colour to give any jurisdiction where it ought not, but on delivery of the names of the owners, the Court awarded a prohibition.

4. THE KING *against* DALE CHURCHWARDEN OF SPALDING.

Parliament.

Barnard moved to quash an indictment on the Act of Uniformity, because it was said quod cum per stat. ad Parliament. tent. 14 Car. whereas that was the day only of prorogation, which the Court agreed ill, the conclusion being contrà formam stat. prædict. and so lately in C. B. in an action upon the case against an attorny on 3 Jac. for fees, such exception was held good, that being only prorogation, which was not mentioned: so the Statute of Usury and of Maintenance, 32 H. 8, which was at Parliament. tent. 31 H. 8, so *Strange* against *Partridge*, Pl. Com. the offence was for keeping the church doors shut, whereby the bells could not be rung, which is only miscarriage, but not within this statute, or 1 Eliz. so on ringing too often, or unseasonably, but disturbance against this statute must be in time of divine service: but the record not being in Court, adjornatur.

5. ROGERS *against* ROGERS.

Heirs.

Monday moved to set aside judgment against an heir, had by nihil dicit fairly, for want of a plea, which was delivered, but not into the office, nor by signing the book of the plaintiffs attorny, as is used in all general issues: the Court doubted, in regard that if execution should be taken of more then the heir had the day of the writ, or of his own lands, the heir would be put to falsifie and more trouble by remedy against the sheriff, which would be mischievous; wherefore no inconvenience appearing on the other side, the Court ordered to go to trial, paying costs, and that the judgment by nil dicit be set aside.

[731] 6. BOIS *against* BOIS. Siderf. 214, pl. 15.

Slander.

In an action upon the case for calling her whore, per quod she was in danger to lose her widows estate, which by custom of is to be quam diu casta vixerit, which as in 25 Eliz. *Banisters case*, to say of an heir, he is a bastard, is actionable, being no colour for it after verdict. Twisden conceived them alike, so Hyde and Keeling, contrà by Windham; whore may be one of such a carriage, and is of no certain signification, as bastard is: and when a whore in Oliver's time was to be whipt, the word was not generally actionable; contrà to say she was the whore of J. S. But the words being, that the plaintiff was a brazen fac'd whore, and I will turn her out of her living, seem to be direct to this end, and so as scandalous as per quod she lost marriage. Adjornatur.

7. SMALLBROOK *against* SLADER. *Ante.* Siderf. 21, pl. 22.

Prohibition.

The Court refused to grant a prohibition till a copy of the libel be delivered, in that it is not asked till after sentence removed by appeal to the delegates, for it ought to be granted only when men are in fear of sentence before answer by the same Judge, or else the party should have prayed prohibition to the delegates before his answer in the Spiritual Court, for all is removed to them, as a record out of C. B. hither by writ of error: also per Curiam, The demand ought not to be so as to stop any proceedings only after answer, and prohibition being awarded on false suggestion, consultation was awarded.

8. SADLER *against* TAYLOR. *Saturday, June* 11.

Ejectment.

Hyde conceived, that action for mean profits on the judgment in ejectment shall be in the name of the lessee, during his term, which Twisden and Keeling agreed. Windham conceived this is no such lease as shall estop the lessor to bring another action in his own name. Sed Curia, In this action no evidence shall be given as to the right, which must be, if the action should be in the lessors name, and therefore he can have no such remedy : but the parties agreed to try it de novo.

[732] 9. THE KING *against* PAULET. *Ante.*

Poor.

The defendant demurred to the indictment on the stat. 14 Car. 2, 12, which being private, is not found, and so the Court ought to take no notice of it, although the general title of it be general, as by Mountague, Pl. Com. 65. Hub. 226. Moor 253. Act. *Carters case*, Moor 583. 1 Leonard 306. The Statute of Bishops is private ; so 18 Eliz. of Colledges is a Particular Act, but 18 Eliz. cap 11, is general, 21 Ed. 4, 56, & 4 Co. 120 b. vide 4 Co. 76, *Hollands case*, 23 H. 6, 10. Dyer 27 b. pl. is private ; contrà where it is of all officers in general : but an Act for a whole county is but a Particular Act : so in our case, which is a particular enacting clause of erecting a corporation for the poor, and workhouses in two cities, and in some parishes which are but as individua, and so is much more private then where it extends to a species. 2. Indictment will no more lye on this Special Act, had it been found, then for private nusance to some particular persons. 3. Here are particular officers imployed, and no penalty set for his default, therefore he cannot be indicted. Lindly contrà ; As to the third, it's a contempt of the authority, and so is indictable, whatever the matter be, 3 Cr. 655, *Crouders case*, private or publick : as to the first, it's not a Private Act distinct, but coupled to the body of the Act by words, of farther redress of the former mischiefs mentioned generally before, and it's no distinct independent paragraph. Keeling conceived the Act private, as the provision for the poor in the Isle of Foulness in the statute of 43 Eliz. cap. 2. Also it must be a General Act on which any must be indicted for disobeying. The King is not trusted for any particular city or town, but as members of the whole kingdom : but Windham and Twisden contrà, especially for the mischief that would else be ; for in London or Middlesex the party may doubtless be indicted on it, for they need not recite their own laws : also by Hyde, The Act is fruitless unless it be publick ; for a churchwarden is a publick officer ; and here the King is in a sort concerned, to whom information is to be made by the justices : also the Act for Foulness is but a proviso, which can never make a general law private, but this is part of the body of our Act. Adjornatur.

[733] 10. COLEMAN *against* HARTCOAT.

Days.

If H. pleads as of last term general issue, and it be not entred till the next term, the defendant may plead de novo, but cannot change the venue ; but on delivering a declaration on a former term too late for the defendant to plead, he may then change the venue the ensuing term ; ex motione Keeling to change it in action upon the case for words, the Court refused it.

11. THE KING *against* CORPORATION OF MAIDSTONE.

Mandamus.

The Court conceived this retorn non fuit debito modo elect. was ill, and against all presidents, Yelvert. 30, pl. 42, and on good advise, by Twisden, in the case of this town before, it was held no fit retorn, this being a negative pregnant, whereby the

truth of every case will be concealed. The Court awarded a writ to command him to be sworn, or if he had been sworn, to be restored; so in the case of *Hereford. Post.*

12. ARRIS *against* BRADSHAW.

Trades.

In trespass for breaking his house and taking goods, the defendant pleads that Chipping-Wickham is an ancient corporation town, and by patent of King James, have power to make by-laws, granted to the mayor, aldermen and common council, for regulation of the town, and they ordered that the plaintiff, presuming to set up a shop without their licence, should pay 10s. per month, and in default thereof distress, which by Jones is ill, there being no by-law that no trade shall be used without their licence in general; no by-law that restrains trade is good without special custom; for by common law every man may exercise any trade, which is restrained by 5 Eliz. cap. 4, to such as serve seven years only: so is 8 Co. 107, *Waggoners case:* so 11 Co. 53. 2. It doth appear the plaintiff was not free of the town, but it doth not appear but he might serve seven years there; so like Hub. 211, the weavers of Newbury. Also by Twisden, the by-law is only to distrain, and by virtue of that there is a warrant made by the mayor to the other defendant to sell the distress, this hath been doubted, but held in an Act of Parliament for sewers, that levying by distress implyeth sale; but never in a by-law or letters patents, which the Court, præter Windham, agreed: and by Keeling, **[734]** this by-law is ill; but for the inconvenience, the rest waved any opinion as to that; but for the last insufficiency. Judgment for the plaintiff, nisi.

13. HUTCHINSON *against* SIR J. LENTHALL.

Officer.

The Court conceived it in their discretion to suspend Sir J. Lenthal the marshal, or not, from his office, on prayer of any that had recovered against him, on escape: and here the debt being the customers, and contracted in the late time, they refused to sequester him, but left him to his remedy at law, ex motione Jones.

14. D'AVADGE *against* D'AVADGE. Siderf. 210, pl. 6.

Executors.

In debt against an executor, he pleaded plene administravit præter bona not sufficient to pay the debt in demand, which on general demurrer is held substance, 9 Co. 109. But its held in Hub. 133, *Andrews case* to be but form; however, the plaintiff having here specially demurred, because the certainty of what is left, is not said; but the plea was, that J. S. hath recoverd against him, ultra quod he had not goods sufficient to pay the plaintiff; yet, per Curiam, on a special demurrer, its ill, and ought to be that J. S. had recovered 19l. &c. ultra quod he hath but 5s. or nothing. But there being a mistake in the action, which was entred in Tr. 15, alias prout patet Mich. 14, and the obligation was dated in Jan. 14 Car. for which cause nil capiat per billam was awarded on the exception of Stroud for the defendant.

15. AUDLY *against* BERRY. Det. Br. 100.

Covenant.

In action of covenant on articles of agreement, whereby the plaintiff covenanted to make an assurance by a day of lands, as the counsel of the defendant shall advise; and on perfecting thereof, the defendant is to pay 300l. and 300l. more generally within three months when demanded, and now breach being assigned in non-payment of the whole, the defendant pleads the plaintiff had no estate which he could convey; to which the plaintiff demurred, in regard this payment is collateral, and the latter is

general, without reference to the former: but, per Curiam, the first depending on the assurance, the latter must be so that is subsequent: so if no assurance, nothing is to be paid, and so the plea of the defendant is good, although the plaintiff **[735]** averreth he was always ready to perfect it, and that the defendant never tendered any, nor hath paid, &c. præter Twisden, who conceived its at the defendants peril to cause an assurance, and if the plaintiff refuseth for to convey by fine, &c. then he is liable, else not: but, per Curiam, this is good in action by the defendant for non-assurance, but here the action is for the money, and so the defendant hath election to plead, as here, or that he tendred special conveyance by advice, and the plaintiff refused. Judgment for the defendant, nisi.

16. CRADOCK *against* POCOCKE.

Priviledge.

North moved for a supersedeas, the defendant by writ of priviledge having removed the suit of the plaintiff against one Petty, for whom he was surety, on attachment of Petties mony in his hands by the custom of London, which the Court granted, in regard the suit is not directly against the defendant, who was an attorny of this Court.

17. SWAIN *against* SHIN.

Error.

On errors assigned, its entred quod petit, &c. which is intended to have certiorari for diminution; but the defendant having joynd in error, no certiorari is necessary; no more is it, unless the party, when he assigns errors, prayeth it for want of original, &c. But however, if the defendant agree that the Secondary shall give rule for a certiorari, although none be requisite, yet being granted, there must be four days betwixt the entry of such rule in the office, (till which its no rule revera) and the retorn of it, that are hall-days; and because there were not, ex motione Glyn the Kings Serjeant, the Court ordered a new certiorari.

18. ALCOCK *against* HERBERT BAIL OF MERRY. *Monday, June* 13.

Bail.

In writ of error out of Palace Court, which is to remove the judgment had against the principal, cum omnibus ea tangentibus, by vertue whereof the record of the bail, which is distinct, is removed; and the plaintiff now brings a scire facias here against the bail; to which Raymond pleaded nul tiel record, because this is a collateral record, **[736]** and not removed. The Court conceived, that had the plaintiff brought the writ of error, he should not have scire facias on the recognizance; contrà here, when all is removed by the defendant: and so it was resolved, *Jones* against *Williams*, of bail in C. B. no scire facias lieth here, because by mittimus the record may be sent from hence back again, which cannot be to Inferior Court, nor tenorem thereof, as was urged by Jones for the defendant; so in the case of *Dinchurch and Risan* against *Goodwin*, 1 Cr. Adjornatur.

19. PETIT *against* CONWAY.

Rent.

The Court conceived that reservation of rent to the lessor, and his assigns, during the term, shall go to the heir, as well as reservation during the term generally; contrà, by Wild, on *Mallories case*, 5 Co. 112. On the motion of Mr. Argoll in arrest of judgment, in action of covenant by the heir grounded on articles of agreement, whereby the auncestor of the plaintiff, on consideration of the rent so reserved, was to lease, and the defendant by another article to pay redditum prædict. at Michaelmas and

Our Lady, and said not during the term, which, per Curiam, on breach assigned for non-payment, a year and more shall be intended, as well as half yearly ad usualia festa generally, shall be intended during the term.

20. ARCHER *against* BENNET. *Tuesday, June* 4.
Tr. 15 Car. 2, Rot. 1704.

Appendant. Siderf. 211, pl. 9.

By special verdict in ejectment, it was found that Oaker was seised of a mannor and messuage, and a close, and having two mills on the west side, and of a kell, which he newly erected upon the other side, then by meats and bounds divided the close, and enfeoffs the plaintiff of the west part of the close, and the mill, with the appurtenances; after assigns the other part of the close, with the mannor, unto the defendant, and whither to these auncient mills the kells will, being severed, pass as appurtenant, having been enjoyed and used with the kell, by assignment of the feoffor, who had both for a year, which by common reputation is sufficient to be so accounted parcel: by Bigland for the **[737]** plaintiff, they shall, this being the intent of the conveyance, as *Hill* against *Grange* Pl. Com. 171. And also the end of the kell is to serve the mills, and so may as well be appurtenant, as a shop to a house, 1 Cr. 17, Brian, 1 Cr. 57, *Hern* against *Allen*, seem contrà; but there the verdict found they were never enjoyed together, as appurtenant, or not intended to pass, 1 Cr. 168, *Gennings* against *Lake*, adjudged in case of the King, that such grant was good for the joynt enjoyment, 2 Cr. 121, *Reignolds* against *Chamberlain*, because of the necessary use, conduit was adjudged to pass as appurtenant to the house, especially being used joyntly by him that had the inheritance. Any small time is sufficient to cause things in esse to pass in grant, 6 Co. 65, contrà to enable one to prescribe or make title as appurtenant. Also the mills are useless without the kells; and so, as in Hub. *Darcy* against *Askwith*, they shall pass together. Wilmot for the defendant, In all the verdict, the kell is not found necessary: I agree the cases cited, but ex natura rei, both mills and kell being corporeal, they cannot pass as appurtenant, as in case of a mannor, which is compounded, as *Tirringhams case*, Brief F. 783. Also from the nature of appurtenants, as Fleta lib. 4, cap. pag. The usage here is not above a year, which is not sufficient to make it appurtenant. Also had the demise been of the mills with the kell appurtenant, it had been good, as in *Hill and Granges case*, cum terris pertinent. passed the meadow; but by general words it would not have passed; Br. N. Case 31. 27 H. 8, 2. 3 Cr. 113, is on the same diversity betwixt devise and demise; also as 21 E. 3, 2, Snelfords Assize, both being enjoyd by J. S. and he granting away but the mills only, the other cannot pass as appurtenant: also they have found the defendant seised of the mannor generally, and no other title for the plaintiff, so whatever cometh after is superfluous. Keeling conceived strongly it passeth not, being neither found necessary, or belonging to the mill: Windham accordingly, that the verdict is short, for it appears not but it is a lime-kill, and not kell purposely erected for the use of a mill, in which case it would have been parcel, as a dove house or conduit is to a messuage. Also cum pertinentijs is too short, without all kells appurtenant. Twisden and Hyde accordingly. Judgment for the defendant, nisi.

[738] 21. HOPPER *against* HACKET.

Pasch. 16 Car. 2, Rot. 42.

Arbitrement.

In debt on bond, the defendant pleads it was for performance of an award, & nullum fecerunt arbitrium: the plaintiff sets forth the award, which was, that the defendant should pay to the plaintiff 4l. for arrearages of rent, & erga reparationem domus: to which the defendant demurs, because the submission is of all matters in controversie, and the arbitrators have taken notice that there are other differences, and so this award not going to the whole, is but an award of one side, and so void;

and the Court shall not intend that this was the only difference; which, by Twisden, was long doubted in the case of an attorny of B. R. one Burbedge: but, per Curiam, there doth not appear there is any other matter in difference unended; and if there were, the defendant ought to shew, and plead it: and although the submission recites there were other differences about the possession and standing of elmes, these are arbitrated for the defendant, in lieu whereof he is to pay 4l. &c. which goeth to the whole, for an award of one particular for the ending of one hundred, is good enough, and reciprocal. Judgment for the plaintiff.

22. PARTRIDGE *against* WALGRAVE. *Ante.* In Error, Br. 186.

Leet.

Windham conceived that it doth not appear that he that levied the cottage was a tenant; but if he were, this custom to distrain any goods out of the grounds of the party amerced were good, which Twisden denied on Dyer . But per Curiam, neither of the exceptions made by Jones are deniable, ut ballivus episcopi, being ill; so to say ad Curiam visc, & baronis without discrimination. Judgment for the plaintiff, nisi.

[739] 23. FOURQUIER *against* FRAZIER.

Legacy.

In debt on bond conditioned to pay 4000 mark Scotch to the plaintiff, when he shall take sufficient discharge from A. and B. of the payment of legacies; and the defendant pleads no sufficient discharge was taken from them. The plaintiff replyeth that he paid the mony to both, and took an acquittance from one by the others consent, testifying the receipt. The defendant rejoyns he took no acquittance from both, which is ill, and therefore the plaintiff demurred: and by Jones, this is a sufficient acquittance; and the rejoynder ought to have been with special plea, or traverse of the acquittance, modo & forma, & protestando he did not pay, is not sufficient. Wild for the defendant, This is a condition of a bond, and therefore must be such an acquittance that may discharge against both in fact, and not in law only, to which the Court inclined, in regard this is but evidence; and if it were under seal, yet a discharge by one legatee is no discharge against the other. Judgment for the defendant.

24.

Trials.

Nota pro regula, in Michaelmas and Easter term, they never plead to try the same term on cepi corpus, but contrary on habeas corpus; but in neither they cannot plead farther then to enter in Hillary or Trinity, by Livesey Secondary, and the clerks, in a case where Binks was the attorny.

25. GARRET *against* WEEDEN. In Debt, Fitz. 92.

Arbitrement.

In debt on bond, the defendant pleads it was for performance of an award, & nullum fecerunt arbitrium. Jones (on Mich. 15 Car. 1, *Caps* against *Penny*, award adjudged naught in B. R. for not saying ready to be delivered by the time, contrary to 1 Cr. 541) conceived the award set forth in the plaintiffs replication, to which the defendant hath demurred, is naught, because the submission is so, as it be ready to be delivered to the parties by a day; and the plaintiff saith it was made ready to be delivered to the defendant only, which, per Curiam, is well enough; and the rather because it was farther said, or to either of the parties requiring the same. 2. The award was to pay mony by a day, and the interest which is or shall be due, without any day certain, which, per Curiam, is well enough. And for the other exception, it

cannot be intended but that it was ready to be delivered to the [740] plaintiff, because he hath brought his action upon it. Judgment for the plaintiff. So had it not been said they were ready.

26. KEYS *against* BREDON. *Ante.*

Ejectment.

The Court conceived a release of errors obtained of the casual ejector by the lessor, being but fictitious, is void; and although non est factum were the issue joyned, the Court set it aside, and made the parties accordingly to try the right by a time, or assign errors, or else the trial may proceed: and the Court ordered a rule that no such release be accepted, without leave of the Court.

27. THE KING *against* THE CITY OF NORWICH AND DIXE. *Wednesday, June* 15.

Peace. Endictment, Fitz. 1.

The Court on view of presidents, that conviction by justice on view might be removed hither by certiorari, and quashed, conceived that a fine set by an order of session on the grand jury, may be hither removed by certiorari, but not by writ sent to remove all orders made at sessions betwixt the King and the party indicted, but must be specially betwixt the King and the grand jury by particular name especially, because the retorn is but by way of recital of what was done, and no order retorned; also the retorn is in English, wherefore the Court would have fined the clerk of the peace, but that it was done by advice of counsel there: but by Keeling, No alias certiorari can be granted for default in the first retorn; the offence was for not coming to church, and the jury would not find the bill, unless it were proved that the party was at no other church: but, per Curiam, this was an offence, and such negatives is needless: nor, by Windham, is it necessary to swear the party was not at his parish church, but that on diligent search he could not see him there, and that's sufficient to put the affirmative to be proved by the party indicted, which the Court also agreed; and this being but an accusation, the jury ought to follow the direction of the Court; as if one be kill'd, & constat de persona that did it, if they find it manslaughter only, they are finable, and ought to find it murder; but whether this order might, (as Pasch. 9 Car. per Curiam, and the case of Alcock) be amended here, the Court were divided; also whether by writ, or alledging diminution. Adjornatur.

[741] 28. THE KING AND WILLIAMS *against* THE INHABITANTS OF UPWOOD, &C. *Ante. Thursday, June* 16.

Common.

Baldwin for the plaintiff, The last trial is but of favor to inform the Court, and the judgment on the distringas is perfect before: also the last is not given to the plaintiff alone, qui sequitur tam quam, but its also given to Sir Tho. Fanshaw, and he 2 Inst. 477, 8 Car. 1, B. R. the case of *Gibbon* 1 Cr. 281, was long argued; and held, that after distringas once awarded, its too late for the party to indict the parties for any offence contrà formam statuti, or to plead, but the vills shall answer: so on the Statute of Winchester, the words being quod respondeat, is intended by way of action, and not by judicial writ, as here; which is rather a commission to the sheriff then proces; and hereupon the writ of enquiry is awarded, on which, if the vills do not plead, they come too late at the second distringas which hath fi. facias in it. Twisden knew no difference betwixt the first and second distringas, especially if the second have no fi. facias. Keeling said, that it was Noye's argument on this statute, but yet the party was, contrary thereto, admitted to plead in that case; as well where the distringas conteins fi. facias as on the retorn quæ damna, which is judicial, and the retorn of issues on the vills, upon the other part of the writ of distringas, is the proces: but after this, on the distringas to repair, and issue taken, that it was not done noctanter, the last jury cannot assess damages; and if the plaintiff will release

them, he shall have his execution on the first judgment. Windham held, as in *Malleries case* in the Star-Chamber, the party may have action upon the statute for the damages found, but having taken this course chalked out by this statute, it would be perillous, should the defendants have no remedy against the first dammages found by enquiry, if excessive. Hyde, The former excessive dammages is now admitted, but the defendant might have confessed it was done noctanter, and taken that by protestando; and for plea to say the plaintiff hath not susteined any damages, which the Court agreed, præter Windham, who conceived the damages but consequential, and not to be pleaded to; and the action upon the **[742]** statute is purposely to assess the damages by jury; but per Curiam, This is meant where the action is brought before any enquisition. Judgment for the plaintiff, nisi.

29. SEURL *against* TAYLOR.

Rent.

On avowry by bailiff of the L. Anglesey for rent-charge, judgment was had by the defendant, and now my lord desired to try the right, which the Court would not grant, without bringing the money into Court recovered, and agreed to bring no second deliverance to procrastinate the cause by withernam, &c. Adjornatur.

30. THE KING *against* RING. *Ante.*

Pardon.

Winnington for the defendant, conceived the coronation pardon sued after the conviction, mentioning all attainders and convictions of any felonies, ac etiam all, forgeries, shall relate to this, as well as if it had been particularly named, being to be expounded beneficially for the offenders, as aunciently 1 Ed. 3, 17, pl. 5. 11 H. 4, 16 & 48. But at this day, 9 Ed. 4, 48, the conviction must be taken notice of, as 6 Co. the case of pardons, so as that the King may be truly informed: so in the case of *Goldenprentice* in this Court, on the like pardon, the Court allowed it, Mich. 13 Car. 2, after conviction: but, per Curiam, This exception was not then stird, the pardon was of all razures, &c. and all pains of death and judgments thereon had, but no licet convictus in this paragraph of forgery, which, per Curiam, makes the case the stronger against the defendant. Also pardon, in case of death, is allowable at any time, but not so of any other offence, to which this pardon being teste before, ought to be pleaded: and, per Curiam, The defendant cometh now too late to plead it on assignment of error, and after examination thereof. Adjornatur.

[743] 31. LONGVILLS CASE. In Dower Br. 73.

Dower.

Newdigate moved for amendment of the assignment of dower, being under value, and on refusal of an equal division proferred to him by the dowager, with liberty to chuse which two parts he would for the heir, which the Court ordered, and committed the sheriff for taking 60l. pound of the Lady Longvill to execute his writ of execution, and information against him.

32. EXECUTORS OF LOWR.

Executor.

In debt on bond, all are named in the declaration, and but only one arrested, and for him Hall appears as attorny, and strikes out the names of the other, because he had no authority for them, and after pleads in abatement, that there are other executors not named in the writ, which the Court set aside, as frivolous, and only to put off trial, and ordered a common bail to be filed for all, and pleaded in chief: but, by Twisden, the statute of 9 Ed. 3, cap. 3, extends not to executors that come in by arrest upon latitat, quod non fuit negatum.

33. KEBLE AND MILLER *against* SAMBROKE. *Friday, June* 17.

Church.

The plaintiffs prayed a prohibition, being excommunicated in suit by the defendants, who were chosen by a select vestry, and sued in the Arches for the keyes of the church, and that they cease the exercise of their office of churchwarden, to which by custom they were elect by the majority of the parish of Anne Black-Friers, which hath been aunciently a parish-church, and the parson was not interessed in it; which the Court refused, because this should have been pleaded, which it was; but however, they would grant none, præter Keeling, who conceived they cannot sue in the Spiritual Court for the keyes, or any goods of the church.

[744] 34. THE KING AND BELL *against* RANT. *Ante.*

Usury.

In information on the Statute of Usury, Jones excepted in an arrest of judgment, because an agreement corruptè to take use for the time past, is not within the statute, which is for giving day or forbearance which cannot be, the time being past. Twisden and Windham, The statute is not for the forbearing, but for the forbearance, which may as well refer to time past, as future: also by Hyde, It being said corruptè aggreatum, the dating of the bond will not avoid it, especially the information being grounded on the receipt, not on the contract. But by Jones, This makes void the security, the other hath only penalty annexed: also the usurer hath no means to compel the payment of any use. Adjornatur.

35. LEADER *against* CHESSELIN. Siderf. 212, pl. 11.

Bail.

In action upon the case by bail in the Pallace Court for J. S. at the defendants suit, on agreement to assign judgment there, had by the defendant, if the plaintiff would pay 3l. and give bond for another sum: Paulet moved in arrest of judgment, this being a void consideration, 3 Cr. 551, *Dr. Barrows case*, and maintenance, and the judgment not assignable to a stranger. Sed Curia contrà; This is an assignment to satisfie a just debt: also the consideration to assign debt, judgment, and all the profit and advantage I may have by it, is good enough. 2. The colloquium was of recovery of judgment, with costs and damages, with increase tax and, which, per Curiam, is well enough, for this follows the judgment of course: judgment for the plaintiff, nisi, although this was a judgment by nil dicit, which is but an award.

36. THE KING *against* CROSS AND DABBIN, CONSTABLES OF AXMINSTER. *Ante.*

In Coron Fitzh. 407, seu 405. Siderf. 204.

Siderfin excepted to enquisition super visum corporis, which appears not to be taken by the four next vills, but only by those of Axminster. 2. Its not said where Brocas per infortunium dyed. 3. Its not said that the bell and bell-rope prædict, were those that kill'd him, and as to the matter, admitting these exceptions void; 1. A bell fixed, fal-**[745]**-ling upon any man, is no deodand, Indictment F. 27, but only as are prophane, and occasion mens death: this appears by 4 Ed. 1, de Officio Coronatoris; banni, in the old roll of Magna Carta, signifying things accused; which bells being instituted for pious uses in the church, cannot be 11 H. 4, 12, by Hulls: as for bells unfixed, there is but one authority, and that is Coron F. 405, the former words whereof are but the words of the enquisition, not of the Court: also although it be not found that the bell in our case was fixed, yet it must be necessarily so intended, because its found it was ringing, and B. taken by the rope, and so killed; and being fixed, its part of the church, as a door is of a house, which being on the

hinges is no deodand by impulse of wind killing any man, Coron F. 389, is the words of the enquisition also, for then the coroner might enquire how the party fell, from house or mill, or ship, &c. Forfeiture F. 20, the Court conceived the parish a sufficient vill, and there need no retorn of it, although it must be taken by the four next justices, and so shall be now intended. Windham doubted, 3 Inst. 57, the bell being intended to be fixed, its no deodand, no more then door or wheel, which the Court agreed: so it was resolved of the grinder of a windmill, in the case of Hyde, heretofore Chief Justice, and so of the fane or sails, or stone of a mill, all which go to make such a compositum, although it be only laid on, and to be taken asunder; and they denied the case of F. Coron. 389. Also, by Keeling, If one fall upon a piece of timber by occasion of it, its a deodand, which the rest denied. The Court favors not deodands. Adjornatur.

37. WHEATLY *against* THOMAS. *Ante. Saturday, June* 18.

Estates.

Keeling, Justice, The lessor of the plaintiff is Francis, one of the four daughters of Sir William, son of George, the son of William, the son of old George Lord Cobham, who, with the others (that are found to be yet living) were restored to blood only by the Act of 7 Jac. but there is no title found for the defendant, but primer possession, which is sufficient, unless the plaintiff have title, which she makes as heir in general tail of the body of William, son of George Lord Cobham, but is bar'd by attainder of Henry Lord Cobham, and George, all the remainders being vested by the Act 3 Jac. 1, and the will, the Act of 7 Jac. is out of **[746]** the case, and neither makes nor hurts them; and its clear on the limitation of the will alone: all which estates are vested by the Act of 3 Jac. in the Crown, and in compassion to that family, there is a grant of the lands in question to several sons of George, and their issue male; and after a clause, on which the question is grounded, that after such estates spent, to be to and for such uses, estates and purposes as are limited in and by the will, whereby they intend not to create any new estates, but is all one as if they had said that the lands shall go to the said five persons, but after that they would limit no farther, but leave the other estates, as by the will, without any farther Act, its but expressio eorum quæ tacite insunt, and only declaratory; and the clauses of perpetuity in the Act added to the five estates, shew the intent of it to be no farther; for it ordains that no Act done shall hinder any estate to go to the said persons, as limited by the will. 2. Admit the Act respects this remainder, yet its void, as remainder to heir of person attainted, who is not capable as purchasor, and so it cannot be derived to the lessor of the plaintiff, although there may be a special heir in some cases since 26 H. 8, of persons attainted; but if this be a new estate, its forfeited, as vested in Henry, who was now living, notwithstanding his attainder: had the remainder been to the heirs of William, 3 Cr. *Douties case*, and *Sheffields case* Hub. it had been good to the plaintiff, had Henry been dead; so 8 Co. *Digbies case* for 26 H. 8 only restrains Westm. 2 to such estates whereof the person attainted was seised at the time of attainder, or at any time after. Also I agree the case of Lit. good law, but the grounds thereof are fallible; for the King, by such grant, shall not enfranchise a villain, no more then he shall make corporation by grant probis hominibus: also any Act of Parliament is but as conveyance, which can never enure, as a restitution in blood, or a naturalization: also this disability could not be foreseen by the Act, because Henry was not at the time of the will born; so is like remainder limited to the heir attaint of J. S. who is person able, as William is here, without taking notice whom he should be which vests in J. S. as 10 Co. 77, and shall go to the Crown, notwithstanding J. S. hath other sons.

2. Windham conceived the point shortly on the Act of Parliament, whether the Acts do remove the attainder which stands in the way of the lessors of the plaintiff, who are agreed heirs by the will; and the Acts do confirm the attainder as to all lands forfeited, but after by proviso, as to the **[747]** manor in question of Cooling is qualified by limitations to several in other manner than by the will, and after by a general clause, enacts, that after the limitations

specially recited, shall go according to the will, which sets afoot the will again as to all persons claiming by it, as if an Act should confirm the attainder of J. S. as to the forfeiture of all his lands, except the manor of A. in which case the attainder works not at all on A. and this is the greatest elegancie of expression, being a clause opposed to the former, there have been many presidents hereof in Co. 3 Inst. without any restoring in blood, because it's in the same Act; and the words notwithstanding this Act, &c.) in this case are needless. Also it was never the mind to set up all the estates in the will, but only quoad this manor, which was not toucht by the attainder; for the words had been idle, had they intended only to set up the will generally, and not in opposition to the former words, which specified what should be forfeited, 3 Inst. 241. Acts of mercy are most favoured against the Kings prerogative: also a gift by Parliament to the heir of J. S. who is person attainted, is good, and must be intended such person as might have been his heir, being only a description of the person, à fortiori in our case, where the attainder is only quoad hoc, and so conceived judgment ought to be for the plaintiff.

3. Twisden ad idem, Henry had only an estate tail vested in him, and a remainder as general heir of the body of William, both which are forfeited by his attainder, but none of the other remainders to the other sons, Pl. Com. 556, *Walsinghams case*, are touched by the attainder, but cannot take till the others spent: but the Act of 3 Jac. by the words, doth remove the attainder, as well as if the persons had been particularly named, as 6 Co. 18. 2 Cr. 39, 54, and make the persons in by the Act, not by the will; and is all one as if the Act had said the estates should be enjoyed by such persons as are named in the will; also the estates are limited of this manor for such estates tail which were in the will, which were vested only in Henry, and so it's all one as if it had been named, in which case the Act of Parliament may enable him, although private conveyance cannot, nor by bare gift to person attainted, would not enable him to retain: but here the Act confirms the attainder, as to all other lands, except the manor of Cooling, and so would be idle if Henry should not, as he might, yet that the heirs of William should hold and enjoy these lands according to the will: there is no difference betwixt this and the Statute of Westm. 2, which preserves the estate of the person attainted as to issue, although not as to **[748]** the person attainted: also the King by patent might have granted the estates limited by the will in omnibus, and so an Act of Parliament was needless, unless it were to preserve this manor in remainder to the heirs of William; and it appears through the Act, that as great care was taken of the remainders in the will, as of the estates forfeited, and did not leave them as things regardless, nor regard whether Henry and George were dead at the time, or not, nor was it material. Hyde Chief Justice ad idem; The only doubt that stuck with him was the attainder of Henry, who had all the estates in him, which was clearly solved by Windham. Also the will in this case is parcel of the Act of Parliament, as well as if every particular had been expressed in the Act, and the attainder doth not hinder as to these lands, because they are excepted in the Act of 3 Jac. and the law, as F. N. B. 33, supplyeth all necessary incidents to the enjoyment of those lands, 10 H. 7, 23. So by restitution by Parliament H. may have trespass against the Kings patentee for his entry, although it were by title, which is as inconsistent with the rules of law as our case: so for grantee of advowson to have quare impedit without former presentation, as 21 Ed. 4, 1 & 4. Also had the words been, that all the sons of William should take, the persons attainted shall hold, although they be not restored in blood thereby; for now, as in our case, there is no use thereof, for the attainder doth never affect these lands as it doth the rest, but intended them as a support for them, and so quoad hoc takes away their incapacities; and that this was their intent is declared by 7 Jac. Judgment for the plaintiff.

38. WIN *against* LLOYD. *Ante.*

Wales. Siderf. 213, pl. 12.

Hyde Chief Justice declared the opinion of the Court, because they were all agreed that judgment ought to be affirmed: common recoveries being common assurances,

shall be supported as far as the rules of law do allow. And here doth appear a general warrant of attorny on the record, which shall be intended now done according to commission, although another be particularly mentioned before.

[749] 39. ALCOCK *against* MANUCAPTORS OF MERRY. *Ante. Monday, June* 20.

Bail. Siderf. 213, pl. 13.

In scire facias against them on removal (of judgment had below against Merry) by writ of error, cum omnibus ea tangent. the defendants plead nul tiel record, supposing that the bail is not removed hither by this scire facias, but Hutt. 117, *Risam* against *Goodwin*, the difference is taken betwixt a certiorari which is voluntary, 2 Inst. 23 c. and a scire facias, in that case this Court will not be a means to execute their judgments; contrà when the record is judicially come in hither, which the Court agreed. And judgment for the plaintiff.

40. THE KING *against* PAULIN. *Ante.*

Poor.

Offly conceived no indictment lay on a Private Act, no more then for nusance, 3 Cr. 90, *Willoughbies case*, and this is so, like the Act, 3 Inst. 160, although the consequences thereof may be publick, for this is private, because as 4 Co. *Carter* against it concerns speciem infimam, so this statute; but the Act of Sheriffs being speciem intermediam, it was special in a generalty; and in all cases, as Dyer 27, it's the species, not the quality or number of persons that makes an Act public or private: also such Acts as concern the King in his honour, joyned with his interest, are publick; but contrà where his honour only is concerned. Also here, as 1 Leonard 323, *Green* against an action upon the case is a proper remedy, the churchwardens being to this purpose only ministerial officers. Keeling conceived clearly no indictment lyeth on a Private Act; and this Act, if it only concerned London, is so; so of an Act concerning all the cities of England, because it contains only individua under it: but this Act is a general law, and concerns the whole kingdom, and the particular provisions are but as mediums to the same end, and take not off from the generality of it: so is the Act of the same time for high-ways. The Court agreed it a general law. Judgment for the King.

[750] 41. COLLINS *against* FLETCHER.

Trades.

In debt on bond, the Court cited in the case of *Dixon* against *Williams*, judgment affirmed in an action for not finding the defendant with meat and drink, &c. to which the defendant pleads he found him, &c. till such a day, the plaintiff being his servant, departed into a foreign county, the action being laid in London, which was resolved ought to be sworn. But however, the action being transitory, the defendant shall not by any thing transitory alter the visne, but ought, as in the case at Bar, alledge that the ship was cast away, &c. at S. Mary de Arcub. in warda de Cheap, in the same county the action is brought; the condition of the bond being, that in case the ship were cast away in the voyage, and did not return, it should be void: the action was laid in London, and the defendant pleaded that she was cast away at Falmouth, which they held naught; and had the plea been local, it ought to be sworn. The Court ordered the defendant to plead this day, as he will stand to it, or judgment for the plaintiff.

42. HATTON *against* MASCUE.

Mich. 15 Car. 2, Rot. 703.

Executors.

Administration is granted to one executor during the minority of another, 5 Co. 29, and he in his own name brings a scire facias against the defendant, on recovery in scire facias had by the testator as executor of Ascue, who recovered against him, which, by Jones for the plaintiff, is good enough, and without question, which the Court agreed: so *Knights case*, 3 Leonard 278, pl. 367, if an administrator, during minority recover, the executors at full age may have scire facias thereon. Judgment for the plaintiff on demurrer of the defendant to the scire facias.

43. NICHOL *against* HACKET EXECUTOR OF WOODY.

Assets.

In debt against the defendant as executor, he pleads that there were several judgments, ultrà quod he hath nothing to satisfie. The plaintiff saith they were all paid by the said defendant, and set on foot against him by fraud and covin of the defendant, not saying the said judgments had do remain on record yet unsatisfied; to which the defendant demurrs: the Court ordered to stay, in order to be amended.

[751] 44. ARMIN *against* BOWS.

Covenant.

In an action of covenant on demise of Freestone Quarry to the defendant, the defendant covenants not to digg in any other part of the common, and now breach being assigned in digging, the defendant pleads non locavit the quarry prædict. to which the plaintiff demurs, the demise being by indenture, and the covenant collateral: the Court agreed the plea frivolous. Judgment for the plaintiff, nisi.

45. JUSTICE TYREL *against* HATCH. *Tuesday, June* 21.

Peace.

He prayed good-behaviour against the defendant, Vicar of D. for praying in his pulpit for Sir William Herbert, who prosecuted a petition for a pension to the vicar from the church of Lincoln, to which the plaintiff was tenant, and was over-ruled by the delegates of the council-board, yet the vicar preacht up his cause, and said, Devourers of church lands never thrived to the third generation, which the Court conceived a high scandal, and bound him to his good behaviour.

46. THE KING *against* BUCKENHAM.

In Coron. Fitzh. 282, 280. See 1 Cr. 373, pl. 442, *Sir William Wallers case.* 12 Co. 71, Oldfield. Siderf. 211, pl. 8, M. 22 Ed. 3, 13, pl. 26.

On information against him for striking one Hurlestone in Westminster-Hall, he was convicted, and the Court imprisoned him during life, that he forfeit his lands during life, and all his goods, and have his right hand strook off in the pallace-yard. Wild, the Kings Serjeant, as amicus Curiæ, prayed for the King, that the prosecutor might be bound to good behaviour for his provocation; which the Court would have done, but that it did not appear on the evidence, but ordered affidavits to be made thereon.

[752] 47. SNOW *against* CUTLER. *Ante.* In Devise, Br. 1.

Tr. 15 Car. 2, Rot. 1704.

Ejectment.

In ejectment at Bar, on the lease of Sir Henry Cholmly, of lands, by the name of moiety, of which baron & feme were seised of copihold to them, and his heirs; and so seised, he surrendred to the use of William, and devised my lands and houses in H. which was my wives, and now is for her life, and then to my heirs; I give and bequeath all my right, title, and interest, to the heirs of the body of my wife, if he or they shall live to be fourteen years of age: but for want of such heirs, then unto William, Jacob, and his heirs for ever; she after the devisors death hath issue, which at her death is fourteen.

1. Paulet for the plaintiff made the only question, whither this were a good executory devise to the lessor of the plaintiff, who is found heir-male of the feme, and he conceived it was, the intent being the heir should enjoy it, during the life of the wife; and that if she left issue above fourteen at her death, it should be executed to such, else not, as Tr. 51 Rot. 1350, *Jay* against *Jay*, B. R. especially because notice is taken of them, as the wives auncient inheritance, and as the meritorious cause of his preferring her heirs of her body before Jacob his own kinsman. 2. The finding the lessor of the plaintiff under fourteen at the death of the wife, but that he lived after fourteen, doth not hinder but that the devise may be executed to him, for to such intent it had been more proper to devise to his heirs, &c. when he should come to fourteen, for this is but a description, and no such contingent: also the devise is not to the issue, but to the heirs of the wife, which is a name of description only, and all one as if it had been to her heir after her decease; in which case clearly the heir should have took notwithstanding this, if in C. B. 1655, *Fermer* against *Fasset*, devise, that if child (with which feme was inseint) should be born, he shall have a share with the rest, adjudged as good a devise as to infant in ventre sa mere? so in *Bate* against *Amhurst*, in C. B. Mich. 15 Car. 2, devise by Amhurst to the heirs of the body of J. S. (taking special notice that J. S. had no heirs at the time) is good to after born issue. 3. As to the recovery suffered by the wife in the court of the mannor, as *Blunket* against *Holmes*, it doth not hurt this executory devise, being suffered before the heir come to fourteen years of age; so *Mannings case*, Co.

[753] 2. Scrogs for the defendant, that (Dy. 304 is not warranted by the roll) this is a devise to such as were not in being, but on contingent; also there is another contingent to make the devise effectual, viz. that he live to fourteen: an executory devise hath always a dependence on some particular estate, but this hath none, but is issuant immediately out of the reversion, and to pass in præsenti. Also had she had two daughters, one above another under fourteen, this devise could never have taken effect, no more here. Keeling held the devise void, there being no devisee, as *Archers case*, devise to A. for life, remainder to the heirs of J. S. is destroyed by feoffment made by A. Also this devise of reversions or remainder, as *Counden* against *Clerk*, Hub. must have some particular estate precedent to any contingent, and to some person by 32 H. 8. to which the Court inclined: and as to the recovery it's doubtful. Adjornatur.

48. LOCKE *against* ETHERINGTON. *Ante.*

Hill. 15 Car. 2, Rot. 684.

Pardon.

The Court on conference with the Judges and Barons of the Exchequer, conceived that this debt is pardoned, as well in the hands of the debtor as of felo de se, because the King pardons all he can or may pardon; and the constant practice of the Exchequer is to discharge it, being a thing in action, and as such vested in the Crown, and so discharged by general words of release; but goods vested must be specially regranted; but persons utlawed, or manslayers, being pardoned, are made able again to sue their debtors. Adjornatur 157, pl. 60.

49. FITZHERBERT *against* HIND.

Arbitrement.

A ward to pay mony in or at the house of J. S. The plaintiff sayeth it was not paid at the house, which, per Curiam, is well enough; and if it were paid in the house, it may be given in evidence on issue that it was paid at, &c. Judgment for the plaintiff in debt on bond.

[754] 50. PRIDE *against* ATWICK. *Ante.*

Devise.

In ejectment, the Court were of opinion for the plaintiff, that the lands demised for five years to the wife, is to be divided between Daniel and John, as survivors, the survivor whereof is the defendant, John having only for life, it being not found that W. had no issue, it cannot go to his issue, and on devise that on the death of any of his sons within five years (to be divided) without saying what should be divided, must be intended the lands to be divided. Adjornatur.

51. DUDLY *against* COLE.

Arbitrement, Br. 39.

In an action for taylors work, the defendant pleaded an award that if the plaintiff made the work, the defendant should pay, which, per Curiam, being uncompulsory is void, and although it were ouster, that the parties should give mutually general releases, which of it self is sufficient, and independent, yet per Curiam, it's ill, for in this case the whole award must be good; but if in action on an award any part be good, especially if that on which breach is assigned be so, it's sufficient. Judgment for the plaintiff, nisi.

52. NICHOL *against* HACKET. *Ante.*

Amendment.

The Court ordered an amendment of the plea, the paper book being right.

53. RUTTER *against* HEBDEN AND WILLIAMS. *Wednesday, June* 22.

Proof.

Keeling conceived it no evidence to swear what J. S. (not concerned, but as witness in the suit) said, because J. S. was not on his oath when he said it: sed Curia contrà, that it's good evidence; and on denial in another trial in Court by J. S. the credit is left to the jury, in information for tampering with jury.

[755] 54. KEYES *against* BREDON. *Ante.*

Ejectment.

The issue that H. that was casual ejector, and gave release of errors, was not the same person, being tried the Court would not suffer the defendant to assign error, but conceived he was barred now.

55. HOLE *against* ATHERTON MANUCAPTORS OF WEEKS.

Bail.

The bail of Hicks at the suit of Hole, bring error tam in redditione judicij against the principal, as in adjudicatione executionis by fieri facias against the bail in Inferiour Court, by which all was removed: and now in scire facias against the bail, he pleads

nul tiel record: and Windham conceived 3 Cr. *Blodwells case*, that the execution alone cannot be removed without the judgment on which it depends; and although no error can by him be assigned on it, which the Court agreed; yet by Jones, no scire facias lyeth against the bail without the judgment be had against them: but, per Curiam, the writ of error, si judicium redditum sit, may be intended the judgment against the *principal, which the bail may thereby remove*, if they be in danger by an award of execution: but for the consequence adjornatur.

56. SNOW *against* COOLY.

Days.

The Court, ex motione Sir Jeoffry Palmer, ordered that a new declaration delivered on the essoin-day, should be sufficient (the old one being delivered before) but the lessee dying, the name was thus changed, there being sufficient notice, and this the act of God, which shall not prejudice, as by Twisden, the Court will allow plea of auncient demean the same term, contrary to their ordinary rules in ejectment.

57. THE KING *against* REYNOR. *Thursday, June 23.*

Peace. Siderf. 214, pl. 14.

He was indicted of battery, and judgment against him at the sessions in Middlesex, and now assigns error in the judgment, which was to pay A. 100l. fine, to be taken, and to be of good behaviour towards the King, which being without time is ill, by Jones, which Keeling agreed; contrà **[756]** per Curiam: also if it be not said by whom, it shall be intended by the Court; but the judgment being compleat, & ulterius ordinatum, that he find sureties, &c. it's well enough, and this no part thereof. Judgment affirmed.

58. THE KING *against* RING. *Ante.*

Forgery.

The indictment being removed by error, Lindly waived the pardon, and assigned that the deed supposed is a lease to Joseph, habendum to John, with a release grant &c. to Joseph the defendant, dated in Nov. 1651, and the enrollment, which was supposed to be forged, was in April 1652, but it's acknowledged eleven months after, and so the estate of Keymer the bargainee is not in jeopardy, for the acknowledgment is the ground of the enrollment: the Court conceived the pardon ill, but as to the errors adjornatur.

59. AUDLY *against* BERRY. *Ante.* Debt, Br. 100.

Covenant.

Twisden held the plea ill, the articles being to convey by 25 Dec. following, and the defendant to pay on perfecting assurances 300l. and 300l. at a day certain after, and now in covenant on these articles, the defendant pleads the plaintiff hath not, at time of covenant, or after, any right or estate, to which the plaintiff demurreth; and he may; for although the plaintiff hath no estate, yet if he be required to convey, and doth not then do it by the time, the covenant is broken, for the estate of the covenantor may be in trust, & that need not be defeated till the assurance be required by the other side, whose counsel is to advise it; and the saying licet he was ready at all times to assure, viz. to the first of October, 12 Car. 2, whereas the articles are dated in Octob. 1659, to convey by 25 Dec. following, is well enough, for the day in this case is immaterial, and the breach assigned by non-payment 1 Oct. prædict. is not material, although issue were thereupon, the defendant having committed the first fault by not requiring an assurance, and so his plea, that the plaintiff hath no estate, is idle: sed Curia contrà, that the plea is good; but they agree the covenantor may enable him-

self by the time limited, but yet he must, as 5 Co. 21, be enabled by the day, else the counsel can never advise any conveyance, 1 Inst. also the manifest intent of the parties was not to pay mony but on assurance. Adjornatur.

[757] 60. LOCKE *against* ETHERINGTON. *Ante* 753, pl. 48.

Pardon.

In scire facias against the defendant to have execution of judgment of 2000l. recovered against him by Tooms felo de se, found by enquisition and so actually vested in the King. The defendant pleads 12 Car. 2, 1, § 5 & 7, of the General Pardon and Oblivion; to which the plaintiff demurs, the defendant having not averr'd himself a subject at the time of the passing of the Act, but only that he is modo (which must be intended at the time of the plea only) like 2 Cr. 215, pl. 12, and 1 R. 3, cap. 4 H. 7, 8. 6 H. 7, 6. 16 H. 7, 2. Pl. Com. 376, where the disability is, in that part of the Act which the defendant pleads, he must shew himself able, 29 Eliz. *Zouch* against *Bamfield* C. B. 1 Leond. 24, pl. 102. 32 H. 8, of leases by tenant in tail, it need not be averr'd he were of full age, which is for the particular reason of the purview; but where the disability is in any other part of the Act, its well enough, and the defendant need not shew his ability: as to the matter, it could not be the intent of the Act that this debt should be pardoned, the general words, all judgments being intended of the former particulars, although they should have been prosecuted to judgment; for when Acts begin with special words, as 2 Co. Archbishop of Canterbury, and concluded with general words, they shall be something restrained, as well as when it begins with general words, and concludes with special words: also there are no words in the Act, of debts, bonds or recognizances. Also there is another clause, that all bonds, recognizances for any debts aforesaid, shall be pardoned, which implieth that no other shall be so: and § 7, which is as large as this clause, and declaratory of it, doth shew the intent of the Parliament: and that this debt is not within this clause, is apparent: also it would be against the nature of the pardon, which was intended only for such persons as had made themselves liable to the King, and not to take away the Kings power of making restitution to them: also every utlawed person, would by such pardon, be discharged from all their debts owing them; and this is not like the Kings proper debt; or debts assigned, especially if for any of the causes mentioned in § 5. The case of St. George Binion will rather farther us, for he being the Kings receiver, and a debt of his debtor seised into the Kings hands in aid, and ruled that this was not pardoned. Winnington for the defendant, that this § 7 doth refer to the first, all offences and debts not excepted: the [758] Act intended not to release the debt of any private person, but only so much as was in the King: also these words of release, 1 Co. 54 b. shall operate as large as other release, and not only to such things as the word pardon extends to remit: the case of *Sir G. B. The King* against *Tourner*, the Court conceived that very debt had been pardoned, had it not been for the particular exception of it in the Act. 2. The plaintiff is not well entitled by grant of omnia jura, credita, bona & catalla, as for debita judgment, without special naming, will not pass. Twisden on *Caudryes case* conceived they should, had it been general, be intended natural born subjects: Windham agreed in a special verdict, but in pleading, the defendant ought to shew he is subject: Keeling, Subject shall be intended natus, and not factus, and so the plea good; and the matter of utlary is not like this, for by pardon of utlary, the party is restored in integrum, and enabled to sue, which felo de se cannot be. Hyde held the pleading ill, being modo subditus; so Twisden and Windham. Adjornatur.

61. HAWARD *against* DRAYDON.

Error.

The Court contrà Twisden, conceived that error lieth in the Eschequer Chamber on judgment in scire facias against executors, if it be assigned tam in redditione judicij against the principal, as in adjudicatione executionis against the bail; and so by Jones, it hath been resolved, not in adjudicatione executionis only.

62. BOIS *against* BOIS. *Ante.*

Slander.

Thou art a whore, and I will throw thee out of thy living, per quod she was likely to lose her widows estate in a mannor, whereof the defendant knew the custom, per Curiam, is actionable, the words being coupled to the intent; judgment for the plaintiff: but it appearing the words were spoken at several times; at one, that she was a whore, and a brazenfaced whore only; and after, the words above alledged, and intire damages, which, per Curiam, is ill, whore alone being not actionable. Adjornatur.

[759] 63. THE KING *against* BOWERS.

Alien.

Coleman moved in arrest of judgment on indictment against alien, for using the trade of a goldsmith, removed hither from the Old Baily, by certiorari; 1. Because its only said contra formam statuti, but sheweth not whither as master or servant. Adjornatur.

64. HANSON *against* NOKE.

Bail.

After execution in Pallace Court in sc. fa. awarded on 2 nichils against bail, he brings error of the judgment against the principal as in adjudicatione executionis against him, the errors assigned was that there was no capias, which, by Twisden, is ill, and ought to come in by plea: and the assignment of error in the principal judgment is but surplusage, Hyde and Keeling held it well of capias after judgment, for without it, there is no warrant of scire facias. Windham and the clerks conceived it only proces, and never certified out of Inferior Court or Superior, to which all agreed; and that the bail should have pleaded below, before execution awarded against him. Judgment affirmed.

65. CHARLTON *against* FINE. Amendment Br. 7.

Payment.

In debt on bond, condition to pay money at several days, the defendant pleaded particular payments according to the condition; the plaintiff replieth, that 1 Cr. 164 Dunscomb, he did not pay at such a day certain, & hoc paratus est verificare: to which Williams demurred generally; the Court agreed the replication ill, and ought to be & de hoc ponit se super patriam; but on performance generally pleaded, the plaintiff may reply with particular breach, & hoc paratus, &c. and leave the issue to the defendant: also Twisden agreed this is substance, and need not be specially demurred to; sed Curia contrà; want of averment, where its necessary, is substance; but contrà of a male conclusion, as here hoc paratus for de hoc ponit se super patriam. Adjornatur.

[760] 66. WOODCOT *against* COLE. In Condition, Br. 129.

Condition.

In debt on bond, condition to give an accompt of all moneys gathered by virtue of a brief granted to the Mayor and Jurats of Graves Inn: on oyer demanded, the defendant pleaded he gave accompt of all such moneys. The plaintiff replyeth, that he hath received several sums, for which he hath given no accompt: to which the defendant demurreth, because there is no particular sum certain charged on the defendant, which by Jones for the plaintiff, is well enough, the breach being not assigned in non-payment, but in not accompting on particular request, which by the bond he is to do, whether he doth receive any mony, or not. Windham held the

barr naught, as 6 H. 7, 6, by Wood, because the defendant ought to have specified what he had received of all, which he hath accompted; or else, as 6 Ed. 4, 1, pl. 4, to say he hath received nothing; and this being ill, the defendant having demurred to the plaintiffs replication, judgment ought to be for the plaintiff, which Hyde agreed, so Keeling; Twisden contrà, either way is well enough, and the plaintiff ought to assign sufficient breach, that the defendant hath received so much of J. S. for which he hath not accompted for; thus the receipts in every county in England will come in issue; but, per Curiam, the certainty ought to be made by the defendant. Judgment for the plaintiff, nisi.

67. PRICE *against* HILL.

Lieu.

The Court now conceived that quod cum indebitatus infrà jurisdict. Curiæ pro mercimonijs prius venditis (not saying where) is ill out of Inferiour Court at Wallingford, because in such Courts the jury should enquire of the contract, which they cannot do if forreign; and the Court will not intend the contrary, this being assigned for error. Judgment reverst.

[761] 68. MIDDLETON *against* MANUCAPTORS OF SYLVESTER, &C.

Bail. Siderf. 216.

In scire facias the defendant Tibbot pleads, that before the issuing forth of any writ of scire facias the principal was committed to the marshal in exonerat. manucapt. Chamberlain & T. & hoc paratus est verificare, to which the plaintiff demurreth, because it's not said prout patet per recordum: sed per Curiam, it's well enough, none being to be discharged by committitur entred in the marshals book; nor shall the trial be by the record only, although that be evidence: but by Twisden, There is never any record made, unless he be committed in exoneratione of the bail; and all the presidents are, that this is triable by the record: so had it been reddidit se, which is the most usual entry, the Court agreed the reddidit se triable by record, but committitur may be by any Judge in his chamber (as this was) which is only fact and triable per pais. Adjornatur.

69. THACKER *against* HOW. Siderf. 216, pl. 20.

Issue.

In trespass, the defendant pleads quoad vi & armis non culp. and saith not, & de hoc ponit se super patriam, which per Curiam is but form, and on general demurrer good enough. Judgment for the defendant. *Post* 764, pl. 77.

70. WADSWORTH *against* GUY.

Trades. Siderf. 216, pl. 21.

In an action of covenant by an apprentice against the widow of his master, which was to instruct him, and cause him to be instructed in the art of a sadler, and find him meat and drink for and during the said term of seven years: the breach was assigned in turning him away contrary to his will, & sic conventionem fregit: to which the defendant demurred generally; for although the defendants executors be bound to find meat and drink, yet the breach must be assigned in the default hereof, and not thus generally, & sic, &c. Hyde conceived this general covenant to instruct, is not gone by his death, although there be no particular custom, as in London, especially since 5 Eliz. to which the Court inclined. Adjornatur.

[762] 71. PAGE *against* CLERKE.

Slander.

P. is one of the grand traitors in Leycestershire, and proclaimed the King a traytor, spoken at several times: the defendant pleads not-guilty to the first part, and to the last justifieth. The plaintiff sheweth it to be done by colour of the pretensed powers, and sheweth the Act of Oblivion; to which the defendant demurreth, on Hub. 294, *Searls case*; and per Curiam, the pardon taketh away only the scandal but not the fact, but that still remains, as to say H. (after pardon) stole any thing, or that Richard Cromwell took on him the protectorship which is but a relation of fact; præter Keeling, who conceived this a reproach and actionable, to say H. was a thief, Hub. *Cuddington* against *Wilkins* 82, is not actionable; but if it be, although there be 10l. given by the Act, that takes not away remedy by common law. Adjornatur.

72. WOODLY HAYDON. *Ante.*

Assets.

The keeping the judgments on foot by fraud, must be traverst, and whither they be paid or not is but evidence: and although it be said paid to the defendant, against whom the judgment (*Brandon* against *Haidon*) was, which is insensible; yet payment being not necessary, its well enough.

73. SMALBROOK *against* SLADER. *Monday, June* 27.

Forgery.

Wild prayed a prohibition on suggestion, that libel was for forging letters of ordination and putting the bishops seal, which, by Hyde is meer spiritual. 2. It was for perjury, which being but incident questions, and the matter spiritual, by Windham its well enough, but the principal article being that he was laicus, and on that he is deprived, and so the other offences are not enquirable: also by Windham, The Ordinary may deprive the clerk for any excess whatsoever, be it temporal or spiritual, as they might degrade for murder, although they cannot proceed after pardon, as Hub. and the sentence here is grounded only upon the being lay, and takes no notice of other articles. Twisden and Keeling, conceived that were the libel principally on the forgery, if they give any punish-**[763]**-ment beside deprivation, prohibition lieth; but here per Curiam it was denied.

74. CHAMBERS *against* HUNTER.

Covenant.

Jones prayed a repleader in an action of covenant for non-payment of freight: the defendant pleaded another covenant in barr, that the ship was to be brought as near the City of London as could be, on which the plaintiff took issue, and verdict for the defendant, in which case the plea being insufficient, the defendant can never have judgment, as payment pleaded to single bill found for the defendant, 5 Co. 43, Nichols, Det. Br. 8, and in this case the fraight is to be paid on discharge of the ship, and another covenant to discharge as near as could be, &c. which are collateral covenants. The Court agreed the difference. Sed adjornatur.

75. COLE *against* SUTTON. *Ante.*

Lieu.

In transitory action of covenant, the defendant pleaded a foreign plea, that the ship was cast away at Falmouth, to which (being done to put off a trial, and not sworn) the plaintiff demurs specially, and the defendant joynd in demurrer, on *Dixons case.*

Keeling conceived, that unless there be special local cause, the defendant cannot alter the place where the action is laid; but it being only a record, the Court ordered it to be read that the defendant might not change his plea, but that it might be peremptory. Adjornatur.

76.

Ordinary.

Powis prayed a prohibition to the Bishop of York, on suggestion that title of treasurership of D. & Ch. which the King had granted to Sir H. Bellasis a lay-hand, and to which a peculiar jurisdiction was annexed, which the Court denied, because lay-hand, without Act of Parliament, is not capable of such office; but however, the peculiar being jurisdiction spiritual, is appendant to the office, not to the corporations or demean; but for the difficulty day was given to shew cause against prohibition. Adjornatur.

[764] 77. THACKER *against* HOW. *Ante* 761, pl. 69.

Nonsuit.

Williams prayed leave to discontinue, which the Court refused, the actions being frivolous, and the opinion of the Court given on demurrer for the defendant.

78. PINDER *against* COOTS.

Prohibition.

Bigland prayed a prohibition to the Arches, for the plaintiff being excommunicated in a peculiar, appeals to the Arches, suggesting that he liveth in the parish of D. out of the peculiar: the defendant said, that that parish was within the peculiar, and thereon, as if bounds of parish were in debate, would have had prohibition; sed Curia contrà, peculiars being by spiritual composition by bull, &c. And this Court will not try bounds of peculiar as they will of parish.

79. DICKINSON *against* PRESTWICH.

Execution.

Paulet prayed, the defendant going abroad by rule, might be brought into Court by rule to be charged with actions, in regard the opinion of the Court is, that in such charges the plaintiff must prove the defendant actually in custody, and not only by committitur entred on the roll; which the Court granted, or that the marshall shew the prisoner to the plaintiff.

80. DUDLY *against* COLE. *Ante.*

Arbitrement.

The general releases being not to be given till after the gown made, and that only conditional, and left to the taylors discretion, the award is void. Judgment for the plaintiff.

[765] 81. JUSTICES OF LEICESTERSHIRE.

Poor.

Wingfield prayed confirmation of a sessions order, that New Barton in the hundred of Perkno, be charged to the poor of Loughborough, which was opposed, in that the place taxed was no parish, and so not taxable, as the Isle of Foulness, without special proviso. Also by Keeling, The parties may go originally to sessions, as in case of Garrowdon Parke was resolved; to tax any place for this, in ease of the two justices,

and the party is not hereby barred of his appeal, but it may be to the next sessions; contrà where any thing is to be done by the two next justices that cannot be originally begun at sessions. Hyde contra, that the next sessions in this case will not be equal Judges; and for this cause, the justices that make order for bastard, have no votes in sessions; Twisden absente. Adjornatur.

82. HALES *against* JULL. *Tuesday, June* 28.

Ejectment.

Mr. Attorny prayed an allowance of plea, that the lands in the ejectment were within the five ports, which the Court granted there being no imparlance, general or special, both which affirm the jurisdiction of the Court; but had the demise been laid out of them of lands therein, such plea would have been disallowed, by Twisden; and at the venire facias the plaintiff may suggest the lands to be within the five ports, and have it of the places adjacent within the county.

83. HALE *against* ATHERTON, &c. MANUCAPTORS OF WEEKS. *Ante.*

Bail.

Polyxphen prayed the opinion of the Court, whether recognizance of bail be well removed by writ of error of judgment against Weeks the principal, as also in adjudicatione of execution against the bail brought by the bail. Twisden conceived this record well removed hither, as 1 Cr. 575, *Smith* against *James*, as the latter opinions, although the contrary be held, Hub. 72, *Forests case:* so when the principal brings error of his judgment, and adjudication of execution 24 Car. *Scot* against *Jeoffries*, against the bail, and steward below cannot determine whether the bail may have **[766]** error of principal judgment, or not: so where principal and bail joyn: but by Keeling, in both these cases there were judgment against them that brought the writ of error; and although in *Sir William Brunkards case* it was ruled in the Exchequer Chamber, that the purchaser for his privity of estate may have a writ of error; yet here there is no judgment against the bail, and therefore the record is not removed in scire facias against the bail, and nul tiel record pleaded here by them Windham agreed an estranger by fraud cannot remove record, but any that is endammaged, or pretends to be so, doth remove the record, as 3 Cr. by writ of error, although error doth not lye for such person. Twisden agreed in writ of error by the bail there must be judgment; contrà in scire facias against them brought on recognisance. Adjornatur.

84. THE KING *against* LUXFORD, &c. *Wednesday, June* 29.

Force.

The Court quasht an indictment of forcible entry and assault, it being quod ad tunc & ibidem assemblati ingressum fecerunt, & ipsum le plaintiff verberaverunt, &c. not saying ad tunc & ibidem. And, Hyde and Windham absente, it was quasht on *Bauds case*, 2 Cr. 41, the offences being several, must have special times alledged, ex motione Lee.

85. FINIE *against* CHARLETON. *Ante.*

Pleading.

Windham on *Stephens's case*, Dyer 353, pl. 29, conceived that the hoc paratus est verificare is ill on general demurrer to the replication; contrà on general performance pleaded, or any justification, absque hoc, he that concludes the negative never ponit se super patriam, but only he that ut prius affirms his former covenant or plea; which Keeling agreed; contrà by Twisden, Although the course of the clerks is to enter it thus, & hoc paratus est verific. yet its ill on such particular plea. And the Court differing, the plaintiff prayed leave to discontinue, which was granted. See Issues Joyn, Br. 1.

[767] 86. JACKSON *against* FENWICK AND HOLT.

Proof.

Bertue prayed the depositions between primate and the defendants in Chancery of witnesses that are dead, might be allowed at the Assizes in an information of perjury, which the Court refused; either for that the defendant, or the King, in regard the King is no party to the suit in Chancery.

87.

Days.

Nota pro regula, that on the last day of the term the Court will never hear motions for altering venue, or stay any proceedings after judgment or reference prayed to the secondary; nor will alter any possession, how illegally soever obtained; but mutata opinione they now frequently hear them for reading a record (not before in the paper) to be made a concilium of the following term.

[769] DE TERMINO MICHAELIS, 16 CAR. II. B. R. DIE LUNÆ, OCTOB. 24, ANNO 1664.

Hyde Chief Justice; Twisden, Windham, Keeling.

1. THE KING *against* SELBY, BRISCOE, AND FOUR OTHERS.

Enquest.

The Chief Justice had bound them over hither from the sessions at Newgate, in that being jurors, they contrary to clear evidence, would not find certain Quakers indicted there guilty; they found they met under pretense of religion, and that it was not according to the laws of the Church, with common prayer, but because they were not satisfied they met only in pretense of tender consciences, and to raise rebellion, although the Court directed them, if they were satisfied they met, being twice before convicted, they ought to find them guilty; for if they were there to raise rebellion, they are triable another way, as for treason; also it lyeth on the prisoners side to prove upon what account they were there: the Court ordered an information against them.

[770] 2.

Force.

The Court (ex motione Jones for restitution after verdict and trial had against his client, and restitution awarded to the defendant on indictment of force on issue, that the lands were not auncient demean) conceived that if steward there be illiterate, or partial, as if he were solicitor of either party, that the trial ought not to be in the Inferiour Court, but that it may be on feigned issue in an action of trover at common law for the profits; contrà in an action of trespass, and awarded restitution nisi the defendant would accept such trial. Ballard Attorny for the plaintiff.

3. KEBLES CASE. *Tuesday, Oct.* 25. In Enfant, F. 6.

Recovery.

Memorandum that I went into C. B. as tenant, to suffer a recovery, wherein my brother Richard Keble, and Elizabeth his wife were vouchees in person, and also Milton and Brooke, who were absent, and Tho. Keble demandant, and all the vouchees not being present, the Court would not suffer it to proceed by parcels, but if part do now, all must appear again afterward the same term to vouch over the common vouchee, but they absent made an attorny, and so it passed on Thursday, and Keble and his wife appeared, and after the other two.

4. VAUGHAN *against* SIR HENRY ANDREWS.

Assurances.

In ejectment it was agreed, per Curiam, that a deed of bargain and sale given in evidence is good between these parties, although no consideration were pleaded but against creditor or other purchaser, not only a good consideration must be shewed in the deed, but payment also; and Drew the lessor of the plaintiff, having concealed an absolute deed, which was so made by his cosin, who had nothing else, was non-suited by the defendant, who claimed as heir in right of his wife.

[771] 5. BICKERSTAFF *against* PERDEW. *Wednesday, Oct.* 26.

Trin. 16 Car. 2, Rot. 984.

Monstrance.

In debt by administrator cum testamento annexo; on lease made by his testator for rent arrear after his death; on non debet pleaded, and verdict for the plaintiff, Wild the Kings Serjeant moved in arrest of judgment, because its not shewed by the plaintiff what estate his testator had, which, per Curiam, on demurrer, had been ill, especially not saying the testator was seized, but only quod cum demisisset, &c. reversione inde to himself, but after verdict, which hath found quod debet, it shall now be so intended and that the testator was a termor, and not seized in fee: but Hyde contrà; the plaintiff can have no action without sufficient title, and the finding that the reversion was to the plaintiff by virtue of administration, & quod debet, although they cannot be otherways true, is not sufficient: but by Keeling, it had been good on demurrer; for lessor in debt for rent never sets forth his title: but by Twisden, &c. it's the better way to do so. Adjornatur.

6. RUSSEL *against* SUCKLIN.

Escape. Dett, Fitz. 80.

In an action upon the case against the defendant, as sheriff, for escape of one Rose in Northfolk, and falsly retorning non est inventus into B. R. in Middlesex: after verdict, Coleman, in arrest of judgment, conceived this a mistrial on the stat. Jac. being to be intended where the cause of action ariseth from several places in the same county, not when from several counties: also the false retorn is the principal, which Twisden agreed; sed Curia contrà, the escape being the cause of action, and the false retorn, which is also made in Norfolk, is but aggravation, as 7 Co. *Bulwers case*, also the party hath election to lay his action in either county, and the whole must be laid in either declaration. Judgment for the plaintiff, nisi.

[772] 7. THE KING *against* SOMERS AND SOMERS.

Slander. Stiles 244, pl. 558.

They were indicted for a libellous letter to M. Melwiches Mistress Harvy, that he was a debaucht person, and had no estate, the parties were found guilty and fined, one 100l. the other 30l. in London by the justices of peace. Winnington assigned for error on removal of the judgment, that the justices have no power of this offence, being originally punishable in the Star-Chamber, or here, being a thing rather of government then breach of the peace. 2. The form of the process is ill, the first sessions being 13 Car. 2, when the indictment was found, after which there was an award for the parties to plead, which they do at the next general sessions, and no continuance is made, which is necessary when any entry is made quod postea, at another time the party appeared; contrà if it were ad hunc diem, then whenever the party cometh in, the continuances may be entred up at any time. Also 3. There is

a continuance of the parties to the next sessions, & idem dies to the other parties, which is ill, the sessions being at no day certain, the Court conceived these two last immaterial, and the continuance ad proxim. sessionem is sufficient; and there is never any continuance below after the venire facias. Wild for the King, This libel tends to quarrels and breach of the peace, as pictures or horns set up at doors: the Court conceived this only a private defamation, and not infamous, and therefore not within their power; were the words of an officer, unless they be against execution of his office, or of him in his office. Windham conceived, that had the defendant vaunted of his letter, and published it, it possibly might have been indictable: so where many persons are mentioned in the libel, although the matter be particular; but here it was only particularly directed to one, which might have been good cause for the Judge, before whom it was tried, to direct for the defendant; but here being found quod nequiter publicavit, &c. he doubted. Adjornatur.

[773] 8. THE KING *against* PRIN.

Slander. Siderf. 219, pl. 4.

Indictment at Exeter for causing a libel against the city to be delivered to the parson to publish, and quicken the magistrates to punish the crying sins, &c. After judgment there, Jones assigned for error that this is not indictable, because although it suppose great wickedness, uncleanness, and sodomitry in the city, without controul of the magistrate, yet it doth not suppose the magistrate knew of it; also what became of the letter doth not appear, and in the judgment it self, ideo consid. quod def. solvet to the King 100l. on his confession, there is a fault. Windham and the Court conceived this a scandal of the magistrates, and this a sufficient publication, for it implyeth their default, in that he exhorts to quicken them; also quod solvet is well enough however, only the judgment is reversible, but no more in case of the King. 2. The party not being present, the Court would hear no further exception. Adjornatur.

9. RIDE *against* ATWICKE. *Ante. Thursday, Oct.* 27.

Tr. 13 Car. 2, Rot. 630.

Devise.

John seised in fee, devised to his wife for five years, and by codicil adds, that if any of his three sons dye before the five years be out of the freehold, then to be equally divided between the survivors (mentioning no lands at all); he and two of the sons dye, the second, viz. D. leaving his wife inseint with the lessor of the plaintiff, and on Tr. 1649, Rot 394, *Bell* against *Wainman*, Stroud on special verdict conceived it void for incertainty, Stiles 240, pl. 557. Also this would leave the children of that son that dyeth, without provision: also the codicil going in destruction of the will, is to be taken strictly. 2. These words can only relate to that freehold; which the wife had for five years, because else the same advantage, as to the other estates, remains afterward, and the contingency of division is tied up to five years, and the wives estate is only conditional, 10 Co. 43, *Portingtons case.* And by this construction all legacies are satisfied, and provision made for all. Also 3. This makes, as *Lewin* against *Coxe*, 3 Cr. 493, only tenants in common; also this would be unequal, being an-**[774]**-nexed to Williams estate only as eldest, and so if he dye, his estate shall survive, but nothing, or only a moiety of the other estates shall survive to him, because expresly devised to John, and Daniel, and their heirs.

(2.) Baldwin for the defendant Daniel, agreed only an estate for life to be in the defendant, but so he shall have, being living, and the only survivor at the end of the five years, and not on the death of either of the sons within the five years: the five years is only for limitation of the contingency, not that it should be then presently divided on the death of one; in which case William dying first, if they be tenants in common, Johns moiety discends, like the case 3 Cr. 52, *Pettywood* against *Cook.* Also the not finding that William dyed without issue, is ill, and primer possession (the defendant,

by rule of Court, being made to confess lease entry & ouster) is not sufficient: the Court conceived that had the words been, that on death of either the survivors should have it equally to be divided, it had made them jointenants. Keeling conceived the words shall not relate to the estate of William, but only to the freehold, which was devised to the wife for five years, for the other is not mentioned in the will at all; and this is repealed on this contingent, if it were any ways good; but for the uncertainty the codicil is clearly void. Also the Court will doubt of no more then the jury doth, but will intend all other titles. Windham conceive the meaning was, that the share of him that died should be divided, not any of the other estates; and the heir is provided for by the inheritance; and by the death of any of the other their parts discends, which they had by survivorship. Also its not said, the issue of John entred as heir, and therefore it shall not be intended William died without issue; when the jury doubted on single point, the Court will not intend any thing else: but when the conclusion is si super totam materiam, the matter is left at large, but the Court will not supply this by intendment, *Castle* against *Hobs* 2 Cr. which Twisden agreed; but conceived primer possession sufficient in the plaintiff; so Hyde; and that the codicil is uncertain and derogatory, and so void. Judgment for the plaintiff. Nisi.

[775] 10. CONNY *against* JOHN JACOB. *Ante.* Siderf. 220, pl. 5.

Execution.

The Court conceived the entry of committitur alone is sufficient evidence to charge Sir John Lenthall, Marshal, as in execution for escape of a prisoner, without actual proof of his being in execution: but if he be so, although no entry of committitur be made in the marshalls book, he is chargeable: also committitur is but the act of the attorny, and so not sufficient to take capias, or hinder other execution to be taken against the parties.

11. BOARMAN *against* ARTON EXECUTOR OF ELTONHEAD.

Covenant.

In action of covenant on lease for years, that the lessor, nor any of his tenants, should not dig gravel other then for repairs, the lessor having before made another lease before of kills, which lessee leaseth over part of his term, and if the sublessee may be said tenant to the lessor, they find by special verdict for the plaintiff, if not for the defendant. Barwell for the defendant, that the lessee hath but a liberty to dig (on demise of the two wharfs) in the gravelpits, which were in the hands of other tenants and the under-lessees are possessed of the kills, which have also liberty to dig; and are most properly tenants to the mesne lessee, and not to the lord paramount, or lessor. Also the meaning shall not be extended against a stranger, as the under-lessee is, and on whom the lessor, as Yelverton 36, hath no tye, the case of condition and covenant differ not as to this purpose. 2. It is here intended of under-tenants of the soil, in which the covenantee hath liberty to digg; for tenants of other lands would be trespassers by digging, and so cannot be intended to be restrained by covenant. Keeling conceived the case strong, that these are under-tenants within the covenant, which might intend other tenants then those of soil, which the Court agreed; and by Hyde, If seignior (where freeholders and copiholders) seised of chalkpit leaseth it with such covenant against his tenants and under-tenants, if lessee of copiholder dig, the covenant is broken. Adjornatur.

[776] 12. DOLEWRIGHT *against* BARWEL.

Slander.

You P. go lye with a cow again; if you had your deserts, you would be hanged. Winnington in arrest of judgment, that no mention being made of buggery, the words are not actionable. See judgment for the plaintiff.

13. LORD FAUCONBRIDGE *against* DEAN AND CHAPTER OF YORK. *Ante. Friday, Oct.* 28.

Prohibition.

Jones prayed prohibition, suggesting that one of the prebends, who as such, was treasurer of the church, and by vertue thereof proved wills, and made inductions, &c. the prebend surrenders his corps to the King, cum pertinentijs & commoditatibus (but not privilegijs) and the King with larger words regrants to the plaintiff, which is confirmed by Private Act of Parliament; and this being spiritual, although some branches be lay, a lay person is not capable of it, by Keeling, nor can the King exercise such jurisdiction, but only grant it over, which Hyde agreed, but Windham and Twisden doubted. Adjornatur.

14. ROCH *against* COTTERELL.

Error.

Winnington prayed amendment of judgment after verdict in indebitatus, being capiatur for misericordia, which was refused per totam Curiam, on *Ellisons case*, and Twisden said *Keyes's case* was amended, because the Secondary Broom, or Hodsden, who entred his judgments himself, had done it right, but his clerk mistook his directions, and entred misericordia for capiatur; but this is aided by 16 & 17 Car. 2, cap. 8.

15. PALFRY *against* PLEES.

Covenant. Siderf. 270, pl. 25.

Siderfin moved in arrest of judgment in an action of covenant grounded on articles, whereby the plaintiff agreed with the defendant to give so much per load for all the bark of such a wood, and that the defendant scribi causaret a bond (not saying of what sum, or to whom) and the breach is assigned in not writing the bond, nor being ready to deliver it on 5 Co. 77, *Saimans case*, because no sum is mentioned, and the matter incertain, the agreement is void, as *Bibbe* against *Cunningham*, Hetley 89. Sed per Curiam, the defendant ought to have given a bond, and the sum **[777]** may be reduced to certainty, according to the value of the book, and should not have pleaded non assumpsit. Judgment for the plaintiff.

16. THE KING *against* PHILINGHAM. *Saturday, Octob.* 29.

Mandamus.

On mandamus to restore a burgess in Nottingham, Bigland excepted to the retorn, which was for not taking the oath and declaration in the Act of Corporations, 13 Car. 2, cap. because a burgess is none mentioned, nor within the meaning of the Act, being no ways interessed in the Government, sed non allocatur, because they are part of the common council in the retorn, and have a voice to elect Parliament men, &c. they affirmed the retorn.

17. THE KING *against* COOPER.

Corporation.

The Court, as in *Mr. Prin's case*, conceived that it's a sufficient retorn by the mayor, to say, that H. was turned out by the commissioners in the Act of Corporation, they having no power to know the cause why the commissioners turned any out: but by Twisden, Had the retorn been by the commissioners, there ought to have been a summons. And Hyde Chief Justice doubted whether one turned out by the commissioners may be in futuro elect by the mayor, &c. into any other vacant place.

18. TOOKE *against* ATHO.

Lieu.

Coleman moved in arrest of judgment in ejectment laid on demise at Tavenham of a land and house in quodam campo juxta le Castle Hill, which, per Curiam, is ill, and no execution can ever be directed to any sheriff, but in debt it's well enough, as Cr. that any place be of the demise; but in the other it must appear where the land demised lieth. Adjornatur.

[778] 19. GROVE *against* NEVILL.

Pasch. 16 Car. 2, Rot. 401.

Enfant.

In an action upon the case in nature of disceit on sale by the defendant of goods as his own, whereas in truth they were anothers. The defendant pleads nonage at the time of the sale: to which the plaintiff demurred: and by Crofts, this being a tort as waste or escape, nonage is no plea: sed Curia contrà, this being no actual tort, or any thing ex delicto, but only ex contractu, which is voidable by plea; but it's a tort by construction of law; Windham doubted. Adjornatur.

20. OPIE *against* THOMATIUS.

Powers.

By special verdict it was found in ejectment that Rouse tenant in tail, made a lease for 99 years determinable on three lives, and then after makes another lease to commence after the former lease, then tenant in tail dyeth, and his issue conveyeth by fine to the plaintiff: and Polyxphen argued that against him this lease is not good, because its to the prejudice of the issue in tayl, as rent granted by him is void against the issue, unless it be for release of right of the tail, 10 Co. *Octavian Lumbards case.* So lease without rent is void by his death, Pl. Com. 437. 26 H. 8, 2, as of baron seized jure uxoris: also this is but a present charge and incumbrance in futuro, and no present lease, but is a clog to the conveyance of the reversion, and so an apparent prejudice, being not voidable by entry or claim, nor 1 Inst. 296, capable of confirmation, release, or surrender, 1 Co. 137, *An. Mayos case*, and therefore void: also entry of lessee is not justifiable, as it is if only voidable: also issue in tail is quasi remitted as to the avoiding the charges of his auncestor, because here is no person against whom he may have remedy, Dyer 297, Pl. Com. *Smith* against *Stapleton.* 2. Maynard for the defendant, absente Twisden, held the difference, that of any things that issue out of the land, or of the land it self, leases are only voidable, but other collateral charges are absolutely void, which Windham agreed; and that a lease without rent may be affirmed by acceptance of fealty: also the tenant in fee claims under the lessor by fine, and so must take the clog; and had the auncestor, tenant in tail, levied the fine, it's clear, but because the issue **[779]** might have avoided the lease, his conusee hath the same election if the lease be only voidable, which the Court agreed. Maynard now shewed that the power reserved to make any lease determinable on one or on two lives, doth warrant the lease in question, the land at the time of this reservation being in lease for three lives: and in the Chancery in *case*, there was good opinion, that power to make leases in possession, warrants a lease made by H. in reversion during joynture, 38 Eliz. *Thomson* against *Traford* on 13 & 18 Eliz. However 2. This lease is warranted by the interest of the issue in tail, there being a rent reserved, contrà of a parson, his lease is void by death, as 33 H. 8, Dyer 51 b. and the conusee cometh into another estate, then that of the issue in tail, as *Procter* against *Kelsey*, Bridgman 27, and so hath no election, any more then on 11 H. 7, to avoid lease by joyntres. Windham conceived this power doth warrant the lease made determinable on the fourth life, leases in possession being as well intended of the reversion as of the land in possession, Dyer 357, but not in reversion.

Hyde conceived the election destroyed by the fine, as well as revocation: and by Windham it's a point of great consequence, 7 Co. *Earl of Bedfords case.* Adjornatur.

21. BUTLER *against* MAYORS.

Trials. 14 Ed. 3, 16, § 1, n. 11. Hetly 81, 116.

No trial by proviso, notwithstanding default of the plaintiff, can be by Nisi Prius, without giving rules of eight days notice in the office of the secondaries, which the Court agreed.

22. RATCLIFF *against* TATE.

Execution.

Nota pro regula, that after hab. fa. possessionem executed, be it by sheriff, or voluntary delivery of possession, if the party be turned out again by the defendants means, he may have a new hab. fa. possessionem on motion in Court, and attachment against him: but if after quiet possession others enter, he must have new action or restitution, else by this means by practice the plaintiff may turn out any of his after lessees on non-payment of rent.

[780] 23. ALDERMAN LAWRENCE SWORN LORD MAYOR. *Monday, Oct.* 31.

Records.

Nota, The Court directed Coleman, now admitted clerk of the rules that he should not enter the reasons of any rule, but only ordinatum est, &c. nor deliver copies to any counsel or attornies to agree; but if any doubt be, to stay a day or two, or go with counsel to a Judges chamber; or move the Court to declare their meaning.

24. SNOW LESSEE OF DR. CRAWLY *against* PHILIPS.

Proof. Siderf. 220, pl. 8.

Newdigate excepted against a bill in Chancery exhibited in evidence against the defendant, whereby he prayed to be received against simoniacal agreement, because counsel or solicitor may draw it in absence of the party; sed Curia contrà, There being a suit in Chancery proved, and no other appeared, its good evidence, although not binding. And 2. Procurement is symony, although by a stranger, ex parte recipientis, but the patron shall not lose his presentation, unless he have notice, as 1 Cr. *Mackallyes case.* The counsel of the defendant, 3, admit him simoniacal, yet on 12 Car. 2, cap. conceived him confirmed by the Act of Ministers, being in actual possession 24 Dec. the general words being, not only relating to the preamble, of defects in the late times, but also, notwithstanding any act done or omitted by the incumbent, especially the Act of Oblivion having before pardoned the offence; and however, as Latch. 22, and *Burtons case* 6 Co. there being no due presentation, as is requisite in 31 Eliz. 6, for want of bishop; as one convicted of perjury, and after pardoned by the Act of Parliament, is now capable of giving evidence. This very point, by Glyn, counsel for the plaintiff, was per totam Curiam, resolved the Act of Oblivion doth no ways restore or capacitate the party, in a prohibition prayed in C. B. by this defendant; nor is this disability of simony cured by the Act for ministers, for, notwithstanding any other act done or omitted, was added to help the not reading the articles, institution, and other collateral acts: and those objections were overruled also in C. B. which Hyde remembred when he was there a Judge: also perjury is inseparable from the crime: contrà in the case of *Smith* 41 Eliz. Owen 87, of **[781]** simony, that is distinct from the crime, and it being a nullity, the incumbent cannot be said in possession, which the Court agreed clearly, but when a special verdict is demanded by a serjeant, the Court cannot deny it, by Hyde, as was resolved in C. B. in the case of *Popham* against *Southcot*, where the case was of a

wreck as clear as the sun; yet because Serjeant Glanvill prayed it, and stood on it, it was granted: also by Windham strongly, that *Burtons case* is no law, 6 Co. 13 b. its doubtful if presentation obtained by simony, and nothing done thereon farther, make the living void. But I conceive it will so on admission by the tryers, 9 Car. *Priests case* in the Exchequer Chamber; the Act of General Pardon lets not in a pluralist, but only 1 Cr. 354, pardons reatum, much less of simoniack. Also three of the Judges of this Court, as delegates have judicially given their opinion already; and so this is an extraordinary case not within the common rule, nor no new case. And by Hyde, in *Fowlers case* in this Court symoniacus was adjudged, that he is not capable of this, or any other ecclesiastick promotion, as by the canon law, of which this Court will take notice; but per Curiam, Though this be cause of refusal, yet by 31 Eliz. it makes him only incapable as to the same living. The Court conceived the matter clear, and were most unwilling to suffer special verdict, but denied it: and the council for the defendant seeing the opinion of the Court direct, waived it. Judgment for the plaintiff on general verdict.

25. WRIGHT *against* BEAL. Siderf. 123, pl. 11.

Encumbent.

Stroud in arrest of judgment in indebitatus assumpsit by cumque etiam, in action on the Act 12 Car. 2, cap. for the Confirmation of Ministers for the moiety of profits, for which, by the Act, the party is to give bond. After verdict for the plaintiff, by Keeling, this is but for security, and the duty remains, and non assumpsit generally pleaded is only to the cumque etiam, but not guilty had been to both; so here is discontinuance of part, which is aided: also the indebitatus is intended on contract at common law, although it be for tithes of the same year, there being no conclusion contrà formam statuti; but by Winnington for the defendant, indebitatus lieth not for tithes without setting forth the contract particularly, *Hulls* against *Brayfield:* but by Jones for the plaintiff, unless there were a contract he could not be indebted for tithes, and so its as good as for wears **[782]** sold, without relating the cause at large: Windham held indebitatus for rent on lease for a year, or profits of rectory, lieth not, being in the realty; and so of tithes, for they are not in being, and so are not sold; also by Twisden, the tithes are said provenient. è vicaria, to which the plaintiff makes no title; but after verdict, this shall be intended, as it may be good, that these are profits of the vicarige, and not paid by him. Adjornatur, 783, pl. 24.

26. THE KING *against* SHARPE. Siderf. 222, pl. 10.

Bastardy.

Holt excepted to an order for bastard child, being made by two justices, not saying one to be of the quorum, sed non allocatur. 2. Its said to pay 2s. 6d. per week till the child be fourteen years of age, which is void, and ought to be so long as the child is chargeable to the parish, which Twisden agreed: sed, by Keeling, its in discretion of the justices, as *Hazelwoods case* in B. R. to order all the charges of the lying in, which Windham agreed: and that justices may charge them, as well with monthly, as weekly payments: also the party is discharged by the death of the child; and if the child be never chargeable to the parish, the justices have nothing to do with it: but when once the parish is charged, they may make such order, and it ceaseth by other provision made for the child, as by discent of an estate, &c. this was the case of the parish of Edgcot. in com. Bucks.

27. JERNY AND RAMSEY *against* SYMSON. *Thursday, No.* 3.

Trials.

Mr. Attorny moved for trial at Bar this term in faigned action upon the case, on wager by agreement of parties (as was used since 1640, only by direction of Chancery) to have the opinion of the Court of the validity of a will of lands in Derbishire; and

although the action were laid in Middlesex, yet being an innovation, and the way to subvert ejectione firme's, which hath subverted the formedon; and it sufficiently appears feigned on the record in that the title of land is hereby to be tried in personal action: had it been by direction from the Chancery, the Court enclined to have it; but in no ways would grant this: nor, by Hyde, should either be granted, for this, as examination of wit-**[783]**-ness going beyond sea, before the trial, would turn the Courts of Law into Chancery.

28. ROBINSON *against* SAYARS.

Trespass.

In trespass for breaking his house, and certain goods (not saying sua) nor then and there being, taking away; after verdict, this was moved by Foster in arrest of judgment: Twisden doubted, because ad tunc & ibidem existens refers to the place of visne only, not to the goods. Adjornatur.

29. LAUGHORN *against* MERRY. *Friday, No.* 4. Siderf. 223, pl. 12.

Assurances.

Sir Thomas Merry, in consideration of affection, covenanted to stand seised to the use of himself for life; remainder to his wife for life, remainder to Ralph, father of Ralph, the lessor of the plaintiff, and his wife in tail, who was daughter to Sir Thomas Merry, the remainder to his own right heirs, and after dyed, a fine was by Ralph the son, and he suffered a recovery also; but this being of less lands then were in the declaration, Maynard for the defendant conceived, an election ought to be made by the tenant to the præcipe, sed non allocatur: but the Court directed the jury to find for the plaintiff, for so much as is in the fine.

30. WRIGHT *against* BEAL. *Ante*, 781, pl. 25.

Tyths.

Wild prayed judgment for the plaintiff, it being said for the tyths è vicaria provenient. of a former year, shall be intended for tythes severed, which Twisden agreed; as pro una acra ligni, which the Court agreed, being after verdict, judgment for the plaintiff. Nisi.

[784] 31. JAMMOT *against* COOLY. Siderf. 223, pl. 13.

Trin. 16 Car. 2, Rot. 481.

Rents.

In evidence to a jury in ejectment, the title of lessor was under Sir Ralph Bovy, as grantee of Drake, of rent-charge, with a proviso that if it be behind, the grantee, his heirs and assigns, may enter and retain until he be satisfied inde. The demand made was only, I come to demand, which the Court conceived sufficient, this being but by way of distress, and not penalty of forfeiture, but after an express demand was proved. And now Maynard for the defendant insisted, that this title is not sufficient, for the lessor of the plaintiff to have ejectment, for no execution of the grant quoad the land appears, and so not like 1 Inst. 203, nor to *Havergill* against *Hare*, 2 Cr. 511, where by use there was a freehold executed, which is reduced by a condition to fee conditional, which Keeling accorded; and Twisden held by devise or act in law, such estate may be good, but not by act of the party. But by Glyn for the plaintiff, there is no difference; for he that enters on feoffments, doth not reduce the ancient estate, but a new interest: and in *The Countess of Pembrokes case* on such use limited on fine, claimed to enter and retain for fine due by tenant right, and ruled in C. B. she might have ejectment, which the Court agreed; but the cases are not alike. Hyde and Windham doubted, and directed to be found specially.

32. STANTON & UXOR *against* HUBBARD.

Trespass. Siderf. 224, pl. 14.

In an action of assault and battery of the wife necnon tearing of her wastcoat ad damnum ipsorum, which by Coleman, in arrest of judgment, is ill, the cloaths being the husbands, which the Court agreed, and that several actions ought to have been, præter Windham, who conceived this but a consequent of the battery, and not like trover, which ought to be only ad damnum ipsius, or ad usum ipsius. Also were this only for taking the wastcoat, it ought to have been ad damnum ipsius. Adjornatur.

[785] 33. LOVELESS EXECUTOR OF CHAPMAN *against* RATCLIFF. *Ante.*

Execution.

Had actual possession been had by agreement of parties, or by delivery of the sheriff, the party can never after have any new hab. fa. possessionem; but if there be agreement to deliver possession in futuro, if it be denied, a new writ may be had: but per Curiam, after the year there must be a motion for it in Court. And by Hyde, If the defendant hath paid any rent to the plaintiff after the execution, he shall render all the costs.

34. HARRIS *against* FIELDING. *Monday, Nov.* 7.

Leases.

H. seised in fee makes a lease to S. for his own life, and the lives of A. and B. S. leaseth for 60 years to begin after the death of S. if A. lived so long, and after made another to B. for sixty years, to begin after the death of S. and A. if B. so long lived: S. the the tenant died, and Serjeant Heal, under whose second son the defendant claimed, purchasing the fee, after assignment of the lease levied a fine, and suffered a recovery before, which A. and B. assigned to Sir Symon Clerk lessor of the plaintiff, who after purchased the fee from the third son, having livery upon the assignment; and if these occupants were sufficient tenants in possession to vacat the fine and recovery for want of tenant to the præcipe was doubted in evidence to the jury in ejectment, and a verdict and nonsuit on full evidence on the same point for the plaintiff: and the defendant waived it, and gave evidence of surrender (as is usual in the west country, where there are many leases for lives) to be done under condition, that if 10000l. or a far greater sum then the lands are worth be not paid, the surrender to be void; and so no payment being made, the tenant continually keeps his possession, and yet the recovery good; but this must be by deed, not by paroll.

[786] 35. BURGOIN *against* THOMAS AND HARDMAN. *Wednesday, Nov.* 9.

Ejectment.

In ejectment against two, one confesses, the other pleaded not guilty, and at trial the plaintiff is nonsuited, he cannot take execution against him that confesses; but if by rule of Court one be made defendant for part, and confess, the plaintiff notwithstanding the nonsuit, may take judgment against him that confessed for his part; but if each defendant take on him the whole title, the plaintiff in any case cannot have execution; but one defendant being lessor of the house, reserving a chamber, who never had any notice of the action, and therefore judgment entred of the whole house is not void, quoad the chamber only, but wholly. And Hyde would have had the attorny that entred judgment pay costs, but ordered possession to be delivered to the tenant on agreement to relinquish the costs.

36. LICHFORD *against* ELIOT. Siderf. 224, pl. 16.

Trespass. Trespass, Br. 441.

In trespass for breaking a close, and throwing 20 logs upon his ground diversis diebus continuando a quarter of a year also breaking his cellar, and throwing down water. Powis moved in arrest of judgment on 20 H. 7, 3, pl. 7, § 2, & 2 R. 3, 15, in that this being single acts, the continuando is void, as breaking close, which the Court agreed, there being a certain number of logs mentioned before, but else it would be well enough after verdict; and so by Windham it is now, for trans. may as well be transgressiones, as well as transgressionem, but being prædict. it must refer only to the throwing of the 20 logs, which is void.

37. GREEN *against* COLDUCK AND CORSELLES.

Prohibition.

On libel against Colduck for sale of a ship super altum mare. Sawyer prayed a prohibition for Corselles, who was drawn in by process, which is prayed against all parties interested, suggesting the contract made on the land, which the Court agreed without plea, præter Hyde, who conceived it ought to be pleaded, although it go to the original suit, and not only to incident. Keeling absente.

[787] 38. ——— *against* KELLY.

Visne.

Hyde remembred the original of changing the venue, which was not so at common law, being contrary to the oath of an attorny, which the Court agreed, and is in discretion, and may be dispensed with, as in this case, on affidavit that the witness now in town, living in Wales, could not be had at the Assizes: but Hyde refused to examin him by consent of parties, as is used in C. B.

39. BUCKENHAM. *Ante.*

Pardon. Coron. Fitz. 282 (280).

He delivered in his pardon, which recited the verdict and judgment, neither of which were extant, and therefore they fined Sir Thomas Fanshaw 20l. and the marshal 100l. for letting him go abroad. Also the indictment being quod verberavit, which was omitted in the pardon, and only vulneravit inserted, the Court bailed him, but would not allow the pardon.

40. BASSET *against* SHIPPON. Siderf. 225, pl. 17.

Trespass. 2 Cr. 534, pl. 18. Error, Br. 90.

In trespass for entring his house, & pedibus ambulando, continuando for two years, & alia enormia, under which he gave evidence that the defendant came as suitor to his daughter, and defiled her, which was the cause of great damages given, for which cause Winnington prayed new trial, which the Court denied; but conceived this may well be given in evidence, without saying quod insultum fecit super filiam, &c. so of the wife, but this is the better way. Judgment for the plaintiff.

41. In Error, Br. 68.

Error.

Ex motione Brewer to quash a writ of error brought on the Crown side, de recordo quod coram vobis on judgment given in B. R. the Court conceived that it well lay, as well on errors in law as in fact, but on the plea side only in fact, and the other is removed into the House of Lords, but never on the Crown side. Sed adjornatur to search presidents.

[788] 42. THE KING *against* SUMMERS. *Ante. Thursday, No.* 10.

Slander.

He was indicted at sessions in Guildhall before the justices, for a libel against Mellish: after verdict, and judgment, Jones insisted on it for error, that the matter is not indictable, being a private scandal, for which the party may have an action, 5 Co. 125, is of pictures or rhimes, for which no action lieth; and had the words of this writing been spoken, its clear he could not be indicted, and yet here is as much publication and notoriety, Hub. 121, as in *Dacres case* is, that slander by letters scattered is punishable in the Star-Chamber, but contrà of writing of one letter only. 2. The justices have no power, supposing this matter indictable, for there is no statute in this case, and not any word in their commissions, which giveth it them, only direct breaches of peace, not the precedents and consequences thereof: but in the commission of oyer and terminer hath larger words, all falsities, which may comprehend this; and all the libels instanced in the 3 Inst. 174 are on indictments in B. R. Williams for the King, contrà, that whatever tends to breach of peace is inquirable by them. Twisden doubted at first on hub. *Sir Bapt. Hicks case* and another anonimus of the same resolution, that the Star-Chamber might punish such, because it tends to breach of peace. Justices came in lieu of conservators, who at first could only enquire, but now may try trespasses; and else there would be no remedy. Windham conceived no answer given to the second resolution, de libellis famosis, 5 Co. 125, it being more defamatory to publish such words, then to make pictures, or speak, because none knows from what hand this cometh; also its as much a breach of the peace, and wounds his credit as much, as a squib thrown in his face; at least, it hath a direct tendency to breach of peace, and so is punishable by them. Hyde Chief Justice contrà, remembred an indictment against a justice for worse words spoken of him in his office, and the Judges would not give judgment, it tends only to breach, but are no more a breach then threats, for which only a justice may bind to the peace, but not indict. Also in *Stamps case*, he was bound to good-behaviour, and here in scire fa. on his recognizance, it was held, that threats were no breach, also the party hath his particular action: and its no rule, that because it was punishable in the Star-Cham-[789]-ber, that therefore they are punishable by justices of peace, more then de scandalis magnatum; also eves-droppers are properly presentable in the leet, as tending to breach of peace; yet an indictment lieth not before justices of peace for it: and de verborum propalationibus, is not in their commissions, as it is in the oyer & terminer. 2. The letter appears not to be said of Mellish, but only that the person who is a servant to you, that pretends to the law, without any innuendo, which is not helpt by the verdict. Keeling absente. Adjornatur.

43. THE KING *against* HARRIS.

Trades.

Jones moved to quash two indictments on the statute of 5 Eliz. 4, for using a trade of tallow-chandler, because they conclude not contrà pacem, as all indictments ought, quasht, per Curiam.

44. SHEERS AND NORLAY *against* MARTYN.

Admiral.

Polyxphen prayed a prohibition to the Vice-Admiral of Devon, on nusance there presented below the first bridges in the river of Exon, within the flux and reflux of the sea; suggesting this in corpore comitatus, and so not punishable by the Admiralty, but indictable at common law, and by particular proviso of 5l. forfeiture in 34 H. 8, cap. 9. And this is a trade in the country, to bring lime and sand in boats at high-tyde, and the kilns thereabout fetch it at low-tyde, in regard boats at low-tyde land it, and the river being broad, and this necessary for the country, its no nusance; sed

Curia contrà; navigable rivers are as high-streets, which how broad soever can have nothing laid on them, 1 Eliz. cap. 17, & 5 Eliz. cap. 5, giveth other particular powers, but not of nusances, and for this reason: and because it was in corpore comitat. they gave day to shew cause why a prohibition should not go, but would not grant a prohibition (yet staid proceedings) no more then for not boying an anchor, or towing boats in the Thames, which are as well punishable by the Admiral, as the Mayor of London, as conservators. Adjornatur.

[790] 45. HEAL *against* ATHERTON. *Ante.*

Pasch. 16 Car. 2, Rot. 52.

Bail.

Windham on 1 Cr. 575 conceived the record of the judgment against the principal well removed, as well as by estranger; by error assigned on judgment against the principal and execution against the bail: but there being no judgment in the scire facias against the bail, they cannot have error of the principal judgment alone, nor remove it; but if they joyn, its well removed. Also if it be tam in redditione judicij quam in adjudicatione executionis, the principal record is removed, quoad the bail: but *Scot* against *Jeoffryes*, Hill. 23 Car. 1, not quoad the principal: so *Prats case* 1649. Also 2. There being no judgment at all against the bail, this writ of error is idle and void, and nothing removed more then on interlocutory judgment, which Hyde agreed: but however it should be removed, the bail cannot have any benefit of it. But by Wild the Kings Serjeant, hereby, by a record of Inferior Court, the lands of the defendant, or of the principal, would be liable all over England, which the Court agreed, and therefore by covin it cannot be removed, nor by meer estranger without color; but by a writ of error this may be done: but against *Risams case* 118, Hutt. on certiorari the lands of the defendant are liable only in inferior jurisdiction on removal hither, because the Court giveth no judgment, but contrà in debt here on such judgment removed out of Inferior Court, or on error. Adjornatur.

46. BEAN *against* NEWBERRY. In Arbitrement Br. 24.

Arbitrement.

In debt on obligation, condition to perform an award on submission to two, ita quod they do it de & super præmissis by a time, or chuse an umpire. They chuse an umpire, who makes an award of a general payment of 300l. and not de & super præmissis, as the arbitrators ought: also where there is no restraint an award may be by parcels, and the breach being assigned in the umpire, its ill, by Wild, who having demurred (was made to open the concilium): but by Jones for the plaintiff, Its well enough, being natural, to deliver up a bill of exchange to the defendants son, and apprentice to the plaintiff, and he to be discharged: also the submission is by the defendant for her self, **[791]** and her son, and so whatever is done for the one, is done for the other. Windham conceived the umpire only an addition of time, and not of a distinct power, and therefore without any ita quod he is the same as the arbitrators, 5 H. 77, pl. 14, especially the words being that the umpirage should be touching the premisses. Also although there be no (so as, &c.) herein, which Hyde agreed, but contrà by Twisden on *Geffee* against *Brown*, Hub. 190. But all agreed, that this being a relation and privity in the submission, the award of the bill of exchange is mutual to her and her son. Adjornatur.

47. COLEMAN & UXOR *against* HARCOTE & UXOR. *Friday, No.* 11.

Slander.

In action upon the case by victualer, for saying of the wife, she was a baud of bauds, and a baud to her own daughter, and special damage laid ad damnum, ipsorum 1 Cr. 419. Baker, which is well enough, by Symson for the plaintiff, who after

verdict moved for judgment, because the wife was the cause of the action, and so the husband hath election to joyn with his wife, or not. Windham, The case of case Mintern was real interest in the wife; also after the death of the husband, the wife solely could not have had this action by the survivor: also by Hyde, the action would not lye, for the words, without the special damage, and the special damage is only the husbands; and although it be found, they both kept the house, yet she doth it only as servant, the interest is only his. Twisden accorded, Keeling absente, Person 1 Cr. 329, so had the damage been per quod he lost consortium of the wife, they could not joyn, *French* against *Lever* in C. B. the case lately. Judgment staid.

48. HELIAR *against* CASEBROOKE. *Ante.*

Administrators.

The Court on reading the record, being for rent, conceived that an assignment pleaded before any rent due (on which the plaintiff had demurred) was not a good plea, the action being against the lessee himself, and so if against executors, contrà if against assignee. Adjornatur.

[792] 49. CAME *against* GUNSTON.

Tr. 16 Car. 2, Rot. 210.

Assumpsit. Siderf. 225, pl. 19.

In assumpsit to pay for a years board and schooling of his daughter, the plaintiff brings the action for three quarters of a year, which, by Stroud, in arrest of judgment, is ill, as *Needler* against *Miller*, assumpsit to pay so much by quire to a clerk for writing, no action lieth for half quiers: so on agreement per cent. to which the Court inclined. Jones for the plaintiff, The contract is, if H. will put out his daughter (not saying for a year, or any time certain) the defendant will pay for a year, i.e. not for above a year, but for any time under. By Hyde, Had the consideration been, if H. will place her daughter for three years, the defendant will pay, the placing must be aver'd for three years, but may be to several persons, which the Court agreed; for else had the placing been but for a day, the defendant should pay for a year, and therefore the averment ought to be of the placing according to the payment. Adjornatur.

50. WRIGHT *against* BEAL. *Ante.*

Assumpsit.

Mr. Solicitor Finch moved to stay a judgment on the indebitatus, it being not said pro decimis habitis, or receptis, or that any contract was for them. 2. In this latter part the tyths are said provenient. è vicaria, not spectant. or pertinent. ad vicariam, as the plaintiff, who was rector said in the former part of his count. Windham conceived it well enough, as pro diversis mercimonijs, not saying venditis or habitis; vicaridge may pay tithes on the endowment: Hyde contrà; the plaintiff must entitle himself, although he need not name the particulars: and the plaintiff doth not appear to be vicar, or to have power to sell. Twisden doubted de mercimonijs implieth sold, as well as party to whom; so pro acra ligni shall be intended wood cut: all agreed, the former part of the count being discontinued, is no inducement to lead, this being a distinct count by a cumque etiam, Hub. 5, *Gardner* against *Bellingham*, is de mercimonijs habitis, but indebitatus pro equo implieth a sale. Adjornatur.

[793] 51.

Trials.

Nota per Curiam, ex motione Wild Kings Serjeant for new trial; Huls and Cottington being attornies, that after ne recipiatur entred, and sessions omitted, he cannot try it without new notice, which must be convenient, and according to the

evidence, as on plene administravit pleaded longer then ordinary, issue nil debet; but there need not eight days notice, unless it be out of Middlesex, or in another term.

52. HILL *against* ALLEN. *Saturday, No.* 12. Siderf. 206, pl. 20.

Common.

In replevin where the defendant avows damage fesant in his freehold, the plaintiff replies by prescription for common at certain time every year, as appurtenant to his freehold in another place for four vacchis & dimidio unius vacchæ levant & couchant; after verdict this was moved by Winnington in arrest of judgment, that it should be said for the half feeding of a cow. By Windham, The avowry being but for one, its sufficient, whether it be good for the half cow, or not, as *Grislyes case*, which Twisden agreed; and that the prescription is good enough after verdict, ceteris absentibus. 2. Its not said post falcationem grani, but generally from such a day, which may be well enough, and so shall be intended after verdict. Judgment for the plaintiff.

53. ROGERS *against* ROGERS. Siderf. 226, pl. 21.

Heir.

In debt against an heir by bill, which is alias prout patet of a former term; after riens per discent pleaded tempore exhibitionis billæ, the defendant excepted at the trial, because the bill was not shewed, as is usual in C. B. and thereupon the plaintiff was nonsuit, and per Curiam the bill is here confessed and need not be shewed, but contrà in assumpsit or count on any judgment, so on plene administravit pleaded the plaintiff must prove the filing of the bill, or original, as is used in the Assizes in the west coram Hales Chief Baron: but Rolls nor the auncient practicers by Windham and Twisden in their circuits never used to shew it.

[794] 54.

Execution.

Nota, by Twisden, The occasion of so much liberty in the Marshalsea is, that the marshall is not chargeable but by bill, which must be teste in term time; and so in the former term, the party is not escaped: and by the first day of the latter term the prisoner generally is to retorn to prison, and so no remedy for the party.

55. BEVYNE *against* CLAPHAM.

Days. Siderf. 228, pl. 24.

In indebitatus laid at Bow in London the defendant pleads the Stat. of Limit. The plaintiff replies, that the debt ariseth beyond sea, and that within six years after retorn he prosecuted in Inferior Court in London within six years, which per Curiam, Hyde and Keeling absentib. is well enough, and no departure but a sufficient prosecution, being removed hither on demurrer, by Williams for the defendant. Adjornatur 799, pl. 66.

56. PALMER *against* FLESHIER. *Ante.* Siderf. 227, pl. 22.

Nusance.

In action for stopping lights brought for continuance of former, special verdict and judgment given for the plaintiff; per Curiam præter Keeling that H. that builds on Bl. Acre, and after sells Wh. Acre adjoining, the assignee clearly cannot stop the lights of the first house no more then the assignor himself; *Robins* against *Barns* Hub. 131, and the defendant having demurred to the declaration, *Berry* against *Pope*

3 Cr. because the declaration sheweth no title in the defendant under Wheeler the former assignor; but it appearing the defendant had no title till Wheeler, and so he must be intended he is trespasser and had no estate, unless the defendant had traversed the seisin of Wheeler, or else he is a disseisor; for the plaintiff cannot know what estate the defendant hath. Judgment for the plaintiff, as *Sury* against *Pigot* 1 Cr. ayer being as light, a thing of necessity.

[795] 57. In the Exchequer Chamber.

Joinder.

Judgment in C. B. reversed, trover and an assumpsit being joynd in the same action, in regard they require several pleas, and assumpsit doth survive, but not trover; so *Denton* against *Clerke* and *Flowerdew* against *Kellet*.

58. Ellis *against* Creswell.

Slander.

In action upon the case for words, the judgment is after verdict, that the plaintiff recover damages ac etiam de incremento, &c. per Curiam hic sibi adjudicatis, and doth not say ad requisitionem suam, judgment reverst; but the plaintiff praying time to look into the record in B. R. by a certiorari it was granted; and by Archer Judge in C. B. the plaintiff hereby will try in the mean time to get the record below amended.

59.

Common.

Jointenant grants common to his companion A. for his own proper beasts, quære if good; and if A. may put in such beasts whereof he is joyntenant or tenant in common only with another.

60.

Assumpsit.

Nota in B. R. by Twisden and Windham, Not-guilty is a good plea after verdict in assumpsit: so on non assumpsit, the jury may find the defendant guilty, or not; and good, ex motione Williams in arrest.

61. Sherman *against* Cocke. *Ante. Monday, No.* 14.

Ejectment.

Symson moved that the defendant who by habeas corpus had removed ejectment out of the Sheriffs Court, might consent to rule of Court, that he should confess lease, entry & ouster, which the Court refused, the defendant being not bound by the rule below; because they cannot proceed by way of delivering declaration to the tenants in possession, but as at common law by actual lease sealed: and so by Hyde is the general opinion of the C. B. but all the trials below are tried in the casual ejectors name by him that is tenant in possession, to avoid charge but by Twisden this **[796]** is no innovation but suitable to the rules at common law, and so just to make him confess here as the usual rule. Adjornatur.

62. Gennings and Raby *against* Robinson.

Infant.

Plaintiff as vouchee being infant in recovery suffered by Raby to Robinson, the tenant brings error and assigns error, that he was an infant at the time of the recovery, which was 1653. The defendant replieth that in 1652, he levied a fine sur concessit

for 99 years to one Coleman, if he so long lived, to which the plaintiff demurred; and by Stroud the only questions are, 1. If infant at full age may assign his own infancy to reverse a recovery suffered by him. 2. Admittant que cy, if this fine sur concessit be a bar the Court conceived if he appeared in person its error in fact, contrà of appearance by guardian; but this being a common assurance, must be avoided during nonage; acts in pais by infant may be avoided, as 8 Co. 42, at full age, so of act of record 10 H. 4, 5, by disclamer at full age, as on unequal portion or bargain and sale, 2 Inst. 673, a fine or recognizance or statute or obligation enrolled must be reverst by aud. quer. during minority, because he of necessity must be in person at the doing of them, 9 Co. 80, *Abbot de Strata Marcella:* but judgment against infant in person, or by attorny and recovery, he may reverse at full age; which shall in this case, as every days experience, *Daux* against *Paiton*, be reverst by error, and tried by jury, he never being before judicially inspected, 10 Co. 42, *Portingtons case*, infant cannot suffer recovery by guardian, it being rather a common conveyance then any real recovery by the judgment; but 3 Cr. 471, *Stapletons case.* 1 Cr. 307, *Lord Newports case*, and Hub *Blunts case.* Infant was allowed by guardian Poph. 130, *Wescot* against *Cotton* 39 Ed. 3, the examination of clerks ability after his death may notwithstanding Art. Cleri. be tried by jury to prevent failer of justice, 33 H. 6, 9. At the grand cape infancy was tryed by jury after full age, although before it should have been tryed by inspection, 3 Cr. 323, *Hopton & Uxor* on the same point reversed a common recovery, and so is Stiles 246, Tr. 1694, Rot. 200, *Aylet* against *Walker* the same point adjudged although no judgment be enter'd. 2. The fine sur concessit is no plea in bar, which the Court agreed clearly, being but for years; and the plea doth not rely on the estople, but demand judgment if the plaintiff may assign errors: however by Windham it cannot be pleaded, the infant being sufficient tenant of the freehold.

[797] 2. Jones for the defendant waved the last point as made only to induce the former, but conceived he cannot reverse this recovery: *Aylets case* was of recovery suffered by attorny, which may be done at any time, that being an act in pais and as void as letter of attorny; and this error is no more then that there was no warrant, which strikes not immediately at the record, as this doth, where its suffered in person, that judgment by default, 1 Inst. 380, Dy. 104, cannot be avoided by him at full age, is clear, for the reverence due to records, 9 Co. 30 b. the same ground is laid, acts done by view of Judges, shall never be undone but by inspection of other Judges. So of fine from which recovery, as here had in person, differs nothing, P. 6 H. 8, Rot. 22, judgment by default in formedon against infant in B. R. was reversed by inspection; which is full proof that such error of infancy cannot be assigned at full age: also there is as much concurrence of the Court to this recovery, as to statute or recognizance: and there is no difference in the reason of the thing. Bargain and sale is no record nor nul tiel record pleadable, its only a deed enrolled for better evidence, Mich. 40 Eliz. 377, *Darcy* against *Jackson* B. R. Error of a recovery against feme infant who appeared by attorny, and judged on the former difference that it being by attorny, she might reverse it; but contrà, if it had been in person. Twisden said *Aylets case* was grounded only on question, whither infant might suffer recovery; and the case of *Darcy* was reversed, because the feme could not make an attorny: Bridgman 69, the Court inclined, that this recovery is reversible by error, as judgment by default, there being no inspection in precipe as there is in fine; but by Hyde Infant is no more inspected in fine then recovery, but only a feme; also this is breve amicabile not adversarium; also on the default after default, if the grand cape be retornd he cannot reverse it during nonage; contrà by Windham clearly. Adjornatur.

63. BULL *against* MAYO.

Slander.

I have indicted him of perjury, and doubt not but to prove him guilty to all intents and purposes. Jones moved for judgment, he agreed *Hicks case* that the latter part is not actionable, but the whole sentence must be intended false after verdict, and so its as good as an express averment that he was never indicted of perjury, which Twisden agreed; and that the defendant must justifie if he can; and without

spe-[798]-cial loss averment is needless. Hyde and Windham contrà, falsò & malitiose will not supply where the averment is necessary, as here, for if he were indicted, its not actionable: so where its said I was told or I dreamt, &c. the plaintiff must aver, ubi revera he was never told so, whereever the words are not scandal without averment; but by consent the parties agreed to amend the whole, or waive it, and begin de novo and discontinue by consent. Judgment staid by agreement.

64. CORBIN *against* MERCIN.

Slander.

In action upon the case for false information within the Court of Exeter, per quod the plaintiff was in danger to lose by the stat. 12 Car. 2, cap. 24, 100l. and his office of customer and surveyor in the port of Exeter, not saying that the office is infrà jurisd. which Jones assignd for error on the case of *Stain* against *Haddon;* an action upon the case for words by an attorny in Launceston, which were not actionable; but as they concernd his office, and because it did not appear he was an attorny, infrà jurisd. Curiæ judgment reversed, 1651, and in the case of the taylor of Bath the words were, he had stoln as much cloath as would make his wife a wastecote, and being actionable of themselves, the special damage alledged in loss of customers in other places, is but aggravation and so well enough, which difference Twisden affirmed; so here the action being specially grounded on the statute for loss of his office. But by Hyde and Windham its the false information that is the chief ground of this action, of which by custom they have conusance, and to say such a person took a bribe is actionable of it self, and the loss of the office only an aggravation: so action for such words spoken of a justice of peace infrà jurisd. although he cannot maintain the action without being a justice, yet this being personal and not like loss of marriage in another place, the action is maintainable. Adjornatur.

[799] 65. MAY *against* GREGORY. *Ante.*

Priviledge.

The Court conceived that the being a barrester is only an inducement to alter the visne, and not sufficient without other reason, especially in trover and conversion; but where it concerns him in point of reputation, as an assault, they will try it here: Siderfin moved it, and offered at a second motion, because a gentleman at the Bar, which the Court granted, perceiving he was of the same house.

66. BEVIN *against* CHAPHAN. *Ante* 794, pl. 55. *Tuesday, No.* 15.

Days.

In action upon the case on promise to pay so many reyals; to part the defendant pleaded non assumpsit, as to the residue, the Statute of Limitations; the plaintiff replieth, that at the time the plaintiff and defendant were in Spain, and that such a day he came over and entred plaint in the Sheriffs Court, which is of record, and removed it hither by habeas corpus, and here declared, to which the defendant demurred, because the indebitatus is lain to arise in London; and in the replication said it arose at Teneriff in warda prædict. Also where the debt ariseth beyond sea, and six years there pass, its not within the statute, which the Court denyed: and by Windham at Teneriff in parochia prædict. shall be intended in London, and so no departure: also a cause begun below, and continued hither by habeas corpus, is a suit within six years, although the declaration here be after six years, which Hyde agreed, but Twisden doubted the saying H. was at Teneriff beyond sea in warda prædict. is void, and repugnant in plea; but I agree that for visne it may be laid: but by Symson in *Tayler* against *Raines* the time or place was resolved last term immaterial, and that the plaintiff may pursue the defendants plea: also the defendant

may travers, that Teneriff is not in warda predict. and the defendant shall never by his plea make that necessary and local, that is but form and transitory; but by Windham however the old books were; of late the plaintiff may vary, as in assumpsit laid twenty years, the defendant cannot demur, but must plead non assumpsit infra sex annos, and then the plaintiff may shew cause of action accrewing within four years. Judgment for the plaintiff, nisi.

[800] 67. SNOW *against* CUTLER. *Ante.*

Estates.

In ejectment special verdict find the lands copihold parcel of the mannor of Hackney, devisable in fee in tail, or other ways, and that one Robert Jaacob by surrender was seised of the moiety in fee, and devised to the heirs of the body of his wife (who before the surrender was jointenant with the husband for their lives remainder to his right heirs).

(1) And Jones for the plaintiff conceived it a good devise: 1. Copihold in discent and limitation follow the rules of the common law, and so no difference betwixt this surrender and devise at common law: also the wife having no issue at the time of his death, but only by another husband afterward (named Cholmley) the devise cannot operate presently, as the case of *Foster* against *Ramsey*, and therefore, if good, must be executory, as a fee devised to person in esse after fee conditional before, as *Pell* against *Brown*, and *Fulmerston* against *Steward*, and 10 Co. 35, it was never doubted but devise may be in futuro without present freehold; but if such devise to person not in esse at the time be good, hath not yet been resolved. I agree no conveyance can be made to one that cannot take during life of the grantor, or not in esse, Perkins, 52, 53, but the reason of conveyances which suppose contracts precedent, differs much from devises, they suppose persons in esse to contract, but here the law doth not suppose any knowledge or privity in the devisee, and therefore such as *Francis case* shall not forfeit till knowledge of condition. So a man that cannot convey, may devise to his wife, and yet its not because the estate takes no effect till after his death, for so estate might be limited in his life; but because she cannot contract, the limitations by way of use most resemble Dyer 298, pl. 30, these cases of devise, and future use after fee simple is good in them; so to person not in esse, Dyer 340, a feme que serra she takes not by way of remainder, but by immediate limitation, as joyntenant with her husband. So a use to A. and his heirs till J. S. hath a son, and then to the son in fee, is good; nothing in the case of *Clerk* against *Cormden* Hub. opposeth this way, for there its only said that one cannot make his own heirs purchasers, but nothing is said of the heirs of estrangers: also a devise to an infant in ventre sa mere, contrà to Dyer 303, is good, and was so before the statute 11 H. 6, 13, by Babington; and the words of the statute to devise to any one per-[801]-son or persons hinders no such devise, these words being put in to shew the power and largeness of the statute: and therefore not restrained to persons in esse, but rather to introduce the latter exception, other then to bodies politick, Moor 177, pl. 312. Also our devise is at common law, and only a limitation of the use on such surrender, 8 Co. 96, cited in *Mannings case*, devise to his wife, and after to his children unprefer'd, is adjudged good of a chattel to daughter born after: and there is no difference of a freehold as to the devise, both may be devised in futuro, P. 14 Car. 1, *Cotton* against *Heath*, on reference to Jones. And Bartlet termor devised to his wife for eighteen years, after to his eldest son for life, and after to the eldest issue of such son that was then in esse, in tail, and resolved good, and so certified by them. 2. Admitting the devise good, its not barred by a common recovery, being copihold lands, 4 Co. 23, it being a discontinuance only, which cannot be in our case, it being in remainder. Also here is custom found to suffer recovery, 23 H. 8. Rec. in Value Br. 27. 3 Cr. 372. Tenant in tail of copihold suffered recovery without custom, and no judgment given, Co. Entr. 206, whether such recovery could be to bar the remainder. And in *Cluns case* 3 Cr. 391, its expresly adjudged, that such recovery bars not, and therewith doth accord; 1 Cr. 45, for there can be no recovery in value, which would make them rather tenants by the recovery, then by copihold:

were the recovery of lands at common law, it could not be a bar here, there being no recompence in value (not only in execution, but) not so much as *in intendment*, which is the hinge of all cases of common recoveries, 3 Co. 60, and here the interest was not in esse, nor any part of the estate passed by the recovery; for which cause in the first age of recoveries it was doubted, whither they barred remainders and reversions, which because of the remedy by formedon was after adjudged they should; also the estates of remainders or reversions may be split, but not so of fees, the recovery in value shall always be of absolute fee, without regard to any collateral qualities, 2 Cr. 593, one may notwithstanding enter for condition broken: also he that hath only possibility of entry for condition broken, shall recover nothing, the case of *Pell* against *Brown* adjudged in this point, that common recovery will not bar future devise; and the inconveniences are on both sides alike, and salved by that, if the contingent be remote, the devise is not allowable; but if the commencement be in short or reasonable time, as determination on life, &c, they are **[802]** good. Twisden, Admit this devise good to the right heirs of Sarah the wife, she hath but an estate for life, the remainder in fee; and if the remainder be to enter, the contingent is destroyed by the forfeiture, but contrà, if, as Jones urged, the lord must enter. Windham conceived grant of reversion to the right heirs, is not good, no more then of freehold: also a present devise to an infant in ventre sa mere, is void; contrà if it be said when he shall be born; so to J. S. when he shall marry my daughter, this is executory and good; so had our devise been to the heir when he shall be born, had been good; but this being to the heirs of the wife, its intended present, and so void: also if it were executory devise its so confounded by recovery, that its gone. But Twisden with Windham agreed, if the limitation were dependant on any other estates, as remainder to right heirs of J. S. also devise to infant in ventre sa mere, is good; and the roll warrants not the case of Dyer 303, this devise was farther to the heirs of the body of the wife, if they attain the age of fourteen, remainder over: also by Hales Chief Baron and Windham, devise to heir may be intended as well heir apparent, there being no other, as real heir; but the case of *Foster* against *Ramsey* is express, contrà of tenant for life: H. in reversion deviseth the reversion to J. S. when he shall marry my daughter, tenant for life dyeth, it shall discend till J. S. marry her. Maynard for the defendant being absent. Judgment for the plaintiff, nisi.

68. CAME *against* GUNSTON. *Ante.*

Apportionment.

Jones for the plaintiff agreed the case of an attorny who was to give his clerk so much per quire, which is void, as to the od sheets on intire damages; but here the averment need not be for a year, or any time, to which the Court inclined, there being a verdict, and damages only for the $\frac{3}{4}$ of a year; and the truth may be, the intent was, that if the plaintiff put her out for a day, the defendant would pay for a year: but then by Twisden the demand should have been of the whole year, or at least pro rata, in consideration H. would place her abroad with any mistress, the defendant would pay for a year. Judgment for the plaintiff.

[803] 69. CARRINGTON *against* HARWAY.

Attorny.

The plaintiff being merchant resident in Spain made a letter of attorny there in Spanish, to acknowledge satisfaction on a judgment here recorded against the defendant; and now on affidavit of the receit thereof, and that its truly translated into English, Bish prayed satisfaction might be acknowledged by the attornies named therein, which the Court refused without testimony of the sealing and delivery of it as his deed, nor then, having before assigned it over to one Cocke, which being in satisfaction of just debt, is not revocable.

70. THE KING *against* RING. *Ante. Wednesday, No.* 16.

Forgery.

He was indicted for forging bargain and sale of Keymer, and enrolment, which was 1652. Eleven months before the acknowledgment, which by Coleman was assigned for error, having relinquisht the plea of his coronation pardon after conviction and before judgment, which was 1663. Also its not shewed in what Court it was enrolled, Yelverton 213. 2 Cr. 291, and secundum formam statuti is not sufficient, nor to say it was at Westminster: but by Windham in indictment of forgery its well enough, and the ignorance or misprision of the party shall not excuse the crime; but otherways if one were to make an effectual title, which the Court agreed: also its said, he affixed the seal of H. only ad damnum ipsorum H. and H. which is impossible; the Court conceived, that if the party be any ways molested, its enough, though deed be ineffectual; as to pass an estate in futuro; also the statute is, if it be made to such intent, its sufficient forgery.

[804] 71. LEET *against* THE BISHOP OF EXETER.

Tyths.

Stroud prayed a prohibition to the Bishops Court at Exeter on modus alledged that the King is seised of the forest of Dartmore, and payeth 3l. per annum to the Parson of Litford in discharge of all tyths of him and his tenants; sed per Curiam this is no ground for prohibition, the suit being by the Parson of Dartmore, another person; but they must have prescribed generally in non decimando, the King being persona mixta.

72. THE KING *against* CUMBER.

Sheriffs.

The Court granted attachment against a bailiff who on a latitat arrested J. S. and he being escaped, they distrained his cattle, and no pound being in the hundred, they drove them into Chichester, and there attached them by custom on plaint in that franchise, and would not suffer replevin of them; and although he were no attorny, yet this being an oppression to the people, it was granted; as also because such beasts in the pound cannot be attacht. And by Windham, this is a usual trick to defeat the jurisdiction of this Court, and bailiffs will drive them by night into such franchises; and although the party had brought trespass, which is yet pending for this illegal distress, yet the Court granted it on motion.

73. PETTO & UXOR *against* RUDDOCK. Siderf. 228, pl. 25.

Tr. 16 Car. 2, Rot. 1403.

Baron & feme.

In debt by baron & feme as administrators, not shewing, as 2 Cr. 10, *Wade* against *Atkinson*, that administration was committed to her, nor by what power. 2. Its alledged that the intestate had not paid it; for which causes the defendants demurred generally to the count, sed non allocatur, for adhuc detinet is sufficient: also it lieth not in the plaintiffs knowledge that the defendant is administrator, and therefore need only alledge him administrator ut dicitur, and by vicar general of the bishop; but the plaintiff must intitle himself. Judgment for the plaintiff.

[805] 74. MAUDIT *against* MANNING. *Thursday, No.* 17.

Bail.

Wild prayed bail taken 24 Car. 1, by Justice Bacon, and entred in his book only (there being no bail piece) for prosecution of writ of error, with effect, according to the statute, and to pay the condemnation on affirmation, the parties being yet living that

were bail, that their recognizance might now be entred on record, the action being action of debt: but the clerk of the errors, that took the recognizance, is dead, and the writ is retornable in Parliament the term after, and discontinued there, and no judgment affirmed, which the Court denied, because on the plaintiffs shewing there is no default in the bail, but only a doubt whither the prosecution were with effect to make one in custodia; were it res integra, bail may be filed after his death; but not here.

75. ELLIS *against* JACKSON.

Trespass.

In assault and battery, the defendant pleads not guilty; and as to false imprisonment, the defendant justifies on non omittas out of C. B. directed to the Sheriff of Lincoln, retornable oct. Pur. which was delivered to the sheriff, and his bailiff arrested the defendant the tenth day of February, which was the day after the essoin-day, which in law is the day of the retorn, but before the 4 die post, which was found by special verdict. Stroud for the plaintiff, Moor 711, *Woolly* against *Mosely*, that the 4 die post is only for appearance and retorn of the writ, but not for execution 3 Cr. 180, and 33 H. 6, 45 b. in account, the distringas was ret. oct. Mart. which was a Sunday, and the Nisi Prius the next day, and by Choak, agreed by Prisot, that one may have trespass on arrest after the first day, Jour Br. The Court held clearly that after the day of retorn, the sheriff cannot execute it, but on the retorn day he may; the 4 die post is but a day of grace to save defaults, and unless the defaults be made, there is never any entry on the roll of the 4 die post, this is the reason of *Shellyes case*. Judgment for the plaintiff, nisi.

[806] 76. BOURMAN *against* ACTON. *Ante.*

Covenant.

In covenant as executor, against the defendant as executor of Eltonhead, on devise to the plaintiff of two ballast wharfs in Woollage, and a way through the lands of Eltonhead to pits to dig ballast, and covenanted that neither E. nor his assigns, or under-tenants shall dig in the pits of the said E. any gravel, except only for repairs. The plaintiff alledgeth that one Brent an under-tenant digged; the defendant taketh issue thereon, that he was not sub-tenant modo & forma, on which special verdict find that Parke, lessee of E. made a lease of the pits to Hull for part of this term, H. assigns to B. & si B. be sub-tenant according to the covenant, they find for the plaintiff. And Jones for the plaintiff, that this under-tenant shall not be intended only tenant of the pits only, as E. is, but generally any of the sub-tenants of E. of any other place: also the plaintiff hath only liberty to dig, but no interest, and so as well tortfesors as rightful diggings, the strongest against the covenantor are restrained: also he cannot be sub-tenant, unless there be a mesne estate, or reversions; and in ordinary speech, sub-tenant is taken for any that cometh in under the same title. Scrogs for the defendant, B. is no under-tenant to E. for debt lieth not against him; had the words been, none claiming under him should dig, it had been for the plaintiff, but ejus tenens he cannot be no more then if E. had been dead at the time; and non constat to the Court that E. is living, and so the conclusion of the verdict, that if B. were under-tenant to E. at the time of the bill, or not, &c. is ill. Sed per Curiam, one may be under-tenant, although the lessor be dead, and the time or place is but added for form, and not to be found: also under-tenant is any that cometh in under the lessors interest, *Brumfield* against *Williamson*, covenant that he and his assigns would pay rent, adjudged here that the tenant at will or his assignee is within the meaning thereof: so by Hyde, lease of 99 years of copihold, which hath common in wast, which covenant that he nor his assigns shall not use the wast with cattle, if his under assignee of part put in cattle its a breach. Judgment for the plaintiff.

[807] 77. MASON *against* TREDWAY. *Saturday, No.* 19.

Surrender.

In ejectment by verdict found, that Sir Robert Tredway demised to Tyrrel for 1000 years in trust for payment of mony to children of Lamin; they find that the lessee releast to the lessor, being in possession, & si, pro plaintiff. Bigland conceived that had the lessee been in possession, nil operatur, though the words be remise, release, discharge, and for ever quit claim the said mortgage, &c. all the estate, right, title, interest, claim, and demand whatsoever, 1 Inst. 307 b. 3 Cr. 21, pl. 2, *Wakefords case*, for this cannot inure as a release, nor as a surrender, which must have proper words, 2 Cr. 169, and it shall not be good by way of grant, 5 Co. 15, of ecclesiastick persons, Litt. sect. 331. 1 Co. 76, being not extendable to any other sense, 1 Inst. 30 b. Dyer 251, as grant, feoffment, &c. may. The case of 12 Car. 1, Rot. 235, *Johnson* against *Trumper*, lessee for 30 years demiseth the remainder of the years after the death of the wife to two sons, one died in the life of the wife, and then the other releast to him in the reversion, which on special verdict was held void, as a grant, because it's but a possibility; but it was held per Curiam, præter Bramston, to be good by way of exoneration: but in our case there is a possession to be transferred, which may be done another way. 2. Here is possession found, but neither rightful nor in privity, and so not sufficient for release, 7 Ed. 4, 27. 2 Ed. 4, 6, in 4 Co. *Kite* against *Quinton*, such release to copyholder in fact is good, the privity being created by the lords admittance, 2 Cr. 169, *Butler* against *Duckmonton*. Raymond for the defendant, that this passeth by way of surrender; he agreed the cases cited, but conceived the word discharge, Perk. sect. 607, doth make it a surrender, being a sufficient declaration of assent to waive the term, 41 Ed. 3, 23, pl. 24, *Penruddock* against *Newman*, & 3 Cr. 488, and that the other party shall have it; and this is the end and intent of the parties on the deed which was mortgaged, which by order of the late powers, on payment of the mony in to Haberdashers-Hall for the malignancy of Lamin, who was likewise ordered to release to the lessees in trust, and that they should release to the mortgager.

1. Windham said a difference was taken betwixt a lease for life and years in *Johnsons case*, where the words were only remise, release, yet for lease for years, being but a contract, although the lessee were not in possession, yet it's well, as assent, contrary of lease for life: also to enlarge an estate, [808] there must be privity, but need not be so on discharge or extinguishment of right, but that is most properly to men that have no privity; and if the lease be turned to a right, it's as release of disseisee to disseisor: also a contract may be dissolved by contract, and if not, it's clearly good enough.

2. Twisden, It's not found that the lessee ever entred, so he cannot surrender. Also although the law be, that a release to H. that enters into my land is good, yet very good opinion agreed with Littleton, that such release is void, because uncertain whether such be tenant at sufferance, or at will. Also this is not like the case of copyholder, whose release to the lord is a good release, 10 Co. *Lampets case*, release by termor to disseisor extincts his term, but carrieth nothing to the disseisor. Adjornatur.

78. BROWN *against* PURCHASE. Siderf. 230, pl. 29.

Administrator.

In debt on obligation against administrator, she pleads that judgment before was had against her by J. S. (in declaration on obligation made by the intestate Smith) and doth not aver that the intestate devenit obligatus, for which cause Wild demurred, because the recovery pleaded must be of as high a nature as the action now brought; but it being averred that it was had for just debt, and that it was not paid by the testator, the Court conceived it is well enough, Co. Entr. 148, as *Smallpeece* against *Smallpeece*: and by Windham, The administrator cannot know the date of the bond, nor need demand oyer, and therefore need not say devenit obligatus, however the presidents both ways are well enough; and if there were no bond, although the debt were just on simple contract, yet it's evidence of fraud. Judgment for the defendant, nisi.

79. WILLIAMS AND THE JUSTICES OF SOWN OF BEDFORD *against* BECKET.

Force.

Serjeant Hyde prayed restitution on indictment of force, removed hither by the prosecutor. Hyde Chief Justice conceived, that only the justices that take the inquisition are bound to make restitution, and that only, by Windham, de communi jure, not whether a tort or a droit; but this Court, or the Judges of Assize are not bound, but it's in their discretion, which Twisden denied; and that the statute of 31 Eliz. gives the three years possession, which could not else have been **[809]** pleaded, but restitution awarded; and Keeling absente, the parties were ordered to plead.

80. THE KING *against* BACON. Siderf. 230, pl. 30.

Coron.

He was indicted for offering 100l. in a bagg to Parry to murder Sir Harbottle Grimston the Master of the Rolls, who on misdemeanors in a cause in Chancery referred to him, made an order which displeased the defendant: it's further said, that Bacon would do it if he did not; and after wore a sword. After verdict, and judgment on not guilty, Williams moved in arrest of judgment, because this is but an inclination and cause of the good behaviour: also the issue is joyned by Sir Thomas Fanshaw, which, per Curiam, is as well as an information; for not guilty alone is no issue, but the Kings attorny, or he, must joyn; also anciently, voluntas reputabatur pro facto, so as to evict the party, which is since excused, quoad the felony; but it still remains a great crime: also in such indictments as concern not life and member, the party may plead by attorny; so on the Statute of Recusancy, or appeal of maihme, judgment that he be fined 1000 mark, three months imprisonment, bail 1000l. himself, and 500l. his bail for good behaviour during life, and that he acknowledge his fault at Barr of B. R. and in Chancery. The Court refused now, ex motione Raymond, to charge him with judgment had before in debt.

81. WIN *against* LLOYD. *Ante.*

Costs.

Williams on 3 H. 7, cap. 10, prayed costs on affirmance of recovery in writ of error, notwithstanding no costs were due in the original action, Dyer 77 & 24. 3 Cr. 659 & 617, and though a writ of seisin were retorned, to which Windham inclined; but the course of the Court being contrary, adjornatur.

[810] 82. THE KING *against* BURLEIGH. *Monday, Nov.* 21. Siderf. 229, pl. 20.

Church.

Coleman moved that indictment in Norwich for not coming to church might be sent back, there being no prosecution, the bail which should be in 20l. being but 10l. wilfully forfeited; the Court conceived, as in *Brumfields case* was resolved, that may in the statute is intended that they must proclaim, & fuit remise nisi, adjornatur.

83. ALLEN *against* POWELL. Siderf. 231, pl. 32.

Pardon.

Powis for the plaintiff prayed a special scire facias on the Act of Oblivion, on recovery by the defendant against the plaintiff in an action of false imprisonment for matters during the wars, and that he might not be put to aud. quer. to which Windham inclined, as well as on release shewn in Court, the advantages for the defendant

being the same, and the course speedier for the plaintiff; and in C. B. its used thus, surmising in the scire facias that the matter relates to the late wars, and that he is not a person excepted: but Hyde remembred it not in his time, and conceived that any one may as well have it on bare suggestion at Barr: so Twisden: sed adjornatur to search presidents.

84. HAMOND *against* CONINGSBY. In Demand, Br. 10.

Trin. 16 Car. 2, Rot. 1524.

Ejectment. Siderf. 232, pl. 33.

In an ejectment of a manor, and so many acres as includes the manor, the jury find for the plaintiff as to the manor præter the services: and as to the services not guilty, *Hames* against *Stroud*, Latch. 61, and judgment is for the plaintiff: and Jones assigned this for error, because when the count is of a manor, the jury cannot find for the plaintiff for that which is not a manor; and there is none that brings an ejectment of a manor, but they also add the acres that contain it, to the end that if they prove it not a manor they may recover according to the acres, Hub. 108, but they must enter it so, and not as here generally of both, 2 Cr. 113. Wilmore, Also the verdict being of as much as the count, 9 Co. 59, *Beachers case*, the judgment against the plaintiff cannot be in misericordia, if it be supposed good: the Court **[811]** held both manifest errors, and assignable by the defendant, the verdict being not to be taken by parcels, nor the judgment. Judgment staid.

85. BICKERSTAFF *against* PURDIEU. *Ante.* Siderf. 218, pl. 2.

Administrator.

In debt by administrator on lease for years made by the testator to J. S. by virtue of which he was possessed, the reversion inde to the plaintiff on nil detinet, and verdict for the plaintiff. Wild in arrest of judgment moved, that it doth not appear what estate the intestate had in reversion, either in fee, or longer term for years: but by Goodfellow, after verdict it's aided by virtute cujus, as *Sanders's case*, 5 Co. 12. Assignment by lessee excepting the trees, & Dyer 69, & 3 Cr. 716, & 7 H. 7, 3. Pl. Com. 502, *Grendons case*, in that it's said the lessee entred, & adhuc detinet. Windham conceived this action favoured, and the omission of a mean assignment of the defendant well enough: and per Curiam, the title of the plaintiff is sufficiently found.

86. DAVIE *against* FOX.

Amendment.

Bertue prayed amendment of a transcript of record out of Inferiour Court, on affidavit that the record below was right, but the clerk here mistook, which the Court refused. But by Windham, Were the mistake in the writing over the record of Inferiour Court, it's amendable.

87. PRIOR *against* POWERS.

Trials.

In an action upon the case for misusing a horse, Orlaby prayed a new trial, because the jurors in Bedfordshire being divided six and six, they agreed by lot, putting two sixpences into a hat, that which the bailiff took, that way the verdict should go, which was for the plaintiff, and 2d. damages; but the Court denied it, because it appeared only by pumping a juryman, who confessed all; but being against himself, it was not much regarded. Also the Court cannot grant new trial without punishing the jury, which cannot be by this confession against themselves: and by Windham, This is as good a way of decision as by the strongest body, which is the usual way, and is suitable

in such cases to the law of God. Twisden doubted it would be of ill example, and in *Sir Philip Acton case*, on such verdict, on fillip of counter, a new trial was granted, but here it was denied.

[812] 88. SCURRE *against* THE ARCHBISHOP OF YORK. *Tuesday, Nov.* 22.

Prohibition. Siderf. 232, pl. 34.

Symson prayed a prohibition on 13 Car. 2, cap. 12, an accusation by the archbishop of the party for sitting in the church with his hat on, requiring him to answer upon oath, which by Hyde and Windham he may, the thing being publick of which he is charged, and not private in his own breast only; and the course of all those Courts is to answer on oath, as the oath in the Star-Chamber they objected by bill, to which they required an oath; but this the party may answer generally not guilty, or particularly; but Twisden contrà, totis viribus, & adjornatur till the opinion of the other Judges be known. Also the oath ex officio is general to answer such questions as should be objected, not the answering of particular crime objected. *Post.*

89. ALDERMAN CRIPS *against* THE MAYOR AND JURATS OF MAIDSTONE. *Ante.*

Mandamus.

On a new mandamus to restore him, being again turned out, they return that their charter is, that such shall continue during life, 2 Cr. 540, *Warrens case*, & *Estwicks case*, Stiles 43, pl. 93, if it seem expedient to the mayor and jurats to continue him, and that it did not seem expedient, and therefore they put him out; which, by Wild the King's Serjeant, this being an office, and member of the corporation, they cannot ad libitum turn him out; as a counsel or steward, as *Blagraves case*, they may. 2. Although it be said he shall continue, if it shall seem expedient, it doth not imply that they might turn him out if it shall seem expedient, 1 Inst. 204 b. But by Coleman for the corporation, the retorn of *Blagraves case* was only that the Corporation of Redding might elect a steward who was to continue during life at their will and pleasure: also it's consistent to an officer to be during pleasure of those to whom he is an officer; thus the Judges; and the King may as well make such in an inferiour corporation: also the word si is a limitation, and all one with power to turn out in a retorn, although not in pleading. Windham said it was expresly retorned in *Blagraves case*, that they might amove, which is herein wanting; and si, as 1 Inst. 204 b. makes no condition unless it be added quod tunc. Also it **[813]** seemed good that he should be a jurat during life when they elected him; and by law this makes no tenancy at will, but only a power to elect or not, at pleasure; and so the question of custom to turn out at pleasure is out of the case. Twisden, They are not to be turned out without cause, as 2 Cr. 540, *Warrens case*, a counsel is but to them as steward to a private lord, turnable out at pleasure. Also it's repugnant to say he can be jurat for life at their pleasure. Hyde accorded that the retorn is insufficient; this jurat differs not from alderman in another town; were their charter to turn out ad libitum, they ought to do it for a reasonable cause, this being a free custom, which is as favourable as freehold of the party on Magna Charta. Restitution awarded per Curiam; and Stroud Recorder of Burford, was restored, although they had power to turn out at will for want of cause.

90. PROBY *against* MARQUESS OF DORCHESTER.

Slander.

Error of a judgment in C. B. in action upon the case for words on 2 R. 2, de Scandalis Magnatum, My Lord of D. is no more to be valued than the dog that lieth there. North for the plaintiff, The words are only said falsa, not falsa nova, or mendacia, or scandalosa, as C. Entr. 593. Also there is no averment that any dog lay there by, at the time, but innuendo quendam canem ad tunc ibidem jacent', which

being reference to a thing that is appearing to the hearers, ought to be; contrà if it did not appear; as to say H. killed the wife of J. S. it need not be said she was dead: also a man is not to be valued, because above all value, as in appeal de morte hominis, no damages, no more of dogs, which are below value, and no larceny can be of them: also all the cases on this statute are either, something they said not, as Crumpt. Jurisd. 13. C. Entr. 593, or of something they did not, or some imputation of an evil mind; but these words are neither what he said, did, or thought, but only as 2 Cr. 196, in which is no judgment; also the judgment ought to have been capiatur. Maynard for the defendant, This is as great a scandal almost as can be, and an occasion of discord, and as much as if it had been said he were of no value, worth, or honour at all, 3 Cr. 192, *Lord of Winchesters case*, being spoken malitiosè; although it might be done legally, yet being spoken in disgrace, may be occasion of discord; actions lye for peers that tend to prejudice of honour, although common persons cannot have it without loss: also on indictment, there ought to be capiatur, but **[814]** never in action upon the statute. Also the words are well enough, whither any dog were there or not. Windham conceived, that if it had been said he valued my lord no more, it would not have been actionable; but here is a general value put on him, without issue de injuria sua propria found for my lord on justification by the defendant, that they were spoken with regard to his power, must not be intended in any good sense, as when in equilibro. Adjornatur, but the Court inclined the words were actionable, and that as *The Lord Say* against *Stephens*, no capiatur is ever entred in such action upon the statute.

91. THE KING *against* CORNHIL.

Trades.

In indictment for seducing an apprentice removed out of London after verdict, and judgment here affirmed, the defendant brings a writ of error here of the same judgment, which by Brewer is without all president, the rule in 4 Inst. being general, that it ought to be in the House of Lords, as the president of 27 H. 8, 16. In Cond. Br. 7, and *Sir Thomas Metham case*, temps R. 2, in a criminal cause. Hyde said that if A. be attainted of felony, the writ of error must be here, which Twisden agreed as error of judgment before the high steward, 3 Inst. chap. de Attainder. But by Windham, errors in fact are only assignable, not in law of the judgment: but per Curiam, this is no supersedeas of execution; therefore it was awarded nisi. Also the judgment is only capiatur, and no fine set, which is but interlocutory, and the party must appear in person before he can assign error.

92. EDWARDS *against* ———.

Slander.

In action upon the case for saying he was a traytor to the King; and at another time that he is a traytor to the King. Williams after verdict moved in arrest of judgment, because the former words are not actionable, in regard it doth not appear they were spoken since the Act of Oblivion, and intire damages being given, its for the defendant. But by Baldwin for the plaintiff, hereby it shall be intended that he continueth a traytor, as in the case of Sir William Roberts in the Exchequer, 13 Car. 2, was adjudged, on saying He was one of those rebells that brought the King to the block, which the Court, Hyde and Keeling absentibus, accorded. Judgment for the plaintiff.

[815] 93. SIR JOHN LENTHALL *against* LORD LAUDORIS. *Wednesday, No.* 23.

Escape.

Glyn moved for the defendant, who was joyntly bound with one Lesly for the true imprisonment of L. and warrant of attorny to confess judgment on escape of L. which being a way for ease only, and judgment entred without any trial of the escape

to set it aside. But by Wild Kings Serjeant, its be to entred on action brought, which is brought, and the parties at issue, but no farther prosecution; but Sir J. assigned his security to the creditor, which, per Curiam is well enough; there appearing no fraud, they refused to set aside the judgment.

94. SELBY *against* WALKER.

Bankrupt.

In debt upon bond given to the plaintiff to perform covenants between the defendant as assignee, for the benefit of the other creditors, and the commissioners of bankrupts which was inter alia to give an account to the other creditors or to either of their assigns; on request the plaintiff said he had not given him an account in his replication, (the defendant having pleaded performance in bar) to which the defendant demurred, because by Weston the covenant is joynt as to the creditors, to which the Court inclined, and although as *Windhams case* the matter were several; yet there being a subsequent clause several as to the assigns, it cannot be intended otherwise. 2. The action was laid at St. Mary le Bow in ward de Cheap, and the plaintiff saith quod ad tunc & ibidem he requested the account, which the Court conceived incertain, as appointment of hundred or general place. But by Jones for the plaintiff, where ever it was that the request was, the accompt must be also. Sed adjornatur.

95. MIDDLETON *against* TALBOT MANUCAPTOR OF SYLVESTER. *Ante.*

Bail.

In scire facias the defendant pleads that the prisoner was committed in custody in exoneratione manucaptorum before the action brought, & hoc paratus est verificare, to which it was demurred, because it should have been prout patet per recordum, which the Court agreed. Judgment for the plaintiff, nisi.

[816] 96. COLLINS *against* SANDERS. *Ante.* Siderf. 234, pl. 37.

Visne.

In an action of covenant in London on bottomree, the defendant pleads the ship was cast away at Falmouth in a forreign county, to which the plaintiff demurred, it being a transitory action and plea, as 6 Ed. 4, 46, and *Dixon* against *Williams*, Hill. 1655, Rot. 864, in an action for not allowing meat, drink and lodging, laid in Middlesex. The defendant pleaded departure in London, and swore his plea, which is not due here; and yet judgment for the plaintiff affirmd in writ of error. Coleman for the defendant, By traverse of the same matter in the declaration, cannot alter the place; contrà if it be new matter which accords with the count, and ariseth from the covenant it self; sed Curia contrà; and *Dixons case* is unanswerable; the old books are as Coleman cited. Judgment for the plaintiff.

97. CULPEPPER *against* AUSTIN. In Cond. Br. 133.

Fines.

In debt upon obligation, on oyer demanded, the condition was to levy a fine (not saying to whom) at the costs of the obligor, now defendant, and he to pay within ten days of the levying of it. The defendant pleads no fine was levied by the wife of the plaintiff, according to the condition de terr a præfati Strangford; to which the plaintiff demurred on 5 Co. 127, *Palmers case*, and Hutt. 48, *Waldron and Hill*, because its not aver'd that the defendant brought any writ of covenant, sed non allocatur. For, per Curiam, the law is now changed, and the fine levied before any writ entred, and therefore must be done by the plaintiff without any writ; and there being a fine really levied, by the plaintiff, after the time in the condition, and this demurrer on suddain, the Court, on the prayer of Wild for the plaintiff, gave leave to discontinue.

98. GURNY *against* PILKINGTON, EXECUTOR OF MANNING.

Enfant.

In an action upon the case against the defendant as executor, after judgment, Baldwin assigned for error, that he was an infant, and no guardian made, to which in nullo est pleaded, which being confession of the plea, the Court (on 2 Cr. 420, & 440, and one *Rumnies case Executor of Carew*, where judgment was reverst, because one of **[817]** the executors was an infant, and not by guardian) conceived it manifest error. Judgment reverst.

99. LOCKE *against* ETHERINGTON. *Ante. Thursday, Nov.* 24.

Pardon.

Coleman for the plaintiff in the scire facias, that this judgment is not pardoned in the hands of the debtor, for general words in the statute are restrained to the intent, as on the statute of 21 Jac. 16, of Limitations, slander of title or magnatum are not included: so *Stradling* against *Morgan*, Pl. Com. all receivers are restrained to receivers of the King. Also the debtor hath committed no offence, and therefore is not capable of pardon, as the felo de se is, and his administrator cannot take here, because there were no words of restitution, which are necessary after office, though the Kings own debt, on his lending mony, or on assignment, which is in lieu, should be pardoned, yet there is no other person to whom the pardon can relate, but here there is, and the debtor is a third person no ways concerned in the crime or forfeiture, P. 9 Jac. Lane 117, *Chamberlains case*. 2. This would introduce a general inconvenience that all the judgments due to outlawed persons would be pardoned, for there are no words of restitution to such persons utlawed, but they are as *King* against *Ward*, in the same case with felo de se, and his executors, *Vicount Dunbars case*, 1 Cr. 349, on 20 Jac. cap. 35, is on the whole the same with this case at Barr: and the case of *Sir G. Binion* is not like this, he was receiver, and debt of J. S. assigned by him to the King was excepted, and by equity the debt of the receiver and the assignee are the same: also 5 Co. *Wirrals case*, two bound to H. utlawed, on pardon it was said, that had not such exception been, it had been pardoned; and there was never any express resolution on the body of this Act, that it's pardoned. 3. Modo subditus is not sufficient title, 11 H. 7, 25, pl. 4, it's ill, as Pl. Com. 376, *Zouch* against *Stowels case:* also 2 Ed. 6 may be aver'd or not, it being not laid on the plaintiff to aver himself a subject, but on the defendant, 9 Co. Evesque de Salisbury nuper Episc. doth imply he is not so now. Powis for the defendant, There needs no averment at all, but it shall be intended, till the contrary be alledged against him, 12 H. 8, 3 a. b. pl. 3. 8 Ed. 4, 7. Pl. Com. 103, where the proviso is from the body of the Act, it must be aver'd, 11 H. 7, 24, pl. 2, also where the body of the Act extends only to some par-**[818]**-ticular persons, as 16 H. 7, 2, but where the statute is general, and so of proviso, as in our case, it need not, 1 Inst. 244 a. also a subject shall be intended natural in digniori sensu, 6 Co. 20. Also this is within the words of the pardon, which are of all sums of mony, & nil refert whether it be immediately or mediately due to the King; also if it had been named, doubtless it had been pardoned; and here the words are as large, Kell. 198. Dyer 249, and to be taken by equity against the King, P. 1661, 13 Car. 2, in the Exchequer, *Sir G. Binions case Receiver*, after inquisition found that one Tourner was in debt to Sir G. B. Scire facias was against him, to which he pleaded the Act of Oblivion; to which the attorny demurred, because it was but a debt in aid, and this process made use of only by the receiver in the Kings name, as his priviledge is, here it was adjudged that it was pardoned, and then Mr. Attorny relinquished his demurrer, and pleaded that the King was only trustee, and his name used for Sir G. B.'s use (which did not before appear on record) and now adjudged that it was not pardoned. Adjornatur.

100. BUCKNELS CASE *against* THE FERMERS OF EXCISE.

Taxes.

Coleman moved for a certiorari to remove three informations exhibited against him before the commissioners of excise, which Jones on the Act of 12 Car. 2, cap. 24, of taking away the Court of Wards opposed, because there is an appeal given to the next sessions, and a clause that no certiorari shall be allowed: but yet, by Coleman, This Court is not excluded to send one to the commissioners, but only to the sessions in the country: also the party hath election either to pray certiorari, or to appeal to other comissioners. Also this clause ariseth on 15 Car. 2, an additional Act against brewers, 12 Car 2, 23, § 35, which makes these offences, and the penalties thereof, in which there is no negative words: the Court inclined it lay not; but they ordered the fermors to shew cause why it should not go, which was all one as to deny it, for they give judgment and make execution one day, upon an information the other, and the Court would not stay proceedings in the mean time, so can never try the question.

[819] 101. SCURRE *against* THE ARCHBISHOP OF YORK. *Ante.*

Prohibition.

Symson prayed a prohibition quousque copia of the libell were delivered, which, by Windham, ought not to be, as 2 Inst. Art. Cler. on the presentment of churchwardens, because there are no libels in such cases, to which Hyde Chief Justice inclined. But by Twisden, who said, that if there be no libel, or if libel were before had, they may proceed in the Ecclesiastical Court: which Keeling agreed; and that every charge is within the law of 2 H. 5. Adjornatur.

102. RANDALL *against* KEITE. *Ante. Friday, No.* 25.

Sheriffs.

In debt on bond, condition to appear to action split in a court baron, and answer the costs and condemnation by a day. The defendant on oyer pleaded 23 H. 6, cap. 10, that he was attacht by his goods by process out of the Court, and deteined till by the procurement of the bailiff he entred it to him; to which the plaintiff demurred: and by Jones, This is a good plea, the bailiffs of court baron being within the words of the law; but however its void by common law. Paulet for the plaintiff; This process is only by attachment of goods, and not by arrest of the party, and so no such mischief, as in the case of *Beaufage*, 5 Co. 100, for at common law the sheriff might have deteined the body till delivered by writ of manucaption, which was also left to the liberty of the sheriff to chuse his security; and now he is ordered to be delivered on sufficient bond; and the only meaning was to discharge the person, Dyer 199, pl. 54. Hub. 15, *Norton* against *Syms*. Keeling, This being agreed to be taken in discharge of goods, and by persons that ought, to take bail as ministers, which are not meant of sheriffs ministers only, but others, all being bound to take bail in any civil cause, and that for appearance only; and this is farther. Adjornatur.

[820] 103. GRINSWELL *against* SIR ANTHONY AUCHER.

Condition.

In debt upon obligation, condition to pay when the Kings Majesty shall be restored by conquest, accomodation, or otherways, the difference between him and his Parliament being recited: the defendant pleaded that King Charles the First was beheaded, and never restored to his Crown in peace, according to the condition: to which the plaintiff demurred. And by Hyde and Keeling, This may be intended in his politick capacity, which never dyeth: also had the words been spoken after his death, none could think it tyed to his person: sed Twisden & Windham contrà, This appears to be personally meant of the King that was then in difference, &c. Adjornatur.

104. WADSWORTH *against* EXECUTORS OF GUY.

Trades.

In covenant to instruct an apprentice, or cause him to be instructed in the trade of a sadler, and to find him meat, drink, and lodging, during the term: the plaintiff sheweth the testators death, and that such a day he was turned out of doors by the defendant, & sic conventionem fregit in hoc, viz. not instructing him, and not finding meat and drink: to which the defendant demurred, because that is a personal covenant, and discharged by death, and cannot be assigned, as Hub. 134 & 216 & 48 Ed. 3, 2, being no custom: but all the Court inclined, had it been only to instruct, it had been discharged; and being complex to instruct and find meat is not; and if it were, yet the breach is sufficiently assigned, if either part be true, as here, in turning him out. Judgment for the plaintiff.

105. BUTLER *against* LYDIAT.

Slander.

In action upon the case for words spoken at several days; the defendant pleads that the words were not spoken within two years before the action; to which Jones demurred, and sheweth for cause specially, that it ought to be several issues, as in debt for 20l. nil debet to 20l. modo & forma, and is not sufficient, without saying nec aliquid denarium inde, on special demurrer. Raymond contrà, This is as well as 7 Car. 1 Cr. *Englishes case*, non assumpsit pleaded to several assumpsits. Sed per Curiam, Clearly this is general issue, that goeth to all; and had it been not-guilty within two **[821]** years, its well enough: and this plea, non locutus, making no issue till the plaintiff replyed quod locutus fuit infrà two years, is also well enough, per Curiam, and if the plaintiff prove any of them spoken within the time, its for him. Sed adjornatur.

106. SHEPHERD *against* SPENCER.

Condition.

In debt on bond, condition to pay such a sum as Eliz. Batty should appoint, after marriage with the defendant, by her last will, or other writing, signed and subscribed in tiel form by her: the defendant said she made no will, nor by other writing in tiel form appointed. The plaintiff sets an appointment in writing forth; the defendant said that it was after revoked; to which the plaintiff demurred, because this is a departure, and also its not revocable; sed Curia contrà, This is only fortification of the bar, and could not be foreseen: also this is pleaded as a will, as much as can be, and not like the case of *Dean* against *Eason*. Also if it be no will, to say she made no writing in tiel form, is a linsy-wolsy, and no sufficient title. The Court conceived *The Lord Ormonds case*, Hub. a strange case, that such writing in nature of a will, and voluntary, although it had not the form, In the name of God, Amen, should not be revocable. Judgment for the defendant, nisi.

107. SOPER *against* MORGAN.

Warranty.

A feoffment by dedi & concessi per Curiam in action against the feoffor, doth not warrant action of covenant on eviction of the inheritance, but it must be deduced in the real lien by warranty: but in case of a freehold only, its ground for covenant, as Hub. 3 & 4, In Cond. Br. 141, and here the case was in action of covenant, brought by the lessee for years, on breach of covenant; the lessor pleaded that the Dean and Chapter of D. entred on him, and evicted him: to which the plaintiff demurred; but there being other restrictive covenants. Judgment for the defendant, nisi.

[822] 108. FELGATE *against* TOURNER.

Bail.

Felgate recovered against Mole, and on scire facias against Turner, as bail, judgment was had, and after set aside by rule, as irregular; whereupon Tourner in trespass recovered 140l. which was before recovered against him, and afterwards on the former rule, for vacating the judgment, doth devise an entry on the roll, whereby he was to have restitution for the same mony on the judgment, which, by Wild & Curiam, is never used on rule to vacat judgment, but restitution is awarded: also by rule, and by scire facias on such entry, Tourner had judgment and execution; Felgate having after the former recovery, by a rightful judgment, gotten his debt of Tourner: and now Felgate brings trespass against Tourner, who pleads this last entry in bar, which the Court ordered to be expunged: and by Twisden, The first recovery of Tourner was illegal.

109. RICHARDSON *against* ELLIOT.

Cattle.

In action upon the case on promise to redeliver a dog lurcher, toties quoties he should come to the defendants custody; the plaintiff sheweth, that 28 No. he lost the dog, and the 29 he came to the defendants custody, and that 30 he demanded, and the defendant refused to deliver him. The defendant sayeth, that postea, at the same place, on the same 29 No. she delivered the dog, and doth not traverse absque hoc that she was not-guilty before, or after, for which cause Jones demurred, this being a continuing act, and not any particular matter: but per Curiam, on 12 Ed. 4, 6, and *Lee* against *Rains case*, there needs no traverse, when both parties agree in the time and place; and the demand is idle on the 30 No. unless it had been alledged, that then the plaintiff had lost the dog, & adhuc recusat to redeliver, will not imply any other loss. Judgment for the defendant.

110. BECKE *against* CAVALIER.

Baron & feme.

After imparlance as feme sole in trespass, and assault, the defendant pleads, that at the time of the bill exhibited she was covert, and concludes in bar: and by Barwell for the plaintiff, This is but as a plea in abatement, and therefore prayed respond. ouster, which the Court granted, nisi.

[823] 111. BECON *against* SEWELL. Error, Br. 84.

Abatement. Siderf. 235, pl. 40.

In trespass for taking a bull, and judgment for the plaintiff in C. B. and error here brought, the plaintiff in the writ of error by affidavit, suggested that one of the plaintiffs in the writ of error was dead, which the Court disallowed, as a trick only to save double costs, and to make the new writ of error a supersedeas, this being abated by the act of God, and if true, it should be suggested on the roll (although it cannot be pleaded) by venit J. S. &c. & dat Curiæ intelligi, &c. Judgment affirmed.

112.

Admiral.

Windham and Keeling conceived on 1 Eliz. 18, that the admiral hath divisum imperium to remove nusances in navigable rivers: but by Twisden, This is only in particular cases, and 1 Eliz. cap. 18 is expired. The Court refused to stay proceedings, or grant prohibition.

113. RIDER *against* BEAL. *Saturday, Nov.* 26.

Tythes.

The Court conceived the indebitatus for tythes after verdict may be intended good, that they were a portion of tythes given by the abbot to the vicar, and therefore judgment for the plaintiff.

114. THE KING *against* PAIN. *Ante.*

Amendment.

Coleman prayed alias certiorari to Norwich, or that the clerk of the peace may come in and amend the order retorned, being in the preterperfect tense, ordinatum fuit prout sequitur; this the Court refused in *The King* against *Alcock*, and would not amend omission of contrà pacem, omitted in an order of Inferiour Court in Middlesex, which the Court agreed: but were divided whether new certiorari should be awarded, because else the King would lose his fine, which was set on jurors for contempt in Court, not on indictment or presentment: and by Windham, it's not reasonable the King should be prejudiced by the default of an ill clerk of the peace; and this is only a history, and no order. Sed adjornatur to search presidents, if after retorn, how void soever, an alias may be awarded.

[824] 115. GOODMAN *against* CUDDRINGTON. Siderf. 235, pl. 41.

Trials.

The Court granted a new trial on delivery of customary roll, whereby jurors were induced to give verdict for the plaintiff for her widows estate; it was done by the solicitor of the plaintiff to one juror that was absent a quarter of an hour from his fellows, although it were sworn that the jurors never read or see them, and that the juror to whom it was delivered, knew not the contents of it: so the *Lord Chandois case*, on delivery of depositions by solicitor to the jury, that were never read in Court, and it need not be indorced on postea of Nisi Prius; but notwithstanding 3 Cr. 411, pl. 1, the Court here may grant it, this never being given in evidence.

116. SCURRE *against* THE ARCHBISHOP OF YORK. *Ante.*

Prohibition.

Dr. Burrell Commissary affirmed the course of their Courts, that in matters of crime it's a sufficient answer that it's so, & non tenetur respondere, if it be objected by the bishop ex officio mero; and in case of defamation, which is crimen civiliter intentatum, he answers only quatenus de jure debet; and his proctor protests in such case, that as to matters of crime his client should be saved. 2. Also when they proceed ex officio mero, as on presentments, they never give copy of libel, Moor 755, pl. 1043, nor do absolve him in any case, but on oath to obey mandata ecclesiæ, to be more obedient to the Kings laws, and the commands of his Ordinary: but by Keeling, this is only when they have jurisdiction of the cause. 3. Articles are no more a libel then an indictment is a declaration, nor any oath required, nor copy delivered, which, per Curiam, they need not more then copy of interrogatories are to witnesses in Chancery, or of indictment here; therefore, per Curiam, quoad the copy of libel no prohibition. 2. On suggestion that the Spiritual Court do proceed on presentment by compelling an oath, prohibition may be awarded quoad swearing, the Ordinary may still proceed in the cause without oath.

[825] 117. DR. WATKISON OFFICIAL OF YORK.

Prohibition.

Bertue prayed a prohibition quousque copy of libel be delivered, which the Court refused without an affidavit that the party tendred the fees, and yet they refused to deliver it, as is used in C. B.

118. PRIOR *against* TUFTS.

Fuel.

In an action upon the case for negligent keeping fire, per quod his barn was burnt, & diversa bona was lost, viz. una caractat. pale (with sign spades) & certa ornamenta pro equis, Angl. furniture, not shewing other particulars, which was moved in arrest of judgment, sed non allocatur: for by Windham, the diversa bona is sufficient, Latch. 195, pl. 206, as trover of trunk with divers goods in it, 11 H. 6, 9, pl. 18 & 19, which the Court agreed, the substance being burning the house, and the viz. but an explanation, in which mistakes hurt not. Judgment for the plaintiff.

119.

Tryals.

Nota, The Chief Justice Hyde said at the sessions in the Old Baily, Tuesday Dec. 13, that all the Judges of England were of opinion, that by the stat. 14 Car. 2, cap. 1, Quakers on the third conviction must be tried the next sessions, assize, or goal delivery that first happen in the same county after their apprehension, or else not at all: and although several had been duly arraigned, and the jury being divided, no verdict was given, and they adjorned into B. R. to answer their misdemeanor, yet they were all now discharged for want of due prosecution.

[827] DE TERMINO SANCTI HILLARII, 16 & 17 CAR. II. B. R. DIE LUNÆ, JAN. 23, ANNO 1664.

Hyde Chief Justice; Twisden, Windham, Keeling.

1. MORGAN *against* STAPELY.

Ejectment.

On rule that lessor of the plaintiff, in ejectment shall be liable to costs, the lease being made by baron & feme, on his death she is liable as well as other jointenant surviving, per Curiam.

2. NORTON AND ADAMS *against* THOMLYNSON. Siderf. 236, pl. 1.

Error.

Jones moved to set aside a latitat being in action of debt brought on judgment for damages, pendant a writ of error on 18 Ed. 4, 7, of judgment in action of covenant, there being a security given, not to complain to any Judge of such practice, but to put in bail; and in Bendloes Rep. the difference is, when error is brought then it is ill, but before error it may: but by Windham and Twisden the practice hath been always so, and resolved in *Lymry* against *Langham*, Stiles to be good, and the best way to speed the plain-[828]-tiffs prosecution of his error. But by Hyde debt lieth not on judgment in C. B. after removal, but where the record is it may be as here, notwithstanding removal by error into the Exchequer Chamber, for that is but transcript, and judgment in this action cannot be removed by error. Keeling doubted on judgment here which is no record after removal, which the Court agreed as to the

suing execution, but as to putting in bail or other remedies, the record is here, and all proceedings after judgment affirmed, so on error into the House of Lords, but on judgment in C. B. is actually removed hither, and execution here on affirmance, but because of the security not to complain to the Judge, the Court ordered the officer that took it, to appear. Adjornatur.

3. SANFORD *against* ATKINSON.

Peace.

Nota, as course of Court, when any are bound over to appear here, and in the mean time to keep the peace or to be of good-behaviour, the cause is to be expressed in the recoguizance; also when ever the Court bind any man to the peace or good-behaviour, its always for a year.

4. WILLIAM *against* TONGUE. *Tuesday Jan.* 24.

Slander.

Symson prayed a procedendo into London, on action there for words, Thou art a whore, and a Beechlane whore, which Windham and Keeling granted, as a setled practice.

5. WHITTON *against* PRESTON. Siderf. 240, pl. 13.

Error.

Wild prayed a supersedeas to a writ of error, which was to remove action of debt, tam quam on the Statute of Usury, because not within 27 Eliz. 4, to be removed into the Exchequer Chamber, the King being party, and to have a part of the debt; but in action de scandalis magnatum he is not; yet, as 1 Cr. that is not within the statute. Jones conceived error lay, because this is a bare plea of debt, and not placitum & contempt. contrà formam statuti, and therefore in debt on 2 Ed. 6, that is tam quam, yet error lieth, and so Hutt. where ever the plea is only in placito transgressionis, and the party may be nonsuit. But, per Curiam, it must be superseded, and the King being here to have **[829]** a part, he may be said a party. Hyde & Twisden absente. Adjornatur.

6. GOLDSBOROUGH *against* ANDREWS.

Covenant.

Jones moved in arrest of judgment in an action of covenant brought by assignee of reversion of a brewhouse stored, and there being several covenants in the lease relating to the house, and leaving of the goods, breach is assigned in not leaving the goods, which is ill, like lease of land and stock, and there being intire damages, all is void. But this exception arising as well on the count, as on the verdict, and the postea being not retorned, the Court would not proceed thereon, but inclined it was well enough. Adjornatur.

7. THE KING *against* THE OCCUPIERS OF MYCHAM IN ARLINGTON IN SUSSEX.

Way.

Lindley moved in arrest of judgment in an indictment for not repairing of a way, in that there is no persons named in the verdict or indictment, but on the certiorari certain persons, as such, came in and pleaded, and its found against them, that the way is out of repair; and the occupiers by reason of tenure (not saying tenuræ suæ) ought to repair the said bridge and way. Keeling doubted, because if one that is no occupier should as such come in and plead, all is void: but by Hyde and Windham,

this shall not be here intended, because they come in as tenants; also its the common practice to name no persons certain in such indictments: and per Curiam, till the bridge be repaired they will not hear this exception, nor any other of form, no more then if they had been moved before to quash the indictment; but an exception on the meer right and merit of the thing may be heard. Judgment for the King, nisi.

8. THE KING AND MAYNARD *against* THE INHABITANTS OF ST. BRIVILLS.
Wednesday, Jan. 25.

Common.

Issue after mony levied by distringas and brought into Court, was joyned, that the inhabitants of adjacent vills had no common according to their justification, as appurtenant, &c. Wild the Kings Serjeant for the plaintiff, prayed amendment of his replication, that it might be, that the [830] plaintiff had improved, leaving sufficient common, and then would consent that the defendant should have his mony again out of Court, which the Court would not allow: and by Keeling, an approvement may be against all commoners, unless sans number, or in gross: but by Windham, one cannot improve against his own grant, though it be to a certain number: the Court ordered according to the former rule, that the defendant should carry down the trial, being in defalt, in not keeping the lands from such disturbers, as on roberies in the Statute of Winchester, and if the verdict go with him, to take out the mony, without farther motion, this being but a trial to satisfie a former inquest, like trial in forcible entry, where restitution is given, to be executed according to verdict, without moving in arrest of judgment.

9. BARRINGTON BOUCHER. Dism. Br. 17.

Tyths.

Weston prayed a prohibition, suggesting a discharge by the Cestertian Order, in suit for tyths, licet he had the vills in his own hands discharged, which per Curiam, is traversable, the patentee being only discharged while the lands are in his own hands, as when in the hands of the abbot at the dissolution, not their lessee; and so *Nie* against *Thomas*, Pl. Com. by Windham, licet debite electus fuit per majorem numerum; but the Court also conceived there ought to be a positive averment, that these lands were in the abbots hands at the time of the dissolution, and now in his own, else would grant no prohibition: and its not sufficient, to say the vills were, unless of which they are parcel.

10. BECKFORD *against* CLERKE.

Assumpsit. Siderf. 236, pl. 3.

In indebitatus on promise at Bellafore in parts beyond sea, to deliver goods at London in good order, the dangers of the sea excepted. The defendant said the bill was teste Oct. 15, Car. 2, and that non assumpsit infrà sex annos before. To which the plaintiff said, that two years before he sued a latitat, intending to declare, &c. To which the defendant rejoyned that at the second continuance, the plaintiff did declare in trover, and the defendant did appear, and the plaintiff was nonsuited: to which Jones for the plaintiff demurred, and now excepted against the bar, that it ought to be causa actionis non accrevit infrà sex annos, [831] and not non assumpsit, for here the ground of the action is not on the promise, but on the not delivery. 2. The defendant said, he appeared at the second continuance, and the plaintiff declared, and was nonsuited without prout patet per recordum, and this is contrary to the record of continuance, and therefore ought to be so aver'd: but as to this, Winnington for the defendant, held the replication ill, not concluding prout patet per recordum, on pleading the latitat, but only generally prosecutus est breve & vicecomes non misit breve, &c. & hoc paratus est verificare: also by Wild, by the nonsuit the first latitat is discontinued, and will not support a new action. Also as to the first,

the plaintiff ought to have said licet, there were no perils of the sea, yet the defendant had not delivered: but per Curiam, Twisden absente, this ought to come on the part of the defendant, to shew there were perils: also the promise is incompleat, and refers to the time future, therefore the plea ought to be quod causa actionis, &c. but the parties agreed to try the merits of the cause on non assumpsit generally.

11. THE KING *against* EDMONDS. *Thursday, Jan.* 26. In Error Br. 186.

Peace.

Keeling moved to quash two indictments of battery taken at St. Albans, before the justices of peace, and justices of goal-delivery, not distinguishing in which capacity it was taken; which, by Windham, is but surplusage; sed Curia contrà: but had it been before justices of peace, nec non justices of goal delivery, it had been but surplusage, & cassatur.

12. CULLEN & ANDREWS *against* MICO.

Assumpsit.

In action upon the case on promise to pay mony for freight of ship: on not guilty, the jury found a special verdict, that the freight outward was to be paid within a month after notice of six months service, and the inward on the retorn of the ship to London; provided that if the ship miscarry, after her first port of lading, and before her last port of discharge, then the part-owners should have for the six months freight of the ship's proceed, so much: and find that Falmouth was the first, and Naples the last; and if any thing be due on the charter-party, they find the defendant did assure. Symson for the plaintiff, The ship miscar-[832]-rying after the last port of discharge, the freight is due for the time before. Jones for the defendant merchants, that the covenant is only to pay from the first port of lading, after the last of discharge, and the ship never retorn'd, but after re-lading homeward, was cast away before she came to any other port: and this action being an indebitatus, no other considerations can support the verdict, but only this covenant, which the Court agreed: but this is only direction, and the freight is due from the last port of lading, till the casting away; and by the law of merchants, where the ship is lost, before she makes any port, wages is not due: but if she unlade, wages is due to such port, though she be after cast away.

13. BEAN *against* NEWBERRY. *Ante.*

Arbitrement.

Keeling agreed the case of *Cater* against ——— 1649, Stiles 217, that arbitrement to assure as counsel shall advise, is good, this being but the manner of a fact prescribed. 2. Also the award of the umpire shall be intended of the same nature, as the first submission; and need not any particular, ita quod it be de & super præmissis, but the rule in the first is that which must guide the umpire. 3. An award of action between one on the one part, and one of the other, where there are more parties, is not reciprocal. Wild conceived that such award, touching the premises, relates to the first submission, and amounts to a so as: also the mother was bound on behalf of her son, and the son is to have benefit by bills of exchange, and discharge of his apprenticeship, and so the award is good as to that, if it were so to the other. Twisden agreed the ita quod governs the whole submission, as well to the umpire as the arbitrators, and there is nothing awarded to the defendant, as in case of *Clement* against *Batch*, all must have some benefit by the award. Hyde accordingly; the umpire is bound, as well as the arbitrators, to award de & super præmissis, sed adjornatur. Also, by Keeling, award to enter bond to pay mony, is good, being a present end of difference; but not so when its to perform future contingents: but Windham doubted, obligation to pay such mony yearly as arise out of my mannor, is good enough.

[833] 14. BECKFORD *against* CLERK. *Ante.*

Proof.

On agreement to plead generally non assumpsit, Wild prayed rule by consent (the law being doubtful) to give the perills of the sea in evidence, the Court conceived else it ought to be pleaded specially, that the goods perished by the dangers of the sea: but non assumpsit is sufficient on a promise in law. But by Twisden, if it be a special promise, a release made before the action brought, cannot be given in evidence, but by consent of parties, it was ordered that as the jury find there was dangers, or not, so the judgment should be: but consent of parties cannot alter the law.

15. THE *against* PATRICKE. *Ante. Saturday, Jan.* 28.

Mandamus.

Raymond waived the exception to the form of retorn, F. N. B. 51, that the Bishop of Ely is visitor, therefore not within the jurisdiction of this Court; for there may be a concurrent jurisdiction; 1. In the whole record it appears, the defendant is injured his due election, being not denied, nor any refusal retorn'd. 2. The letters patents being not restrictive to the Vice-Chancellor, is nothing pertinent to the question. 3. Every eleemosinary foundation is not of ordinary visitation, 8 Ass. 31. 6 H. 7, 14, pl. 2, unless there be institution and induction, nor then of grammer school, Register 35, or fol. 41, of hospitals, 2 H. 5, cap. 1, had been to no purpose, had the ordinary power over all eleemosinary foundations, 10 Co. 31, as well spiritual as lay, Linwood. 53. Spiritual are such as have no mixture of laity; and this colledge is of lay foundation, therefore the Bishop of Ely hath no power, for the end is ad studendum, which is principally of humane learning, Cambd. 351, and so hath the continual practice thereof been; Stow 450, and Linwood cap. de Magistris & cap. de Hæreticis 151 & 160, they are distinct from religious houses, whose end was never ad studendum, but to pray pro anima, or observe certain rules made to their hands; they celebrated only, but intended no worship. 2. Ad orandum, which had been also implied, 1 Inst. Linwood de mortali peccato, and is to be intended only of such praying, which refer especially to divine or spiritual matters, *Pits* against *James*, Hub. **[834]** the foundation is denominated a majori. 2. Reason, from the use of these colledges, 8 Ass. 29, they are not chargeable with subsidies, as colledges are; also they send burgesses to Parliament, which they could not do were they spiritual: also they constantly apply to the temporal power on all greivances, Linwood cap. de Magistris 155. Reyly 533, and bawking the bishop of the diocess, Reyly 534, & eadem est ratio totius ac partis, 2 Inst. 640, (which Hyde would have called Lord Cooks comment only on Magna Charta, as the first on Littleton) Reyly 601, and in *Wolvertons case* 50 Ed. 3, pars. 2, Membrana 8, a mandamus to restore a fellow of a colledge; so Hutt. tit. Corody: it shall be intended the King hath jurisdiction, unless the contrary appear: also in several commissions to visit, the Bishop of Ely had been left out: also its doubted whither appropriation may be to a lay-corps or colledge, 34 H. 6, 14 b. pl. 27, F. N. B. 38, and *Holts case* F. N. B. 47 H. 51 b. 1 Inst. 96 b. Also this is but a temporal act to admit a clerk, for which, as induction, action may lye against the Ordinary: presidents are of so much authority as they are of reason, and justice, Hub. 270, Mic. 1652, a mandamus was granted to swear a scavenger to the inhabitants of Clerkenwell, which is the meanest office: also this remedy doth not determine the right, but the due election may be tried by assize; in order to which, he prayed this writ. Baldwin pro Rege, that a colledge is a spiritual corps, on the retorn all the persons first named being clericos, and every fellow within two years master of art, must take orders, unless majority of fellows indulge him longer. 2. The end of colledges is to advance learning, which 11 H. 4, 47, by Thirning, is a thing spiritual, although as Seld. Hist. of Tyths 121, the members may be lay, as the Hospitallers and Templers; so Lindwood 118, cap. de Relig. Domibus. Also they are govern'd by visitors, according to the ecclesiastick laws, and their elections and controversies so regulated as other spiritual corporations are: and

of common right, the bishop is visitor, and things ecclesiastick may be annexed thereto, 6 H. 7, 13. 10 H. 7, 19. 11 H. 7, 26, as a free chappel; so *Caudryes case* 5 Co. 10, Quare Impedit 19, before the Statute of Dissolution of Monasteries, so in Ed. the Thirds time, Parsonage of Tillingham in Lincolnshire to Oryell Colledge, and Dyer 255, *Clerks case*. 3. This Court cannot intermeddle by mandamus with colledges, Spelmans Glossary verbo visitor, such are as exclusive of all others in jurisdiction of Spiritual Courts, as this Court is of lay: and here the retorn specifieth Dr. **[835]** Gillingham to be visitor, as Vice-Chancellor, to whom no application was made, therefore as *Kens case*, on deprivation of parson, no mandamus lieth, there being other proper remedies, *Allen* against *Ash* 13 Car. 1, *Huntlyes case* in ejectment; deprivation by H. commissioner did not disable him to have ejectment; but had it been by the Ordinary the Court would not have medled therewith; also it would be inconvenient fellows should attend here on every small breach of private statutes of the House, and its also against the dignity of this Court, and this Court never hath intermedled herein before, Dyer 376, for this reason no error lieth out of Cinque Ports; also *Crafords case*, a mandamus was denied for a schoolmaster, especially if the bishop do not approve him, by the statute 3 Jac. Also in that all justice is in the King, he may distribute it as he pleaseth, to special visitor or otherwise; and at the utmost, the party must come hither at the darrein resort, as F. N. B. Error. Adjornatur.

16. THE DUKE OF NORFOLK AND JOHNSON *against* SMYTH.

Woods.

In action of debt tam quam on the statute of 1 Jac. cap. 22, for cutting oaks unseasonably; on not guilty pleaded, and verdict for the plaintiff, Dalby excepted in arrest of judgment; 1. That the distringas is Cote, and the person sworn is Coote, which as Maar and Moor, is not the same person: so of Adderby and Adderly, sed non allocatur. 2. The jury find the value of each tree 6s. 8d. but do not cast up the sum: sed, per Curiam, in this issue its needless; but had the issue been nil debet, they must cast it up, and not leave it to the Court. Also 3. The King being to have share of the penalty, no writ of error lieth in this action tam quam into the Exchequer Chamber. Judgment for the plaintiff, and the error superseded.

17. LINCH *against* D'AMORE. *Ante. Tuesday, Jan.* 31.

Action upon the case Br. 150. In Escape Br. 37. Siderf. 237, pl. 5. 3 Cr. 79, 4 c. Action upon the case, Br. 100.

In an information against Bovy, Rivet, Lambert and Tirry, for conspiracy, coming before Judge Keeling, and falsly affirming that no prosecution was had within three terms, whereby the prisoner was discharged of an action of 3000l. on bond; and in evidence to the jury it was urged, that committitur was not proved by the record in Court, **[836]** which being only an action, is needless, but the entry in the marshals book is sufficient; but in execution it must be proved how the party became a prisoner, which the Court agreed. 2. The plaintiff was stopt by injunction three terms, and thereby came the deceit; but per Curiam, a declaration being filed, there can be no certificate of non-prosecution, but may nonsuit the plaintiff by trial by proviso; but they searched only from the time of the supersedeas obtained, whereas they should have searcht from the first entry of the action downward. 3. Per Curiam, This is but in nature of trespass, and it need not be proved that they assembled or complotted together, but it's sufficient that each acted his part to the same end, and practised any deceit, or consented thereto. 4. This being information, the party injured by loss of his debt, was allowed to give evidence, for per Curiam, he is neither to gain nor lose hereby, nor can have any remedy by action upon the case, &c. against any for this deceit: but by Twisden, Did any statute, as 5 Eliz. of Perjury, give the party another remedy by debt, &c. there he could not be allowed as witness.

18. PALMER *against* FLESHIER. *Wednesday, Febr.* 1.

Nusance.

After judgment for the plaintiff in two several actions for continuance of nusance, one on special verdict, the other on demurrer. Per Curiam, contrà Keeling, Coleman prayed the staying of writ of enquiry, having found as much damage for the loss of lights of shop in the Strand, as the rent of the whole house cometh to, which the Court conceived outragious, and would have awarded a new writ: and by Twisden, This way is but in ease of the Court, for they may enquire here, as Yelvert. but only staid the filing.

19. CORNELIUS *against* TAPOR. Siderf. 237, pl. 6.

Way.

In trespass for entring a close in Northfambridge; the defendant justifies quod manerium Coldnorton est antiquum manerium, & quod talis habetur consuetudo infrà manerium quod quilibet inhabitans haberet viam per & trans the said close to ferry: to which the plaintiff demurred, because the close appears out of the manor of Coldnorton, & quilibet inhabitans haberet is no sufficient averment, which the Court agreed; and it ought to have been, that every inhabitant **[837]** within the said manor of C. hath had and used way over to N. &c. Judgment for the plaintiff, nisi.

20. CORBITT *against* MERCYN. *Ante.*

Pasch. 16 Car. 2, Rot. 272.

Slander.

In an action upon the case for writing a letter that the plaintiff took a bribe, per quod prædict. (blank) by a late statute was amoved, and put from his office of surveyor of the Customs in the port of Exeter, and all the matter is laid infrà jurisdict. but not the office, which Jones assigned for error on *Irelands case* the taylor of Bath, *Haddon* against *Starr*, an attorny of Strutton, brought an action for words spoken in Launceston, where the action was brought, which being in relation to his office, and that not appearing to be within the jurisdiction, judgment was for the defendant: and this action is not maintainable, but by reason of the loss of the office, 1 Cr. 570, therefore it must specially be averr'd that the office was infrà jurisdict. Siderfin for the defendant in the writ of error, prayed affirmance of the judgment on the reason of 1 Cr. 570. Twisden agreed the difference of Jones, and that here damages arise on the loss of the office only, and that must be inquired of by the value of the office. Windham remembred the case of *Littleboy* against *Wright* argued by Maynard in the Marshalsea, that calling whore infrà jurisdict. per quod she lost marriage, not saying where, which was adjudged ill, the words being not actionable. And also of Ireland, where the words were actionable alone, to say a taylor stole cloath; and this is a middle way between both; and the action is as well on the scandal to his person, as officer, as loss of his office, and therefore actionable. Keeling accordingly; and that the words are actionable at common law, to say of an officer He takes bribes. But by Hyde and Twisden, then the action must be brought in the proper Court in B. R. but this action is specially founded on the statute; but per Curiam, the prædict. with a blank is incurable.

[838] 21. BAKER *against* BERISFORD. *Ante.*

Administrator.

In an action of covenant by the plaintiff, as administrator of John the lessor, who was administrator to Abraham Baker the first intestate, specially averring that John had paid 750l. which was more then the value of the tearm, and in lieu thereof he accepted it, and so entitles himself to the property: to which Winnington for the

defendant demurred, because it's not said that the mony was the administrators own. 2. The breach is averr'd in not repairing, nor delivering up the possession, not shewing the time in certain; and the administrator here is but as assignee, who can have damages for his own time only. Jones for the plaintiff, This must be intended his own, as indebitatus for mony paid by A. for B. shall be intended his own. 2. It appears the mony paid debts after the death of the intestate, and so not material at what time, whether before or after administration committed, for this shall relate: sed per Curiam, the property is altred only from the payment of the mony: and by Keeling, the administrator hath two estates, and therefore the payment generally is ill: but by Hyde, Twisden and Windham, it being farther said he elected to have the residue of the tearm in satisfaction, it must on the whole be intended he paid his own mony, especially being but in an averment, as an adhuc detinet, &c. And this is confessed by the demurrer; but the parties agree to refer it, or go to trial.

22. WATKINS *against* CAD.

Courts.

In trespass, the defendant justifies by warrant directed to him in the Court of Roughborough by the steward there, to attach the plaintiff by his goods within the hundred, to answer one Anchanow, by virtue whereof he entred the house, and took the goods, as bailiff. Jones for the plaintiff demurred, because it's not shewed what was the cause, or that the Court had jurisdiction thereof; which the Court agreed; and that such Court cannot direct a warrant to a bayly of hundred.

[839] 23. HELIAR *against* CASEBOROUGH. *Ante.*

Administrators. In Debt, Br. 94, seu. 93. Siderf. 240, pl. 12. 2 Cr. 411, pl. 11. In Debt, Br. 1.

In debt against executors for rent arrear; after assignment by the executor, Stroud on Dyer 14 demurred for the plaintiff, that the action lyeth, 10 H. 7, 18, and *Overton* against *Sydall* in 3 Co. is ill; but in Co. Entr. 122. Poph. 120, it doth agree with our case, or is not against it. Winnington for the defendant on *Walkers case*, 3 Co. held the action lay not longer then the executors have the tearm, for the privity of the contract is raised then by construction of law, 3 Cr. 555, out of the lease, which being departed with, the executor is not chargeable. Twisden said this doubt was first started, 3 Car. . Latch. *Ironmonger* against *Nusam*, and no judgment was given in that case; and *Walkers case* hath always been taken for life. Windham Clearly the action will lye, for the same contract the lessee had is in the executors; and it hath been ruled, that debt lyeth against the lessee after assignment, and so debt lyeth here on lease of lands in another country, either against lessee or executors, but not against grantee; and the mischief is as great in this case as in case of lessee of assignment to a beggar; and thus was the opinion of Jones; and that the case of *Overton* against *Sydall* was often denied for law, and the case of *Marrow* against *Turpin* good law. Keeling doubted, because by death of the lessee the personal contract is gone, and the executor is in but by representation. Hyde Chief Justice in *Bret* against *Cumberland*, and 1 Cr. 188. Covenant, Br. 32. Bachelor, This point hath been ruled. Adjornatur.

24. WINGRENE *against* WATS.

Error.

Powis assigned error on judgment in Norwich, in an action upon the case on quantum meruit, that the judgment is ideo consid. not per Curiam, it was super hoc visis permissis per eandem Curiam ideo consideratum est, which, per Curiam, is error; for the consideration may be at the tavern. Judgment reverst.

[840] 25. OSBORN *against* CAWTHORNS EXECUTORS.

Joynder. In Debt, Fitz. 51. Siderf. 238, pl. 7. 45 Ed. 3, 4 b. pl. 9, per Belknam.

In debt on obligation entred into by three brought against one, without shewing the other two are dead: after oyer the defendant imparls, and demurred generally, which, per Curiam, is ill; and the plaintiff must shew the others were dead: so on assumpsit by three, for although three were obligors, or obligees, it's all one, and the title must appear, especially this action being against executors of one, which the Court agreed clearly incurable, and not like *Whelpdales case*, where this advantage was waved on non est factum pleaded, Stiles 78, pl. 166. Also the obligation being obligamus nos, it shall not be intended the others did not seal, but if they had not, the count should have been on writing by three, whereof two did not seal. Judgment for the plaintiff, nisi.

26. HOYLAND *against* BACON.

Court baron.

In trespass, the defendant as bayly justifies by warrant in court baron on recovery in assumpsit, not shewing the cause thereof to arise within the jurisdiction of the Court, for which cause the plaintiff demurred, and per Curiam, its ill; so to say in such inferiour actions, that taliter processum fuit till the defendant had judgment and execution. Judgment for the plaintiff.

27. SHERIFF OF CANTERBURY. *Friday, Febr.* 3.

Franchise. 52 H. 9, cap. 14.

On venire facias directed to him, quod de ballivo suo, &c. he retorns all citizens, and the charter and writ of allowance, which the Court conceived ill, in that the charter is, that for felonies and murders, and all except treason, they shall not be drawn out: but, per Curiam, 22 Ed. 3, 20, there ought to be special words, licet tanget nos. Also there are others beside citizens there inhabiting; also it ought to be retorned there are no other but citizens within his bailiwick. But by Jones, this cannot be retorned on the venire facias as in London, because they know not; but it may be by Nisi Prius there, or by distringas here: but Twisden contrà, for the parties may appear on venire facias. Also if an ejectment **[841]** be brought here of lands in Canterbury, the trial ought to be here. Adjornatur.

28. SHERWOODS CASE.

Forgery.

For forging the Chief Justices hand to common bail, and taking fees thereof, as attorny, being only a clerk, the Court adjudged him to pay a fine of 20l. to come with papers to every Court with his confession, to stand in the pillory here from ten to twelve, and in London two hours, and in the Marshalsea an hour, three months imprisonment, and good-behaviour for a year.

29. SIR JOHN JACKSONS CASE. *Ante.*

Perjury.

He was commited on conviction of subornation of perjury, and during a month of commitment, no actions can be laid without leave of the Court; so while he is in execution for the fine: but if commited till sureties found, none can charge him, else they may after the month, though it be awarded, that he after find sureties. Also per Curiam, fines assest in Court shall not be estreated in the Exchequer, but levied by process hence. 2. He being retorn'd by habeas corpus ad conservand. diem only out of the Fleet, the Court could not commit him to the marshal for his fine, but ordered a new writ retornable with the causes.

30. BOYS *against* NORTCLIF. In Continuance Br. 3.

Abatement. 7 H. 6, 14, pl. 22. In Default. Br. 33. 20 H. 8, 3 b. pl. 3 Cr. 767. Brief Br. 1. 3 H. 6, 33 b. Double Plee Br. 44. 2 Leond. 61. Bridgm. 56, pl. 24. 49 Ed. 3, 23 b. 35 H. 6, 13. Disseisor Br. 1. Discent. Br. 46.

Jones assigned for error in ejectment, that the plaintiff after verdict, and before day in Bank, entred forcibly into the land, the writ being hereby absolutely abated, as by death, &c. there being no time to plead it in the Court; and the judgment quod recuperet terminum is hereby frustrated. Weston for the defendant, This doth only make the writ abatable, because 4 H. 6, 27, the plaintiff may maintain his writ, 34 H. 6, 9. 5 H. 7, 9. 18 Ed. 4, 19. 2 Cr. 303. *Carsy* against *Lovell*, that the defendant reentred before judgment, which Windham agreed, and that by death the writ is actually abated, but entry must be pleaded puis dar. continuans in abatement only. Hyde & Twisden did doubt the plea, being in ejectment, because it hath been adjudged in the Exchequer, that reentry will not revive the term: but Keeling accorded with Windham. Adjornatur 850, pl. 52.

[842] 31. CLAPHAM *against* MOYL.

Assumpsit.

On marriage agreed on between the defendant, and one Mary Ingram, 1500l. was by articles to be paid at several days to the plaintiff, and he to convey several lands, and an office to the defendant, proviso that the defendant, out of the first three years profits, should pay 500l. to the plaintiff: and now the plaintiff brings debt on this proviso, averring profits above the value received, and that the marriage took effect: to which the defendant demurred, because this proviso is in nature of a defesance or condition: but the Court inclined it was only a covenant, and debt lieth, and this being by way of purchace, is well enough.

32. WADDINGTON *against* STONES.

Lieu.

In indebitatus for a horse sold, not shewing where, which Lyndly assigned on *Hill* against *Price*, Mich. 16 Car. 2, for error, and judgment reverst per Curiam, præter Windham, being out of Inferior Court.

33. STARKIE.

Priviledge.

The Court discharged him, being committed by the Queens vice-chamberlain to a messenger of hers; for arresting her servant; and per Curiam, such have no priviledge, more then a servant of Queen Dowager, but only the Kings servants, and Parliament men.

34. LIVERMOOR *against* ———. *Saturday, Febr.* 4.

Executors.

The Court, ex motione Wild, conceived 9 Ed. 3, cap. 3, that the executors or administrators that come first by distress shall answer, extends not to a latitat.

[843] 35. THE KING *against* LAMBERT, TERRY AND RIVET. *Ante.*

Escape. Siderf. 237.

Bovy being acquitted, and the others found guilty, the Court ordered all three to come to the Bar with papers, and Lambert turnd out of the roll, and Rivet clerk of the papers to the marshal, nor Lambert to be implied again in the Marshalsea, to pay

100 marks a piece, and be imprisoned for a month, because they would not discover who imployed them in the cheat of delivering the prisoner on common bail.

36. SELBY *against* WALKER. *Ante.*

Tr. 16 Car. 2, Rot. 185.

Covenant.

In action of covenant, which was super requisitionem of the plaintiff, and J. S. vel alterius eorum agentibus, to make an account; and the breach assigned by the plaintiff, that no account was made, licet the plaintiff did request alone: to which the defendant demurred. And Coleman for the plaintiff conceived, that in regard either of their agents may demand, it shall be intended that more power is in the party himself. 2. It appears on the commission of bankrupts, that the debts were several, and each to have his several proportion, super similem demaud. and neither can demand the others part, and so it could not be joynt, as 5 Co. 8 a. *Windhams case*, but must ensue the interest. 3. The covenant is not between S. and W. but between the commissioners and W. and there was a bond by W. to perform so much as concernd S. who was a distinct creditor, and therefore S. being no party, verba non fortius accipiuntur against him. Weston for the defendant, The interest is in the commissioners, and the defendants no otherways bound to account with the plaintiff, but by the covenant, which being joynt there is no prejudice by one to the other: also the appointment being insufficient, the refusal may be well enough. 2. The request was laid in warda de Ch. & quod ad eundem diem & locum appunctuavit, time and place to take the account, Hut. 73. Bendloes 162, which being collateral is not sufficient, although the plaintiff must be some where when he requested, yet he might be walking too and fro in that ward, and therefore this is too general. Keeling conceived the covenant several, according to the interest and subject matter, and each of the creditors may severally call the party to ac-**[844]**-count, but he doubted most on the covenant by the defendant and his brother, which was severally to do their endeavours to bring in the debts, & super requisitionem eis factam, they would account, and therefore both are bound to account joyntly, notwithstanding bond given by one. 3. The appointment ad eundem diem & locum is ill, for the time must appear reasonable, as after verdict it may be intended. Windham, being in debt on bond, aided it as much as may be, but held this ill, the plaintiff being no party to the covenants, nor Hodgson, and not like 5 Co. 8, being only nominal, as lease to A. for lives of B. C. and D. the death of any one determines the lease, being collateral persons, not parties to the deed, it shall be intended joynt, but lease to three shall survive. 2. The appointment ought to be by both, and in a place more certain then the former request, which is but for the visne, but this for a fact to be done, but would have all amended: Twisden accordingly, and that the defendant having pleaded performance, general issue might have been thereon, and rejoynder by non-requisivit had been a departure: Hyde accordingly; and that if parties will not agree to try the right, the Court seeing this but a slip, may give leave to the plaintiff to discontinue judgment for the defendant. Curia advisare vult.

37. HARRIS *against* WILLIS.

Encumbent. Siderf. 239, pl. 9.

Error of a judgment in C. B. on a special verdict in ejectment on the lease of Kettleby, who was instituted to this living, and they find the Act 12 Car. 2, cap. 17, of Ministers, and the proviso that nothing therein should prejudice the title of the Kings presentee under the Great Seal, within certain time on which the doubt ariseth; the defendant is found in possession, and the conclusion is, if Dr. Ketleby was presented according to the proviso, they find for the plaintiff, &c. And the presentation was within that time, but the execution of it by institution was after that time, and so being incompleat, the intent of the Act is not fulfill'd, though the words be;

for the Act gives no title, but enables them to enjoy according to present possession: Keeling contrà, that had the presentee of the King died within the time, he may present de novo, for thereby it was never intended such person confirmed; and so had there been no institution, the title had been good against the defendant: Windham accordingly; and wondred how this became a special verdict, he being clear at the trial, that the judgment ought to be affirmed, and so it was, nisi.

[845] 38. CLERKE *against* MOLINEUX.

Escape. Siderf. 269, pl. 22.

In an action upon the case on escape on mean process, the defendant justifieth by writ teste Marquess of Newcastle, retornable at sessions, which recites priviledge of all going to and coming from sessions: to which Jones demurred generally, because an Inferiour Court cannot discharge any person arrested by a Superior: also it's ill pleaded, not shewing where the writ issued, nor where the sessions was, nor whether the discharge were in sessions. Wild the Kings Serjeant, This is by common law, that persons going to any of the Kings Courts should be priviledged: also it's said, the defendant received the Kings writ de habend. corp. &c. by virtue of which he brought the person to the same day and place in the writ, which must be intended the sessions. Keeling conceived it a new case, that inferiour and limited jurisdiction should discharge a prisoner; for though they might punish the contempt, yet not discharge: also per Curiam, The sessions cannot make such habeas corpus. Adjornatur.

39. GILL *against* WILLIAM CO-EXECUTOR OF DUHURST, EXECUTOR OF J. S.

Prohibition.

Symson prayed a prohibition, because the suit in Spiritual Court was against the executor of an executor when another executor survived, which being for a legacy, Twisden and Windham refused; but by Keeling, It ought to be granted, the legacy not being denied, but a wrong party sued. Adjornatur.

40. CLEE *against* SCOT. *Monday, Febr.* 6.

Priviledge.

Nota per Curiam as the course of the Court, that a declaration delivered to a prisoner in custodia, must be the same term filed, and cannot be delivered as of former term in vacation time, but copy may: but if the party be not in the prison, process must be against him, unless he voluntarily appear, and so it may be as of former term, as well as in other cases.

[846] 41. PIERCE *against* PARKS.

Trin. 16 Car. 2, Rot. 1768.

Administrator.

In debt for rent (due to the intestates lessor) as administrator, committed by the Bishop of Bristow. The defendant said, that in suit between one Anne, sister of the intestate, and the now plaintiff, the same bishop repealed that administration, and committed it to the defendant. The plaintiff replyeth, that at the time of the first administration he was natural brother to the intestate, and so his power being executed, he cannot repeal it, and that there is an appeal pendant thereof, which, by Hyde and by Windham, the others being absent, on demurrer of the defendant, is double: also the Ordinary may repeal administration if committed improvidè to fool or lunatick: so by Windham, if there after appear an universal legatee. Sed adjornatur, 854, pl. 50.

42. WITHERS *against* WODDEN.

Error.

Winnington assigned error of judgment in Marlborough in a Court there held secundum consuetudinem of the said borough, and doth not say time out of mind sued, which in such Courts is necessary; contrà in Superiour Courts. Also it's not said, that Marlborough is an ancient borough time out of mind. Judgment reverst, nisi.

43. ROBERTS *against* SIR JOHN LENTHALL.

Officer.

Hyde Chief Justice said the Court could not sequester the marshals office for not paying debt due to any private man: but by Windham, an information may be against the officer for this ill using his office to shift mens debts, and on that the Court may sequester; so on any contempt by him; else, by Hyde, it was never done in fact, nor can be. Ex motione Powis for sequestration.

1931. 2 K.B. 353. [847] 44. MAYNELL *against* SALTMARSH.

Way.

In action upon the case vi & armis for erecting posts in the highway of North-Killington, which leads to Fothornton-street (per quod the plaintiff having close in another vill, Bowland in Thirsk, and used that thence maxima propinque via, to be over the said high-way) which so stopt the way, that his corn in his close was corrupted and spoil'd: after judgment in C. B. Stroud assigned for error, that this action lieth not, especially vi & armis, it being reasonably to be intended there was other ways. Jones agreed, that if I have ten several private ways, the stopping any is sufficient, with sufficient damages; but this being a nusance in the high-way, there ought to be an indictment. Hyde and Windham, being after verdict, the Court will not intend any other way; also this is a sufficient special damage, and not like *Williams case*. Also by Windham in the west country, in action upon the case for digging a pit in the high-way, per quod J. S. for whose life the plaintiff had lease, fell therein, and was drowned, it was doubtful if this action lay; but doubtless ours is a more immediate damage. 2. There was a default at Nisi Prius, and thereon a tales was awarded in C. B. which is the usual course, on remanent of juror, or when any are withdrawn. Judgment affirmed.

45. GOLDING *against* GOTEER.

Joynder.

In action upon the case for misusing his horse, and assumpsit for not paying 10s. hire, which requiring several issues cannot be answered by not guilty or non assumpsit. Winnington assigned that for error, the one sounding in tort, the other in breach of promise only; also this may survive in case of two plaintiffs, contrà of the other; so *Flowerdew* against *Kellet*, Hill. 10 Car. 1, Rot. 54, for bills in this Court as to the count ensue the nature of originalls in C. B. for which reason debt on contract and trover was reversed, Mich. 14 Car. B. R. *Denton* against *Coxe*. So *Wait* against *Sanders*, in C. B. debt on contract for ship, and action upon the case for misusing. Adjornatur.

[848] 46. LINCH *against* DACY. Arbitrement Br. 19.

Slander.

In action upon the case for calling the plaintiff traytor, the defendant pleads a submission and award made, which being for payment of mony, and the time past: Jones for the plaintiff demurred, because performance should have been pleaded, being

made in ease of the defendant; and although the action for words be entred, in Pasch. 15 Car. 2, which is before the mony is to be paid, which was in June after; yet the action being suspended, unless the time be not past, at the time of the plea, performance must be pleaded, which the Court agreed; but the plea being entred, as cras. Trin. the term before the time of payment, it was held a good plea. Adjornatur.

47. TWISLETON *against* TRAVERS. *Ante.*

Tr. 16 Car. 2, Rot. 1033.

Arbitrement.

In debt on obligation, condition to submit to the award of two, and if they made no award by such a time, then within the same time to the umpirage of J. S. or such as he should chuse, they within the same time chuse an umpire, and after make an award; to which the plaintiff demurred, and by Jones their power is determined; this case being in particular to the umpirage of J. S. a person certain: sed Curia contrà; Its all one, there being a farther time given for the umpire; contrà if he had been on their disagreement to make an award within the same time, as is given to the arbitrators, as Stiles 306, pl. 664. Adjornatur.

48. THE KING *against* HOUSDEN.

Trades.

Crooke excepted to an indictment, on 5 Eliz. cap. 4, against haberdasher of hats, for exercising such trade, having never served apprentiship: this being not averr'd a trade at the time of the statute, nor contrà pacem, for which exceptions it was quasht; but of a manual occupation it need not be so averr'd, as making arras hangings, which is a new trade, yet none may exercise it unless apprentices, but by Crooke, Millener hath been adjudged not within the statute of 5.

[849] 49. THE KING *against* RING. *Ante. Tuesday, Febr.* 7.

Forgery.

Winnington waived the first error, that bargain and sale is good, though never acknowledged, so the deed be delivered and enrolled: but secondly, insisted that there was no enrolment, 2 Inst. 672, which is essential to the bargain and sale within the statute of 27 H. 8, and to make it a forgery, within 5 Eliz. on *Bellingham* against *Alsops case* nothing passeth until enrolment, and therefore Yelverton 213. 2 Cr. 291, it must appear certainly in pleading, or indictment, in what Court it was enrolled; its true, that if any deed or writing were sealed, ea intentione to deceive, its within 5 Eliz. But then it must be called by apt words, quoddam script. purporting a bargain and sale, and not a bargain and sale. 3. Its said that he forged bargain and sale, whereby Henry and Harrison Keimer did grant, &c. and it doth not appear that ever any more then one of them seald; for unless it be a deed sealed, a court-roll, or customary or will is not sufficient, & expressio unius est exclusio alterius, and it cannot be intended the other ever sealed. 4. The conclusion, that he published it as the deed of both, cannot be against the form of the statute, and the saying ad damnum ipsorum is ill: Windham conceived the deed effectual to pass an estate at will without enrolment, which is within 5 Eliz. and that as a bargain and sale, contrà by Twisden: Hyde said the enrolment being before the keepers of the liberty, is of sufficient certainty in Chancery. And the Court doubted not much on that; its said the seal only of one, because one might really seal, or the deed be the deed of both, notwithstanding only one sealed; so if the jury find only one sealed, or find one accessory to one only on indictment, as accessory to two; and by Windham one indicted of felony, for taking mony of J. S. and its found he cheated J. S. with false dice, the party had judgment of the pillory. But, by Wild, this is without president; also if the matter of the indictment may stand together, it being found by general verdict he is guilty, it shall be aided. Adjornatur.

[850] 50. THE KING *against* PRITCHARD.

Force.

Winnington prayed restitution, on quashing an indictment of forcible entry, having by direction of the Court an affidavit, that he was turned out of possession, for else it may be intended, he is still in possession; also this was intended on enquest, on view of two justices, but being done by order of sessions, by Hyde, that order ought to be brought hither, being not repealable but by another order of sessions, and yet such orders are not removable by certiorari. Adjornatur.

51. COLLINGWOOD *against* PACE. *Ante.* Siderf. 239, pl. 10.

Trials.

Finch prayed a trial at Bar, in action for mean profits, which the Court denied, because how good a title soever the defendant have, he cannot give in evidence any other matter then what was before ruled: but by Twisden the title being admitted, other matter may be given in evidence, as a release or fine, after recovery levied by the plaintiff, &c. And the same law is in action by the lessor, in the former action as by the lessee, and against the under-tenants, or any that claim under the former defendants title especially, the contest being for profits during the time of the former action pendant. Also by Hyde, against estrangers not parties to the former suit, its most proper for the lessor to bring the action.

52. BOYS *against* NORCLIF. *Ante* 841, pl. 30. In Continuance Br. 3.

Abatement.

Windham held it but a plea in abatement, and no error; *Lord Shrewsburyes case*, 1 Boulstr. 5, which the Court agreed, Keeling absente, as in case of *Barecock* against *Thomson*, 2 nichils in scire facias amount to a scire feci, and judgment is then well given, notwithstanding release before, if it be not pleaded; also 22 Ed. 4 is express. Judgment affirmed.

[851] 53. SNOW *against* CUTLER AND STANLY. *Ante.*

Trin. 15 Car. 2, Rot. 1704.

Estate. Devise, Br. 1.

In ejectment of lands in Hackney, as to moiety, verdict is for the defendant; as to the other, a special verdict, that if a devise by Robert Jaacob was good, they find for the plaintiff. Monday for the defendant held the devise good. 1. The devisor was seized by surrender by him and his wife, to the use of them and the heirs of Robert, so he was tenant in fee, and the heirs no purchasers, 1 Inst. 22 b. 319, 376. And 2. This surrender by Robert to the use of his last will, which by devise passeth the reversion, and the estate of the wife for life doth not hinder or suspend it, F. N. B. 199. 3. As to the person that is to take, there is none, it being no executory devise, however it's barr'd by the common recovery, though it be copyhold. Twisden held the chief point, what passeth by the devise, whether a remainder to William Cholmly, lessor of the plaintiff, which is doct by the recovery, although a forfeiture. Windham held devise to infant in ventre sa mere much different, he being a person in esse; but this heir is in contingency, and not so like to an executory devise: also by Hyde, This devise is like the case of *Collingwood* against *Pace*, which was adjudged void. Also by Twisden, He in remainder is not vouched, and so not to be barr'd by the recovery: all doubted the devise was void, and the devise to infant in ventre sa mere hath been a wavering point in all ages. Adjornatur.

54. WILKINSON *against* BOULTON.

London.

In an action of false imprisonment and assault, the defendant pleaded custom of London of Orphans Court, which by custom may dispose of female orphans, that one Pain died, and his daughter committed to the defendant, and that that Court, if the orphan be taken away, hath power to commit the party to prison till discharged by due course of law, or discover where the person taken is; that the plaintiff took away the said Pain, and the defendant by order of the Court took and imprisoned him, &c. Adjornatur.

[852] 55. THE KING *against* DAVIES.

Church.

Williams excepted to a presentment for not coming to church, being super sacramentum 12 proborum & legalium hominum, not saying jurati & onerati, which, per Curiam, is but a form used since these 30 years. Another exception was, that unusquisque of them are said of the age of 16, but it's not said ad tunc at the time of the presentment. Twisden and Windham would not quash it without pleading, being on the Statute of Conventicles, 14 Car. 2. and had it been on 3 Jac. of Recusancy, it cannot be quasht for such form: but they agreed the exceptions good.

56. THE KING *against* BUCKNAM. *Ante. Wednesday, Febr.* 8.

Pardon. In Coron, Fitzh. 282, (280).

Coleman for the defendant, that the pardon de verberatione in indictamento mentionat. is good, though no such word be in the indictment, yet is wholly included in the word percussit, and so is but surplusage, and need not be recited, and it makes no other fact; but the substance of the offence is before fully pardoned, which on *The Earl of Leicesters case*, Pl. Com. is sufficient. Hyde held the recital needless, but being made, is ill, there being no such presentment de verberatione as recited, which is as several steps. 2. The pardon omitted vulneratione*s*, but added & omnia malefacta, which makes it well enough, which Twisden agreed; so by Windham, all being truth that is recited; and allocatur.

57. MATTHEWS *against* THE CARRIER OF TIVERTON HOPPING.

Ways. Siderf. 244, pl. 5.

In an action upon the case against carrier on negligent carriage of a bag of wooll, and of 50l. therein, whereby it was lost; and declared on the common custom of the realm, that the defendant was a common carrier; and in the same declaration there is an action of trover for the same mony. After verdict, Coleman excepted in arrest of judgment, that it's said the defendant was a common carrier 10 Sept. and that the plaintiff was possest the 6th of Sept. & quod postea, viz. die, anno, & loco ult. mentionat. they were delivered, and after lost, &c. not saying the defendant was a common carrier the sixth, in which case, by Hyde **[853]** and Windham, he is not chargeable as a common carrier; contrà by Twisden: and all agreed the postea being not contrary to the premisses, the scil. is good, and shall not be taken as surplusage. Also on supposition he is not chargeable as common carrier, yet by Jones for the plaintiff, he is chargeable by the common law, there being a trust by delivery and agreement for mony to carry to a certain place, and the recital of one part of the common law doth not vitiate, but that the plaintiff may use any other part of the common law, contrà of statute: sed per Curiam, Had the action been on the special agreement then joyned with trover, which is a tort, it's ill: also the custom of the realm ought to be set forth, at least an averment that he was a common carrier. Also by Windham, This is but evidence, and in a special action it ought to be positively laid that the defendant in consideration thereof did assume and promise. Adjornatur.

58. THE KING *against* THE SHERIFF OF CANTERBURY. *Ante.*

Franchise.

Hards for the defendant, held the retorn sufficient; and 1, The exemption is good in point of grant, 42 Ass. 5. 39 Ed. 3, 15. But 2, The doubt is if the words be sufficient in such cases where the King is party, which is neither for any felony, murder, or other criminal causes, except treason, arising within their city: and on arraignment of Lad, reader of Gray's-Inn, on 4 Jac. for murder done there, (26 H. 6,) it was ruled that on the former charter, 8 H. 6, 21. 21 Ed. 3, 54. 11 Co. 64, because in 4 Jac. there was no such clause, coram ipso Rege, and therefore he was tried here by Nisi Prius, this Court being not excluded; and thereupon a new patent was obtained two years after, which would be fruitless, unless this Court be excluded by addition of the clause coram Rege, which is particularly for this purpose, 35 H. 6. 42. Exemption after the distringas is good enough by special words: also here are words equivalent to licet tanget nos, 8 H. 6, 19, which is sufficient. 3. This retorn could not come in at the venire facias, (18 H. 8, 5, for it must be retorned, and not allowable before appearance, which is contrary) 27 H. 6, 5. 34 H. 6, 25. 35 H. 6, 42, for the distringas may be with Nisi Prius, and so tried there. 4. An action upon the case, Br. 1. 2 Inst. 130, Marlbr. c. 14, lyeth against a sheriff if he hath a writ of allowance, as in our case; 22 Ed. 3, 20, is that estranger must pray it on the distringas; but others, Dy. 357. Stamf. 159, may have it at the venire facias. **[854]** Twisden, This liberty vests not in the politick body, but in the particular persons, 30 Ass. 1, who must come in and pray to be discharged, Moor 833, *Waller* against *Hanger*, and it cannot come in by retorn of the sheriff; and so are all the books before cited. 2. Windham held the franchise sufficient against the King, Dyer 46, & 24 Ed. 3. London, Br. 4, being in all cases, except treason, which is the same with London; and that it may be retorned by the Sheriff of Canterbury, although it could not by a sheriff of another county, 19 H. 6, 52 b. 30 Eliz. per Gawdy, The exemption at the venire facias cometh too late; Hyde accorded with Twisden: Mr. Attorny said, *Sir Thomas Overburies case* on indictment for murder of him, was tried in London by measuring the bounds: but by Hyde, This was on special commission of oyer and terminer, and this question never stir'd. Adjornatur.

59. PIERCE *against* PARKS. *Ante* 846, pl. 41.

Administrator. 2 Roll. 303.

Debt for rent due in the intestates life time; the defendant pleads sentence of revocation of the plaintiffs administration in bar. The plaintiff replyeth that was void, he being brother, &c. and that there is still an appeal pendant of the first sentence: to which the defendant demurred. Paulet for the plaintiff, that the action is maintainable, 1. Because the revocation is void; for at common law the Ordinary had only an authority to keep or distribute the goods, and grant letters ad colligendum, Dyer 255 b. 256, but no interest till 31 Ed. 3, cap. 11, to grant administration to any; and hereby he hath only commission to grant to the next of kin capacitated by law, and then the interest is vested in the committee; and 21 H. 8, cap. 5, is but an explanation and direction of the former, which being but bare authority in the Ordinary, and well executed, cannot be repealed; which rule is as true in publick as private authorities, and in judicial as ministerial powers, as 5 Co. 40, and *Prin's case* on the Act of Corporations, and what Judges do, that is not within their jurisdiction or authority, is coram non judice, as the Marshalsea is a Court for all causes, but 9 Co. 76 confined to persons del hostel, and others, are coram non judice there; so the Ordinary is restrained to the next of kin, and otherways his commission is void; but not pleadable here, for his authority remains, and Anderson 303, he may revoke it without any process; but here his authority is well executed, and so not revocable without **[855]** cause, 1 Cr. 62 & 201, as letters ad colligendum might be at common law; and in *Betsworths case*, 22 Car. 1, this point was obiter resolved, but he relyed on *Sir George Sands's case*. I agree, when a caveat is entred by two in equali gradu,

43 Eliz. *Lady Willoughbies case*, Goldsb. 119, Administration granted to one may by appeal be revoked, or where there is some disability by attainder, which is perpetual, the Ordinary may grant new administration; contrà on excommunication or utlawry in trespass, which are but temporary, for there, as 34 H. 6, 14, he can only grant a concurrent administration quousque the disability be removed, which are in nature of servants to the first, as administration during minority; but in our case there is no cause appears. 3. Here the repeal may be pleaded in bar, in regard the Ordinary hath a general jurisdiction of the thing, contrà of coram non judice. 4. Also by the appeal, the first action is still pendent. Wallop for the defendant, It must be supposed that the Ordinary hath revoked for cause being said done debito modo; but however, the Ordinaries power is by the common law, and he might have granted it before the statutes to any person whatever; and what is not taken away still remains in them. Sed adjornatur.

60. PIERCE *against* PARKS. *Ante. Thursday, Febr.* 9.

Administrator.

9 Co. in *Hensloe's case*, it's said the King of ancient time had the power of administration, and granted it to the Ordinary by Act of Parliament, Seld. Titles of Honour, Second Part, cap. 5, fol. 715, since antiquated, as 1 Inst. 45 b. and therefore Seld. 484, in his Review of Tythes, conjectures that such may be said the common law, it not appearing now how such jurisdiction came in. 2. By their law they might grant administration to whom they pleased, and revoke at pleasure, which shall not be taken away by general words, 5 Co. *Caudries case*, without negative, 31 Ed. 3, cap. 11, which is only explained by 21 H. 8, neither of which restrain their power of granting administrations, but forfeiting 10l. 1 Leonard, 240, he may still grant to whom he will. 2. Their power of revocation is not restrained, although it do restrain their power in grant, 2 Inst. 455, in which case being by common law, the Acts that restrain are stricti juris, not extendable beyond the words, which are only, that the Ordinary shall depute, in which case, ex natura rei, all **[856]** deputations are revocable, and its not in either said, that the Ordinary shall grant irrevocably; and its reasonable they should have power over their own acts, so as to review to remedy surprisals or error, which being so incident to the nature of the thing, shall not be restrained by a general construction. 3. There are only three instances, as Latch. 67, *Mayo's case*, where prohibitions have been denied, as on suppression of will. 2. Where he that is next of kin obtains it within fourteen days, which as *Dunsters case*, Pasch. 1649, is too hasty, and not according to the rules of that law, in which case Twisden, who moved then for the prohibition was denied, which Twisden agreed, because they proceeded inverso ordine: and here our administration is taken on the fourteenth day, which in their law is exclusive, not inclusive. 3. Where, *Brown* against *Poyns*, there is a residuum bonorum, Dyer 372, pl. 8, so where there is any incapacity in the person, or other default: so 32 H. 8, that enables all persons, doth not include infants, or feme coverts, or such as are disabled by the common law, 3 Cr. 163, Anderson is express, that such administration is revocable, 1 Cr. 62, *Fotherbyes case* is only, that they cannot grant at pleasure, as they might at common law: so 1 Cr. 146, *Levans case*, the interest of administrator, 4 H. 7, 14, per Tremain, Adm. Br. 33, is only as a power, and accountable to the Ordinary, not absolute interest; 27 H. 8, 26 b. by Fitzherbert, Adm. 3, Owen 50, *Newmans* against *Beaumont*, 3 Cr. 460. Anderson 303, *Caryes case*, the Ordinary may repeal by new grant, without sentence of repeal; and it being their ancient power and jurisdiction, and not given by the statutes, therefore may be executed at several times, being a power just and reasonable; judgment for the defendant. Windham, Upon the Bar held the case not worth the argument: but said the roll warrants not the opinion of Cooke, but that if the King had a debt by Magna Charta he sent a prerogative writ to seise the good of the intestate, to pay his debt; and doubtless the auncient Kings divided these jurisdictions, when all the land was in their hands; but here the Ordinaries power cometh not in question: its true a mandamus hath been sent to the bishop, as I have heard, when the next of kin cometh in, and contests administration granted to a stranger; but in this case the debt must be paid to the new administrator, and the debtor being a stranger, cannot

bring this into question; also its in their power to do, and its sufficient to say its done, concurrentibus hijs quæ in jure [857] requiruntur, for they have many causes not taken notice of by our law. Were the contest, between the two administrators, it might be doubtful. Twisden, The debito modo revoked is not sufficient, so *Betsers case*, Stiles 10, where resolved, that if not rightfully granted, it may be revoked but not where well committed; also in *Trumpings case*, in Latch. 67, and before the deligates in *Betsers case;* also the defendant must set forth the special case, that to the Court it may appear the Ordinary had power to revoke: so debito modo is no good pleading, but the replication, per Curiam is double; if the defendant had took advantage of it, concurrentibus hijs is sufficient, as *Specots case;* but there being a special direction by the statute, it must appear specially. Windham contrà, The matter being properly within their jurisdiction, as *Kens case*, of deprivation, which is measured by their law; and the power not given by any particular statute. But Hyde agreed with Twisden. Adjornatur.

61. BEAN *against* NEWBERY. *Ante.*

Arbitrement.

The Court conceived the award naught, and judgment for the defendant, because the award to pay to a stranger is void. Jones prayed leave to discontinue, which the Court refused, because here doth not appear any real debt; also the party hath other remedy by debt on the award, if it be good.

62. THE KING *against* LUCAS.

Taxes.

Coleman prayed, the defendant, being committed by sessions generally, in pursuance of Act of Parliament, on beating commissioners of excise, and bound to appear there before, might be bailed, the party being only indicted, and no fine: sed per Curiam, that the nex justice, or any other magistrate may commit, doth include the sessions, and not only other magistrates as in corporation inferior to such justice. 2. General commitment is intended as well in Inferior, as Superior Courts, and is intended till next sessions without express words; and being to remain in prison, the party is not bailable.

[858] 63. GEORGE AND BUCE.

Rent.

In replevin, the defendant as baily made cognizance for rent, reserved to J. S. on deed of feoffment made to the plaintiff, virtute cujus the plaintiff was seised, to which the defendant demurred; and Coleman for the defendant held the pleading, quod per chartam feoffamenti dedit is sufficient here, the title not depending on the feoffment but only for rent: sed per Curiam, This being by reservation thereon, if no feoffment there is no rent; and unless it be said quod feoffavit, or shew livery was made, the plaintiff is but tenant at will; and so judgment for the plaintiff against the avowant, nisi.

64. SYMONS *against* PURCHACE, ADMINISTRATOR.

Hill. 15 & 16 Car. 2, Rot. 82.

Administrators.

In debt for rent on lease to Richard Purchace, the intestate reserved half yearly, the intestate dyed before Mich. and for remainder then due, 2 Cr. 411, the plaintiff hath brought the action in debet and detinet; to which the defendant demurred generally, 1 Cr. 63, *Smith* against *Norfolke:* by Twisden on demurrer, This is a controverted point, but on a verdict its well enough; and setled 5 Co. *Hargraves case*, which

Windham held also clear on demurrer for rent arrear, in the administrators or executors time, the land being their own; and the same law is, if the intestate dye but an hour before the day: but they agreed that it may be in detinet alone, and so it ought to be if the rent be of the value of the land. Sed adjornatur.

65. LORD STANFORD *against* HUBBARD. *Friday, Febr.* 10. In Execution Fitzh. 165.

Execution. 3 Ed. 1, cap. 24. Register, Jud. 13 a. Sc. fa. Siderf. 239, pl. 11. Admeasurement Br. 2. Admeasurement 3. Action upon the Case, Br. 81. Extent. Br. 113. 9 Ed. 3, 39 b. Execution 36, 134.

Maynard prayed examination of practice of sheriff on elegit, finding the defendant had lands in A. where he had nothing; and so extending all his lands in B. as a moiety, which being true, no attaint lieth, nor can be avoided at the Assizes, by ejectment of moiety. Windham held an audita querela lieth; Twisden said its avoidable by ejectment, and evidence may be, that the defendant had nothing in A. which the Court agreed; and directed not guilty to be pleaded in **[859]** ejectment of lands in A. or to file the writ of elegit, and in ejectment thereon (which else cannot be brought) to plead the same, but they refuse on affidavit, to refer the examination of the enquest to the Secondary.

66. SIR HENRY HERN *against* SIR WILLIAM BROWNLOW.

Costs.

Finch prayed costs of former trial at Bar in replevin on issue sur son franktenement before the avowant, against whom it was proceeded in new ejectment, which Wild the Kings Serjeant opposed, because the matter is suspended by writ of error, which the Court agreed, they could not award nor hinder the proceedings, but contrà, if the former action had been ejectment, where the right would come in question; Finch prayed an imparlance till costs of a former trial were paid, 17 Car. 1, which the Court refused, but would order that full costs (i.e. such as the defendant shall swear expended) shall be paid.

67. FERRERS *against* JAQUES.

Visne.

On rule to change venire from London into Warwicke, in action upon the case for words, there ought to be, nisi causa ostensa fuit in contrarium, by a day, and none being, the plaintiff may come before plea entred, and suggest, that he will give no evidence, but where the action is laid, and so hinder the changing it; but Serjeant Dalison praying it after plea entred on the roll, came too late: per Curiam.

68. THE KING *against* HALES, &c.

Force.

Wilmot excepted to an indictment, on 8 H. 6, 9, of forcible entry, said vi & armis & manu forti, but its not said illicite, which in *Jacobs case* was ruled by Chief Justice, Rolls 82, ought to be; sed Curia contrà; and if it were not illicite, not guilty may be pleaded to it, but on 15 R. 2, ubi ingressus non datur, it must be so said also. 2. Per Curiam, One justice may as well make enquiry, as to certifie force on his single view, the Court ordered him to plead.

[860] 69. GREENLYE *against* HARPER. *Saturday, Febr.* 11.

Slander.

In a libel against the plaintiff, for calling the defendant, being a minister, drunkard, he by Weston prayed a prohibition after sentence of excommunication, in regard its a temporal offence; and the plaintiff had often seen the defendant

drunk and admonished him, and after information against him at common law for drunkenness, whereupon this libel was conceived: Twisden and Windham granted it, in regard for words only they cannot thus proceed, pro reformatione morum; but by Windam they may deprive him for the offence.

70. ——— *against* LUSAMOOR.

Trades.

Shouldham excepted to an information by common informer for exercising the trade of a barber, not saying he set up publickly; sed non allocatur, the statute being in the disjunctive. 2. Its not said contrà pacem; sed per Curiam, that's never done in suit by common informer; and if the defendant did not set up publickly, he may be found not guilty.

71. CLAPHAM *against* MOIL. *Ante.*

Covenant.

Wild prayed judgment might be staid, the point being difficult; and debt lieth not on these articles made on marriage of the plaintiff with the mother of the defendant; for the agreement is to convey the office of prothonotary of the C. B. proviso, that the defendant shall pay 500l. to the plaintiff out of the first three years profit, he agreed this proviso would be a covenant in the conveyance, because on default the office cannot revert to the plaintiff, nor have any other remedy; but these articles are only to convey with such proviso, and therefore debt lieth not: Twisden and Windham doubted, & adjornatur.

[861] DE TERMINO PASCHÆ, 17 CAR. II. B. R. DIE MERCURIJ, APR. 12, ANNO 1665.

Hyde Chief Justice, he died suddenly on May 1; Twisden; Windham being sick, he came not until Monday, Apr. 17, and went off sick on Friday; Keeling.

1. PAGET *against* LOWE.

Attorny.

He brought a bill against the defendant on 32 H. 8, cap. 4, & 18 Eliz. cap. 14, for not entring his warrant of attorny in the suit of one Clayton. Coleman prayed that this statute, being obsolete and never put in use, might not be now put in suit without rule of Court, in regard all the clerks of the Court are hereby concerned; as also that the defendant may have time yet to file his warrant. Twisden conceived the reason why no warrants are filed is, because the want thereof is aided after a verdict, and this is the occasion of the discontinuance of the practise, but by law they ought to file it: but the Court cannot alter the law, but in **[862]** prudence may, to prevent garboyle in the office, revive it by rule, which the Court, Windham absente, agreed; and Keeling understood not how a statute law can be obsolete: the Court ordered proceedings to stay till farther rule, and that all warrants since the King came in, and in future, be entred, &c.

2.

2. Hyde Chief Justice ordered the attorneys at their perils to keep up the ancient course of pleading, notwithstanding the late Act of 17 Car. 2 doth aid misericordia for capiatur, &c.

3. WARD & UXOR *against* MARSH & UXOR.

Slander. Siderf. 241, pl. 2.

You are a bawd, and I will prove you a bawd, and you took 5s. for a clean pair of sheets for two whores and two rogues. Wild the Kings Serjeant, in arrest of judgment, conceived the words not actionable, there being no special custom alledged, as in London. Jones for the plaintiff, The word bawd with this addition is actionable, as punishable in the leet for the common practice of it, rather then for the place, 1 Cr. 229, is denied in 261 & 329, for though it be out of the house, as 396, it's punishable as well as within. Also it's laid, 2. That the plaintiff keeps a victualling house, 3 Cr. 582, pl. 8, and that hereby she lost her customers; but the words being spoken of the feme only, this exception was disallowed. Also there were other words, that she was a bawd, and took 5s. of a man to help him to a whore; and that she would hire bayliffs to throw durt at her when carted. Keeling conceived the word bawd generally not actionable; but the words in 1 Cr. 396 were actionable, because it could not be otherwise intended, but that she kept a bawdy-house, and this only is punishable in leet: the Court doubted these words would not be sufficient. But 3. There being other words, that she was a bawd, and the defendant would have her carted for a bawd generally, and intire damages given for all, it's ill per Curiam; but had all the words been laid together, they might have been actionable. Adjornatur.

[863] 4. ABBOT, ADMINISTRATOR OF PICKAS, *against* LEECH.

Error.

Per Curiam, The marking the roll, or paying fees for a writ of error, or allowance by the Chief Justice, unless it be actually taken out, is no supersedeas to execution, but being taken out it is; but the sheriff is not in contempt if he have no notice of it, or supersedeas delivered to him. Also per Curiam, If administration be repealed after judgment here obtained, this Court can take no notice of it: but by Twisden, The new administrator may have an aud. querela. Ex motione Serjeant Newdigate to set aside execution, which the Court granted, if the Secondary reported it was unexecuted when the writ of error was taken out.

5. MORGAIN *against* CULPEPER, &c. *Thursday, Apr.* 13.

Joynder. Siderf. 241, pl. 1.

In a trial at Bar it appeared that W. tenant for life, remainder to the first, and so to several sons in special tail, remainder to eight daughters of T. the father: W. having no issue, suffers a recovery 16 Jac. vouching four of the eight sisters, who, per Curiam, as Litt. are tenants for life, with several inheritances, which by Twisden, as to the seven daughters, who were then only alive, this is a defeasible estate, and the other three may enter, and the uses of the recovery was to W. with several contingent remainders, and he enters generally, which by Mr. Attorny for the plaintiff, who claimed three parts of these four sisters, who were vouched by special limitation of the new use to such daughters as were vouched, cannot revest the right of the other three sisters, under whom some of the defendants claimed, in regard that an use being limited to a brother of W. on the recovery, and he suffering another recovery 18 Jac. vouching the three sisters, who coming in of all their estates, do pass all they have, and so bar their right, and the eldest brother of W. may limit what use he please: but by Keeling, The three sisters having not entred, this recovery operates in extinguishment, especially by Hyde Chief Justice, and Keeling, they having but a right at the time of the voucher: also no use can be limited by the last recovery by the three sisters; and the eldest brother being but tenant for life, his limitation is good but for his life: but in 24 Car. 1, John the eldest brother suffered another recovery to the **[864]** lessor of the plaintiff, vouching the four sisters, which doth also extinct their right, and so the lessor of the plaintiff hath no title for want of entry,

by Wild for the defendant: but by Glyn for the plaintiff, The estates of the four is not turned to a right, but confirmed by the second recovery, which the Court agreed, unless the deed of uses be otherwise, as was when shewed quoad 130 acres; wherefore as to this the defendant was found not guilty, and the plaintiff recovered the three parts of the four, one of the sisters of old Thetcher, who had a remainder by his settlement, who was the common auncestor.

6. In Enquest, Br. 30. *Friday, Apr.* 14.

Enquest. Enquest, Br. 30.

Ex motione recordatoris Wild, the Court on certificate of a Judge, that verdict was given contrary to evidence, would not allow the sheriff should bring in the book of freeholders to the Secondary, for the ill example; but ordered the sheriff should retorn a good jury in the new trial. Hyde Chief Justice conceived jurors ought to be fined if they would go against the bare and direction, take bit in mouth and go headstrong against the Court; and said, that by the grace of God he would have it tried, seeing the attaint is now fruitless.

7.

Execution.

Coleman prayed the extent might be continued, unless the defendant would pay principal, interest, and charges, which Windham opposed, because there was several charges by reason of the extent; and by law the plaintiff can have only the penalty of the bond as recovered, 100l. & 20s. Sed per Curiam, This is not sufficient without scire facias to discharge the extent: but if the defendant will put the plaintiff to charges, it's reason he should pay more; but contrà if the plaintiff unnecessarily put the defendant to charge: but referred to the Secondary.

[865] 8. ABBOT, ADMINISTRATOR OF PICKAS, *against* LEECH. *Ante.*

In Error, Br. 55.

The Secondary reported that the writ of error was actually taken out, and notice given to the defendants attorny, after he had given the execution to the sheriff; but before the sheriff had executed it, restitution awarded: and per Curiam, This being judgment in action upon the case by nihil dicit, it's not necessary that the plaintiff, in the writ of error, should put in special bail by the late Act Car. 2, cap. . But by Hyde Chief Justice, he should, had it been by verdict, though commenced before 24 March, quod quære by the rest.

9. RATCLIFF *against* BISHOP.

Arbitrement.

Jones prayed judgment in debt on obligation for not performance of an award, the condition was to stand to the award of two de & super præmissis, or to the umpirage of the third. The defendant pleads no award: the plaintiff sheweth that the two arbitrators made no award de & super præmissis, but saith that the umpire accepto super se onere umpiragij, did award that the defendant should pay, &c. and doth not say de & super præmissis, for which cause the defendant by Barwell demurs: sed per Curiam it's well enough, and can be no otherwise intended, wherefore judgment for the plaintiff.

10. SWALLOW *against* EMERSON, EXECUTORS OF TURNER.

Joinder. Siderf. 242, pl. 3.

In debt upon a bond, the defendant pleaded that there was another executor not named, and yet living; and doth not say that he did administer: for which cause the plaintiff demurred upon 9 Co. 40, and for the mischief of the creditors, if they should

be bound to seek out such as never proved the will; and on the same reason, Trin. 16 Car. 2, Rot. 1403, *Pettoe* against *Ruddock* administrator of Hanshaw, ut dicitur, which, per Curiam, is well enough, because the plaintiff is bound to take notice of no more then is in their conusance, Wentworths Executors 146. Executors, Br. 20 & 21 is on this difference. Keeling conceived the constant difference to be where executors bring the action, all must be named; but an action against them may be against such only who administer, and unless this be averred, the defendant cannot plead this plea in abatement; and per Curiam, this is the constant difference. Judgment for the plaintiff.

[866] 11. MILLS *against* MIDDLETON.

Marriage.

Action upon the case on promise that if the plaintiff would marry the defendant, the defendant would marry the plaintiff; and in action for non-performance, the plaintiff saith only, that the defendant did not marry the plaintiff; and doth not say she was ready to marry the defendant, for which cause Bigland moved in arrest of judgment, that she might be married before to another: but, per Curiam, this ought to be shewed by the defendant.

12. WEEKS *against* COPLESTON. Siderf. 242, pl. 4.

Hill. 16 & 17 Car. 2, Rot. 330.

Assumpsit.

In an action upon the case against the widow of the debtor, in consideration that the plaintiff would forbear to disturb until such a day, and not molest her in her journy to Lond. which by Raymond on demurrer, that this is no consideration, it not being alledged that she is executor or administrator, for which cause it's ill; which the Court agreed, upon the frequent resolutions in 8 Jac. *Hill* against *Baily*, on which *Hinckton* against *Humes* was grounded: so *Whitcher* against *Dodes*, consideration to forbear H. as executor, is ill; so *Howard* against *Ducket:* but the record being farther, & quod the plaintiff abstineret à solutione until a day, and not sue for the same, the Court conceived this, if intended as a general forbearance, is a sufficient consideration; but they doubted that by this (and) it might be tied up to a forbearance of her only; and so it is by Keeling, sed adjornatur. The promise by the defendant was, that if the plaintiff would forbear to molest or disturb the widow Candish, who was in fact administrator, but it did not appear on record.

13. CAMBELL *against* PRESTON. *Saturday, April* 15.

Assumpsit.

In consideration the plaintiff at the defendants request would deliver him certain parcels of tymber, the defendant would build up two rooms in such a house, and repair: after verdict in special action upon the case for the **[867]** plaintiff, Raymond moved in arrest of judgment, that the defendant hath time during life, unless request, and the request is 10 Oct. and the action is of Michaelmas term, so there is no convenient time given: sed per Curiam, The defendant ought to have pleaded it specially, or demurred for that cause, because it's not sufficient. Judgment for the plaintiff.

14. THE KING *against* PERCIVAL AND PARKER. *Ante.*

Franchise. Siderf. 243, pl. 5.

The Court conceived this retorn cannot be made good, and the city in general cannot demand it, nor will any action lye against the sheriff upon their delivery of the writ of exemption; but such particular member must have a writ delivered to the sheriff, Moor *Wallers case,* Also by the retorn of the venire facias, the jury

is admitted as retorned, and therefore the sheriff cannot, on the distringas, make a contrary retorn: also upon such retorns there would be a failer of justice, unless the King will send special Judges to Canterbury. The Court awarded an alias distringas to be retorned Monday fortnight next from Canterbury, in regard the sheriff cannot vary from the first venire facias retorned, but must have the same men.

15. THE KING *against* MIDDLETON.

Indictment.

In an indictment of assault and battery in London, Winington assigned for error that the record was all by way of recital, that adjornatum fuit such and such a sessions, which being several continuances only before the indictment found, but when the indictment is found, it's in the present tense præsentat' existit, which, per Curiam is well enough; and the very words of the record below, quod talis, &c. Sessio adjornat' fuit: so between the finding and the trial is the recital quod at such a sessions præceptum fuit vicecomit' quod non omittas, which per Curiam, is cured by appearance of the party: also had the præceptum fuit been at the time of the trial, it had been ill. Also 2, The clerk of the peace ought to mention only the day of the sessions, and not the continuances, unless there be special cause, as felony, on another day. Judgment affirmed.

[868] 16. THE KING *against* THE APPROVED MEN OF GUILFORD.

Mandamus.

On mandamus to restore one Mills an approved man, who retorned that he said of the mayor, and one Canfield, That Canfield, one of the magistrates of this town, is a lying knave, and the mayor, &c. shall not father their lyes upon me. For which being convented before the mayor, and confessing the words, was suspended until he acknowledged his fault, and made satisfaction to C. Wild the Kings Serjeant excepted, that here is no power by which they may remove, which, per Curiam, is needless, here being only a suspension quousque, for which the party, if injured, may have an action upon the case: but this mandamus lyeth not, unless he be totally removed, because the freehold remains in him, as on putting one of a society out of commons. But by Twisden, Suspension is a remotion for the time; and this would open a great gap for oppression. Et adjornatur.

17. WILKINSON *against* BOULTON. *Ante.*

London.

The defendant justifies false imprisonment by custom of London, that the Court of Orphans is a Court of Record, that have the committing of the guardship of any such; that by the custom, if any such be taken away, the Court may, if the party appear in their Court, and it sufficiently appear to the Court that he is guilty, they may imprison him till he discover whither the orphan is carried, where he is, or be discharged by due course of law, Dyer 245 b. & 2 Inst. 142. Unreasonable customs are not confirmed, and, by Williams, this custom is so, therefore he demurred, because as *Baggs case*, & 2 Inst. nullus liber homo capietur, &c. But per legem terræ, which is by summons; and here they may do it on his appearing in their Court generally, whether citizen or not: also here is no way of trial direct, but only if it appear to them, which is injust. Also F. N. B. 142, there is an ordinary remedy by ravishment de gard, in which case nunquam recurritur ad extraordinarium: also it doth not appear but the orphan was married at the time. And per Curiam, As to the entitling of the defendant, being in a plea, it must be particular, but in retorn of mandamus's, these would be no exception. Another exception was taken to the custom, that it was not only to have the custody of the lands of such orphans in the city, but all over England: sed per Curiam, This might be a question before the taking away the **[869]** Court of Wards,

but where it's no prejudice to a third person, as mean lords, they may have custody all over England; also constant practice having been with the city, unless some presidents have been contrary, it's now too late. Sed adjornatur.

18. AMPCOTS *against* AMPCOTS. Siderf. 252, pl. 22.

Formedon.

Error of a judgment in C. B. Newdigate for the plaintiff its error of a formedon in remainder where the plaintiff counted on a feoffment, 38 H. 8. by Alexander Ampcots, and sets forth the death of the issues in tail, to which the defendant an infant by guardian pleaded, that she was seised in fee; and induced it by conveyances, and prayeth the parol may demur; the guardian dyeth, others are made; the demandant counterpleads the age as in the count, and prayeth she may be ousted, and by judgment the defendant was ousted of her age; and the judgment there held peremptory by the whole Court of C. B. which he conceived to be but a respond. ouster; and this being but a special verdict, was said to be all one with a general verdict: also that action upon the case lieth against guardian, if he doth not pray age when he ought, but 2 Inst. 291, he shall have age in cessavit in his own time; also this verdict is no more then a demurrer, in which case it was there agreed, the judgment should not be final, the truth of the case being alike disclosed in both; also issue upon a collateral point is not peremptory, as Utlary 47. Also this is a delay without a contempt, therefore not peremptory, 2 Cr. 467. Also because the plea is true: also recoveries are good by guardian, because action upon the case lieth against him, but here it would be no remedy, because one guardian pleads the plea, and another prosecutes, 24 Ed. 3, 76. Age Br. 26 & Peremptory, Br. 25 Ed. 3, 80, pl. 2, must be understood that such plea is peremptory only against the age, Voucher 17, 119, insisted on in C. B. this is in lieu of a peremptory; also this delay is by the demandant himself for four terms, else the tenant might have had judgment the same term of his age, Latch. 177, or to be ousted; also the demandant himself prayeth only, that the tenant may be ousted of his age. Jones for the defendant in the error, Tenant in the formedon, the difficulty rests chiefly on the traverse taken, the case being, that in a formedon the demandant doth counterplead the age, and upon matter of fact arising an issue is joyned, and found spe-**[870]**cially; and now he conceived the judgment must be peremptory, for in all pleas in abatement, the prayer is only quod breve cassetur, yet the Court give judgment peremptory, or not, as the law stands, L. 5 Ed. 4, 90 b. Its laid down as a rule, that issue joyn'd in all actions is peremptory, to the tentnt if of full age; and there is no difference warranted by any authority, of an infant from another man: and particularly instances of this rule are, that of the counter-plea of voucher, which on demurrer is not peremptory, W. 2, cap. 6, unless in another term since that statute; and were it a plea in bar, the demurrer would be peremptory also; likewise issue on excommunication, 50 Ed. 3, 20, is peremptory in every dilatory plea, 3 H. 4, 3. Issue against tenant is peremptory, but on demurrer only such pleas as are puis dar. continuance, pleaded after issue, are peremptory, L. 5 Ed. 4, 129. 2 Ed. 4, 10. Yelverton 112. Some books make infancy tryed by inspection not peremptory, 33 Ed. 3. Issue 14. Age 122, but strongly implied that trial per paijs is, because more dilatory, and lying more in the knowledge of the party and his counsel; the Court agreed the rule, that plea in abatement on issue is peremptory: also the prayer cannot be otherwise then breve cassetur; the tenants plea was that the demandant was seised in fee, absque hoc that he was seised in tail, issue thereon found for the plaintiff, judgment affirmed, nisi.

19. MATTHEWS *against* HOPPING. *Ante.*

Hill. 16 & 17 Car. 2, Rot.

Ways.

Jones prayed judgment in action upon the case, that a common carrier, who by the custom of the realm ought to carry, &c. but its only said the plaintiff delivered goods to the defendant for a certain price then agreed to be carryed to D. and that he accepted

the goods to carry accordingly, which is well enough, without shewing the defendant is a common carrier, and there need no promise be laid, because as 2 Cr. 262, its a misfesance, in which case if I deliver goods to a factor to sell for ready mony, and he sells without, such action lieth, and the allegation that the plaintiff delivered; and the defendant accepted these terms, doth tantamount to a promise; and the recital is part of the common law, and declarations would be good without such recital, which is but a formality, and after a verdict insignificant, but statutes are privative of common law, therefore if one be **[871]** misrecited, the action is not maintainable on another. And 2. The joyning of a trover in the same action for the same goods, and found guilty generally of both, and intire damages is well enough, the first action being for a tort, as against a shepherd for misfesance in keeping sheep, so they are well enough coupled: but Keeling contrà; tort can never be made where there is a special agreement, unless there be duty by statute or common law incumbent, as on shepherd or common carrier. And by Hyde, Here is nothing but the particular agreement that is obliging, therefore if any thing, an assumpsit lyeth: also by Twisden, It must be such a tort that implyeth force and arms with which trover may be joyned, as if shepherd destroy sheep; but what is generally called tort, as wherever any parlance is of malice and fraud, or negligence, is not sufficient to be joyned with a trover. Judgment for the defendant.

20. THE KING *against* PINTCHARD. *Monday, April* 17.

Parliament. Siderf. 245, pl. 7.

The House of Lords ordered him to be committed, and delivered the order to the serjeant at arms to take him, and after the House prorogued he was taken and detained till fees paid, and security given to appear the next sessions, which, per Curiam, is illegal, and such order cannot be executed afterwards. But by Hyde Chief Justice, The Chancellor of course may cause their orders to be executed: but by Twisden, He must have a special order from the House to execute their orders. But by Keeling and Windham, The House of Lords is not like other Courts, but is wholly determined by prorogation, and ceaseth till the next session: and so was *Streaters case* on habeas corpus, 1654, he was delivered, the Parliament being determined, against which he spake those words for which he was committed. Adjornatur.

[872] 21. DREWE *against* SLOWLY.

Assumpsit.

Action upon the case, that whereas the defendants father was bound to the plaintiff in several bonds, and he intended to sue the defendant as son and heir, he in consideration, the plaintiff would forbear to sue, and deliver those bonds, the defendant promiseth to pay Jones: after verdict for the plaintiff, moved in arrest of judgment, that the whole consideration being executory, and in nature of condition precedent, its not sufficient to say he did forbear, and was ready to deliver up the bonds only, but that he did deliver them actually, or offered so to do, and the defendant refused, which by Keeling is ill, and not the whole, that is in his power to do, which the Court agreed. Judgment staid.

22. DOLBENS CASE.

Mandamus.

Williams prayed mandamus to admit clerk of the fines in the marches of Wales, which Hyde and Windham denyed, in regard it lieth not, because it doth not appear what the office is: Twisden said that it had been granted to admit to a freedom, 18 Car. 1, which Windham said was an anomalous president, and lately under debate. Keeling said it was grantable by Magna Charta, as well to admit as to restore: and this office being granted by patent, a mandamus lyeth, the party having a certain estate, as *Dr. Goddards case*, though private: also the Court were divided, as to the gift of this writ, to swear administrators or constable. Adjornatur.

23. RANDAL *against* KEITE.

Mich. 15 Car. 2, Rot. 849.

Sheriff.

In debt upon a bond, the defendant pleads the statute of 23 H. 6, and shews that upon a plaint out of court baron, certain goods of the defendants were upon a plaint, taken within the parish of St. Clement Danes; and so being taken colore officij, is void: to which the plaintiff demurred, because on 10 Co. *Beaufages case*, the person is not in danger of imprisonment, and the statute is made for the liberty of mens persons, not of their goods. 2. If goods are said to be attached in St. Clements Danes, and doth not shew that St. **[873]** Clements is within the jurisdiction of the Court, as *Brown* against *Adams*, 3 Cr. and *Johnson* against ——— 1 Cr. Jones for the defendant, conceived that any bond taken otherwise then the statute directs, is void, as when taken of one that is in fear of an arrest; but the case of taking bond on execution by elegit, is upon particular reason. 2. If the bond should be void, if they have jurisdiction à fortiori, where they have none, else the defendant would be in a worse condition; and therefore if the bond be not void by the statute, it's void by common law. Twisden said the clause, that all other bonds shall be void, relates only to the former clause of such as were in prison, yet he doubted, that if one give bond in fear of an arrest, it may be void, but it extends not to this: also this bond is not entred into to the baily, but unto the plaintiff, yet such bond is void by common law, else those Inferiour Courts will be in better case then the Superiour, which Keeling agreed; and that if this be out of the jurisdiction, it's so much the worse: the plaint was of 39s. in the Court of Norton-Folgate, and the baily caused bond of 40l. to be made to the plaintiff, to appear and render the defendant on judgment, or pay the condemnation. Hyde Chief Justice, Though the bond be neither void by statute or common law, yet being on record, if it appear void, as it doth here for the unreasonableness of the sum extorted, the Court may vacat it, for the distress there should be but small. Windham conceived this neither void by statute, nor by common law; but before any opinion given, they ordered an information to be against the bailyes for this extortion.

24. COLLET *against* PURDIEU. *Tuesday, April* 18.

In Escape, Br. 37.

The plaintiff having two judgments in this Court against the defendant, and execution against him, and he actually in the custody of the marshal; and then he forgeth a letter of attorny to acknowledge satisfaction, which being delivered into the office, Walter the officer certifieth to the marshal, that he had received a warrant between such parties, by reason whereof the marshal lets him go; which, per Curiam, is an escape, unless the attorneys hand were to it, or a supersedeas delivered; and the Court cannot award any new execution quia improvidè in neither case, without a supersedeas.

[874] 25. WHALY *against* ANDERSON.

Assurances.

In ejectment of the manor of Sibthorp, on the lease of Sir Ch. Herbert, special verdict find the Marquess of Newcastle seised in fee, and demised to Moor, &c. for 99 years, condition to pay 2500l. by a day, or redeem sooner, Moor dyed, Woollaston and Allestry, and the Lady Morgan, who was cestuy que trust, assigned to Warren, and afterward Whally purchased the reversion, and for 2500l. he redeemed, and then he caused the assignment of the lease to Sir Ch. Herbert, &c. to be passed in trust for old Whally, if he repaid in that mony which was not paid, but in consideration of 2500l. paid by Sir H. Springat, and of marriage with his daughter to Sir Ch. Herbert, and they by direction of old Whally assign in trust, that 200l. per annum out of the profits should be to the plaintiff and his wife for life, &c. The last indenture is found

not to be in trust for Ed. Whally the person attainted, but to the uses of the indenture, wherein some part in remainder, and residue was limited to him; and if this tearm were so in the actual possession of the person attainted, that it's forfeited by the Act, and 2 Cr. 512. Jones for the plaintiff conceived he had not; for 1. By reason of the traytors reversion, whereby he had power of redemption of assignee of the Lady Morgan. 2. By the indenture of Warren to Herbert, Whally on the future payment of the mony, had a contingent trust. 3. By the last indenture, the residue of the profits above 200l. per annum, and the charges of the trustees is actually limited to old Whally; but notwithstanding any of these the King can have no title: for as to the first, the King can only have the condition, and must pay the mony when the time cometh, 1670, before he can redeem. 2. The second did depend on an act to be done, which was not upon November after that assignment; therefore seeing the traytor could not, the King cannot now take any advantage of it: the only matter of difficulty ariseth on the last indenture, which giveth no estate in the land to the King, the trust being only of the residue, and no value found, nor can be intended; and if the Court cannot adjudge a surplusage, the Court cannot adjudge the Kings interest. 2. Admitting there be any interest, then whether this residue after a residue shall swallow up all the rest, which upon the reason of other cases it shall not: I agree, that by utlary the King is intirely entitled to personal things, as to an obligation, an horse or an ox, as Pl. Com. 243, *Dame Hales's case*, which **[875]** is the highest in case of joyntenancy; but things in possession, that may be divided, as chattels real, 3 Co. 55, do only go in part to the King by attainder of joyntenant: the term forfeited in *Dame Hales's case* was granted to them, as baron & feme, after marriage, when there could be no moieties; also in that case the forfeiture of the husband is taken as a disposition as an utlary, in that this shall relate to the act done in his life time; but the land of joyntenants is divided, the profit by writ, and the possession by fact, but the estate is joynt only; but in our case is no joynture at all, for Ed. and John can never take their profits together, but John first, and Ed. to have the residue, therefore they can be but tenants in common by this dividing of the profits, which may be as well as by dividing the estate; so the attainder of Ed. cannot forfeit the interest of John. 2. The purview of the Act of Attainder, that all lands in trust should be forfeited, must be construed by the saving of strangers, the meaning must be, that the King should have the same estate in law as the cestuy que trust, who is attainted, had in equity distributively according to the traytors estate, if for life only, or in remainder; and had Ed. Whally been living, he could not have had the estate in Chancery, as the defendants have it now; but the trustees might have been enjoyned to render the surplusage to him, if there were any, but could never decree any possession to the traytor, therefore is not the trust within the meaning of this Act like the Statute of Uses, which on feoffment made before to such uses as in our case, would never have vested any actual possession in the third man, and left nothing in the first or second: had the trust been by way of rent, as that the trustees should have permitted the traytor to receive such an annual sum, he might have had a petition to the King to execute it; but here it is to permit John to receive 200l. out of the profits, so he is pernor, and the others come in but in remainder, and therefore cannot sweep away the estate of the land from those against whom no pretense of disability is made.

2. Bigland for the defendant, that Ed. Whally had once a trust, and so it's forfeited by attainder; for though Ed. did not pay the mony at the day, yet upon the latter settlement he doth, being party to the agreement of settlement by Sir Ch. Herbert, and directing it, and place in matters of conscience being but circumstantial, and the party hath convenient time to pay, and the trust remains still in him, so though the mony were paid by another person at another day, being by direction of Ed. is well enough paid to make him cestuy que **[876]** trust: also the King by limitation of the residue shall have the whole, and the other parties interested must come by petition to the King, but cannot enter on him, nor his patentee, being intitled by record, 4 Co. 59, Stanf. Prærog. 79. Also by the finding of the verdict, that it was not in trust for Ed. Whally, but upon the trusts in the deed, the conclusion being special, the Court are not bound by the conclusion, but may judge on the whole record.

1. Windham said at the trial it was agreed, that Edward Whally had the reversions, and power to redeem the lease; and he procureth the match of Springat, whereby the mony to Sir Ch. H. was paid upon marriage agreement, and if this be such a payment as will retorn the trust to him, and so come to his son as by his assignment, was the pinch at the trial: and I have known that, where one morgageth lands, and after leaseth by estople, and after procureth mony to be repaid, and assignment to be made, it was held that the lease by estople would first take place before the assignment, which Twisden remembred, the case of a poor man in Hackney.

2. Keeling said Whally had no equity in the lease for years, but only to pay the mony in 1670, but if we admit he had once a trust, its plain and clear, no subject could ever take it out of the Crown, but here whoever procures the mony, the use in present turns to his advantage that paid the mony, and so the 200l. per annum is clear from forfeiture, and nothing of certainty of surplusage appears, which Twisden agreed: so Hyde. Adjornatur.

26. PATE LESSEE OF SIR H. HERN *against* BROWNLOW. *Wednesday, Apr.* 19.

Common.

In ejectment of a marsh, the plaintiff claimed as parcel of the mannor of Cressy Hall, the defendant as parcel of the mannor of Newbery in Surflet in the county of Lincoln, but it appeared to be a marsh in common to two vills, between them and their tenants by prescription for their sheep being salt, quære if this may be approved: the plaintiff also claimed as derelict, but being overflowed by the sea at spring tydes, he was nonsuited.

[877] 27. WRIGHT *against* SHERRARD. *Thursday, Apr.* 20.

Measures.

In ejectment, on the lease of Dr. Poklington, of ten hydes of land late the possessions of the Prior of Peterborough: and by the solicitor, a hyde of land is the same as carucat, which is as much as a plow, which usually is intended to have six horses, (the most may manure in a year, within this county of Northampton), is between 100 and 120 of acres at Erklingborough, which is about five yardland, each yardland being 24 acres of arable and of ley, and 16 of meadow and pasture. 2. An auncient deed is good evidence, without proving, or seal on it, as 44 Eliz.

28. THE KING AND CAPELL *against* BAUD AND SEGRAVE. *Friday, Apr.* 21.

Priviledge.

On habeas corpus they were retorn'd, as committed by the Lord Chesterfield the Queens Chamberlain, for arresting one of her sworn servants, and per Curiam, They were delivered, because such have no priviledge, but as the servants of the King; and the complaint ought to be to the Kings Chamberlain, as the only officer taken notice of by law, and who hath the only power to commit in such cases.

29. DEAN OF THE ARCHES. *Ante.*

Executor.

Guillim and Duhurst were executors of Allington administrator, then Duhurst dyeth, and the executors of Duhurst being sued for legacy given by Allington to Guillim, they pleaded that he was not chargeable, because Guillim survived; and that on his death administration was granted of the goods of Guillim to the plaintiff in Spiritual Court, whereupon the plea being disallowed, Symson prayed a prohibition; Twisden, Whoever hath the goods may be sued as executor of his own wrong, and must be named only executor generally, not executor of his own wrong, and by the same reason that executors of him who did not survive, may be charged by the

administrator of the survivor, as executor de son tort, which Keeling agreed, if the defendant were sued as executor of Duhurst, who was executor of Allington, it cannot be as executor to an executor, de son tort, the **[878]** libel was against Gill as executor of Duhurst, executor of Allington, which prima facie is well enough, to which the defendant pleads, that William was named co-executor with Duhurst of Allington; and that Duhurst dyed first, and William survived, &c. but he doth not deny but that he had the goods of Allington in his hands; and therefore in our law he is suable as executor to the first testator, yet if the form of the Spiritual Court be otherwise, its more proper to have an appeal, rather then a prohibition, which the Court agreed; and by Hyde, In suit for a legacy against administrator of executor on gift by the first testator, if by their law administrator to executor be so to the first testator, they have at worst proceeded, inverso ordine; in which case its proper to appeal; wherefore the Court denied a prohibition.

30. BUCKLER *against* ANGELL. Siderf. 249, pl. 8.

Assumpsit.

Hyde moved in arrest of judgment, in action upon the case, in consideration that the plaintiff would procure the lease of a house of one Woodward, to be surrendred to the defendant, at his request he would pay and content him 10l. On non assumpsit, and verdict for the plaintiff, per Curiam, the judgment staid, because this is but evidence of a promise, without expressing quod super se assumpsit; and this issue is no affirmative and negative, no promise being laid in the declaration. Keeling held this but form, and ayded by the verdict: but Twisden said, The first case he ever moved in arrest of judgment was, that the defendant in consideration the plaintiff would deliver certain hops, he would pay him, &c. and being not said, super se assumpsit, judgment was staid: and so per Curiam, præter Keeling, it was here.

31. THE KING *against* BOROUGHS.

Rescous.

Nota, by Keeling, that the Court never fine sheriff on male retorn of a rescous, because its voluntary; but they allow exceptions to quash it, because the party cannot traverse it; but where he is compellable to make retorn, he is finable, which the Court agreed; and the Court quasht this for want of vi & armis, though it be said rescussit.

[879] 32. THE KING *against* BLUNFIELD. *Saturday, April* 22.

Perjury.

On demurrer to indictment of subornation of perjury, Coleman excepted, that being under the stile of Oliver Protector of England, Scotland, France, &c. before his justices of goal-delivery, it's not confirmed by the Act of Oblivion, but remains coram non judice; sed Curia contrà, because the Act is notwithstanding any alteration of stile, which is intended any other then the King, not such stiles as were not allowed in that time. But by Keeling, Had it been under the stile of Charles the Second, King of England, Scotland, France, &c. it had been well enough. 2. It was quod ulterius recordatur, that in such a suit A. came in and swore, and the defendant did subborn, which is only a recital: but per Curiam, It's well enough as well on demurrer, as after verdict. Also by Twisden, The Court cannot force the King to waive the demurrer, unless the Attorny General consent; but for the Kings advantage they may. 3. The issue was on solvit ad diem, and the oath was only, that it was paid about the day, which, per Curiam, is well enough, the perjury being assigned in non-payment generally. Judgment pro Rege.

33. THE KING *against* MIDDLETON.

Trespass.

Keeling excepted to an indictment of assault battery and wounding; the jury find him guilty de transgr. & insult' prædict. only, and say nothing of the wounding: sed per Curiam, Its well enough, and comprehends the whole; contrà, if it had been de insult' prædict. only. 2. The presentment traverse and trial, as *Brumsteds case*, was all at the same day, and sessions; which being ex assensu, is a favour to the party; and the Court having a general jurisdiction of the cause, its well enough. Judgment affirmed in writ of error.

[880] 34. THE KING AND MILLS *against* THE APPROVED MEN OF GUILFORD. *Ante.*

Mandamus.

Twisden said, he knew no difference, as to *this granting mandamus*, between a suspension for words spoken, till he acknowledge his fault, and between a remotion; sed Curia contrà, it's well enough, as commitment by justices till the party find sureties of his good-behaviour: but per Curiam, There is no power of suspension retorned, as there ought to be: but by Windham, This is an incident to every corporation.

35. RABIE *against* ROBINSON. *Ante.*

In Enfant, F. 6.

All parties waived the exception of the fine, and insisted only, that an infant, when of full age, cannot reverse a common recovery wherein he was vouched, being an infant, and appearing in person: and by Twisden and Keeling, He may on a recovery assign this for error at any time, being triable per pais, and by them it is error; and *Mary Portingtons case* is no law, that it may not be suffered by guardian: and by Hyde and Windam, This ought to be assigned for error during nonage, on 1 Inst. 380. But Wild excepted to the writ of error, which was of a record quod fuit coram justiciarijs de Communi Banco, and doth not say justiciariis nostris, nor coram the Chief Justice & sociis, which per Curiam, is incurable, and doth not remove any record from the Common Pleas. Sed adjornatur.

36. LUDWELL *against* SYMSON. *Monday, April* 24.

Devise. Stiles 301.

The defendant claimed by devise of the lands in question, paying debts and legacies, it's fee per Curiam, which is put in writing during his life, and read to him, per Curiam, the lands pass though there be no legacies, or only paroll legacies; but if the directions were to devise on condition, and it's written without the condition, it's void: but without directions, if devise of lands be officiously put in writing by any of the standers by, in the life time of the testator, it's good enough. 3. These ought to be paid in convenient time, and being to strangers, need not be demanded; nor by Glyn, Golsb. 75, need they be demanded at all, as on devise paying 120l. viz. to one so much, &c. and it was ur-[881]-ged, that it ought to be demanded, Bridgman, but adjudged that it was a sum in gross, and needed not be demanded, by Glyn counsel in C. B. But here being question of the will, non-payment within a year is not sufficient, without a wilful neglect, per Curiam: and by Windham, If direction be given to devise, paying debts only, and the writer adds debts and legacies, it's good enough, which the Court agreed; and the after reading is but additional evidence. The Court also agreed, that though the title be the will of J. S. made by paroll only, yet being in writing, is a good will, which the Court agreed.

37. Dr. Dolbens Case. *Ante.*

Mandamus.

The Court, on perusal of the presidents of *Dr. Goddards case*, and *Townsends case*, and Latch. 123, which appears by the roll to be granted M. 17 Car. 1, Rot. 31, to admit clerk of a parish to swear, Arch-deacon of Chester, Trin. 18 Car. 1, Rot. 123, *Rogers's case*, to admit to a freedom, were, as at first, divided in opinion; Twisden and Keeling, that unless this goeth, the party in remediless: Windham, That he may have an action upon the case, and after this; so by Hyde: but at last a mandamus was granted, nisi.

38. Lowe *against* Beaudmore.

Conspiracy.

Action upon the case against two for conspiring to indict the plaintiff of rescous, wherein he was found not-guilty, and counts quod scienter, the plaintiff was not present at the rescous, they caused him to be indicted: agreed per Curiam, that where one is indicted of a bare trespass, no action lyeth; but where the matter of indictment is scandal, or cause of corporal punishment, there it lyeth. Agreed also, that had the count been only falso & malitiose, the action would not lye; but being more specially by averment quod scienter fecit, the Court doubted. Et adjornatur.

[882] 39. Burton *against* Robinson. *Tuesday, April* 25.

Enquest. Siderf. 246, pl. 9.

In detinue, after verdict for the plaintiff, which did not find the value of the deed, the plaintiff on Rast. Entries 214, § 13, and *Cheynies case*, 10 Co. takes forth a new writ of enquiry de valore of the deed detained, which the defendant opposed, because by the first writ of enquiry there is 20l. damages given; and as *Haydons case* the value ought to be enquired at the same time. Twisden in assumpsit against executor, on fully administred, assets were found, but no damages; this cannot be supplyed by writ of enquiry: but by Windham, The damages here cannot be intended for the value of the deed and damages also, but for one only, which the Court agreed, as Trin. 41 Eliz. Rot. 1916, *Chippingdale* against *Orme* in C. B. in placito detensionis pro equa, Pasch. 3 Jac. Rot. 745, *Barclay* against *Hill*, Hill 5 Car. 1, Rot. 1637, in C. B. Dyer 135, and it being found by verdict on non detinet, that the defendant had the deed, the Court would hear nothing against the presidents produced, till delivery.

40. Nichols *against* The Manucaptors of Stokes.

Scire facias.

In scire facias the defendant pleaded in abatement, which the plaintiff by admittance allows, and so never enters the plea, but takes forth a new scire facias to discharge themselves on render of the principal, which is warrantable by the course of the Court. 2. This scire facias being in favorem, if he be not brought in before the Court riseth, he is not to be admitted, though in the afternoon of the retorn of the second scire facias, and though the retorn were upon the 30th of Jan. the Kings fast. Windham and Keeling conceived in this special case, being by Act of Parliament a holyday, the party is receivable at any time of the day, the sitting of the Judges being dispensed with, and another service appointed; sed Twisden contrà totis viribus: but all being done pendant a reference, the Court referred it, and if true, will award a supersedeas, quia improvide.

[883] 41. ERINGTON *against* HURST EXECUTOR.

Dures, Fitzh. 5.

Debt on obligation to pay on request, on non est factum pleaded, special verdict find the testator seal'd and delivered the bond; and that the plaintiff as the Kings Commission Officer, deteined the testator as a prisoner at war, untill he gave for his release the said bond, and find the Act of Oblivion. Tourner for the plaintiff, That the bond is not discharged by the Act, because one bond given to another is not mentioned, nor is any crime or offence, Pl. Com. 173, and these were the only mischief and intent mentioned, therefore shall have no other construction: also this is collateral, as bond given for arms preparatory for the war; and the general words, all other acts relating thereunto, must be intended acts of the same nature with the principal, as assault and battery, &c. Lindly for the defendant, All personal actions, which, as 1 Inst. 285. 8 Co. 153. Lit. sect. 512, comprehend bonds, which were by reason of any Act of Hostility in the late troubles; and therefore in a legal sense, is within the Act, as if specially named; the words of the Act, being farther, or what ever hath ensued, on any such act of hostility. 2. Had the Act only made the bond void, it must be specially pleaded, but being enabled by the Act to plead non est factum, its well enough.

1. Keeling said, the Act intended not to discharge, such as may discharge themselves by other pleas; and here the defendant may plead dures.

2. Windham said, he knew that in the circuit trover, after demand de novo made, was for horse, though the injury of taking away be pardoned: also all contracts were drawn on by acts of hostility, in those times.

3. Twisden said, the acts pardoned, were such only as immediately concern'd the Acts of Hostility, not of each particular contract: also by Keeling, The injury must be hostile, as action of false imprisonment, and not ordinary contracts, as buying arms, non refert to what use I put them, but I am bound; all actions ex delicto are pardoned only. Adjornatur.

[884] 42. HOWARD *against* SPENCER. *Thursday, Apr.* 26.

In Common Br. 9.

On opening the record, by Jones, in trespass against commoner, he justifieth by filling up trenches made by the lord, whereto the plaintiff demurred; and by Windham, Commoner may fill them up: but by Keeling, He cannot where the lord digs, but only where a stranger, but he must have action upon the case. Adjornatur.

43. THE KING *against* PRITCHARD. *Ante.*

Priviledge.

The retorn of the habeas corpus was, that he was committed March 27 to the Fleet till fees paid, being taken into custody by Lee, Serjeant at Arms of the House of Lords (not saying when, but only) by their order, dated 11 Febr. Coleman excepted for the incertainty, it doth not appear what the fees are, nor who should be Judge of them: also the commitment is not only for fees, but till security given to appear the next sessions. Adjornatur.

44. DAUCE *against* LUCE.

Mich. 16 Car. 2, Rot. 519.

Trespass. Siderf. 246, pl. 10.

In trespass for assault, battery, wounding, and mutilation, the defendant pleaded son assault demesne; to which the plaintiff demurred: and by Coleman, This is a special offence, in which the King hath an interest, and may be felony, therefore though se defendendo be a good plea, yet not son assault demesne generally; but it

may be specially pleaded, 2 Inst. 316, as that the assault was such, whereby he was in fear of maihm; for generally quod verberasset & maletractavit, doth not put any to a necessary defence. Pemberton for the defendant, This is only for damages, therefore the general plea is good, being si quod damnum be, it was of his own assault, and in defence of the defendant, which the Court agreed, the count being laid quod mutilavit only, which the Court agreed, and the per quod he lost the use of his arm, is not sufficient, unless it be laid, quod maihimavit, as in indictment or an appeal, which is the same for the party, as an indictment is for the King: **[885]** also the defence must be proportionable to the assault as laid. Adjornatur.

45. THE KING *against* BENTLY AND WADLAND.

Mich. 16 Car. 2, Rot. 474.

Sewers.

Bigland moved for quashing an information for stopping a water-course, per quod the inhabitants lost the use of their passage, and conclude ad commune nocumentum, but being only a private offence, as laid there, needs no certificate of amendment: but being an information, its not quashable by motion, being done by no parties, but by an officer of the King, as an inquisition, or debt, or private action upon the case by the particular inhabitants, as this is, therefore the party ought to demurr, which the Court agreed, being the course of the Court. But by Keeling, An indictment is as much the suit of the King as an information, and demurrer may be to it, though it be a verdict.

46. THE KING *against* WARREN.

Nosme. Siderf. 247, pl. 11.

The Court conceived addition not given in indictment is cured by appearance; it was against W. Hospes, without an Anglice, for keeping an unlawful game of ninepins. 2. It was ad general' session' of the city of the county of Exon, and said not domini Regis, 2 Cr. wherefore being of a small offence, it was quasht; but had the offence been riot, or offence of oppression, this is no cause to quash it.

47. LIBTRAT *against* FIELD.

Mich. 16 Car. 2, Rot. 366.

Arbitrement. See this in arbitrement, Br. 24.

In debt on obligation on oyer, the condition was, that L. and Nicholas should perform the award of, &c. The defendant sets forth the award, and demands judgment, being ex parte: to which the plaintiff demurred: the award was, that L. and N. should deliver up certain writings indented inter eos fact. which was only between L. and F. and that thereupon the defendant should pay 500l. to N. which, per Curiam, is mutual; and though N. be no party, yet he may have possession, or be more concerned in it then L. that was party; and otherwise he would not have been joyned in **[886]** the award: also an award between one of one side, and one of another, is sufficient on a submission by several. Judgment for the plaintiff.

48. FOSSET *against* FOSSET. *Thursday, April* 27.

Remainder.

In ejectment, special verdict find settlement to J. F. for life, and after his decease the moiety to the use of his son, and Agnes his intended wife, and the heirs of their two bodies; and if the father marry, and his wife is living at the time of his decease, to her for life a third part, and after to the son, and Agnes his intended wife as

before, under whom the plaintiff claims; and it's found that the first grantor died, and was never married, and that the defendant claims under the heir of the grantor: and per Curiam, This remainder is only contingent as to the wife, not to the son: but by Twisden, Had the feoffment or settlement been to the use of the feoffor, and his intended wife for life, remainder to J. S. if he marry such wife, here the remainder is also contingent, which the Court agreed. Judgment for the plaintiff.

49. WILKINSON *against* RICHARDSON.

Trin. 16 Car. 2, Rot. 471.

Disme, Br. 11.

In a prohibition, the plaintiff declares that the Dean and Chapter of Carlisle, is seised of the manor and rectory of Morlands; and that one Gibson a customary tenant prescribes that every tenant of his tenement have used to pay 3s. 4d. to the lord, who is also a parson, in discharge of his rent of the said messuage, and also of the fourth part of the tyth-hay in Bolton-field, & ratione inde hath used to take the fourth part of the tyth of such hay, and therefore prayeth a prohibition. And by Lindly, If any reasonable beginning may be presumed it shall support the usage, 15 E. 3, Aid 33. So 1 Leonard. 11, & 1 H. 7, 24, though such custom be not now reasonable, as considered abstractedly in themselves, and in our case the lord might pay mony in discharge of this field, and after the union of the manor and the tythe, might impose this charge on this customary tenant, 3 Cr. 587, *Somerton* against *Cotton*, where the person claimed lands, parcel of the manor, in discharge of all the tythes **[887]** of his parish, not saying that his parish is parcel of the mannor, yet good. And the like is resolved in the case of *Biggot* against *Hern*, Moor 483, and in *The Bishop of Winchesters case*, 2 Co. 45. 3 Cr. 599. Also admitting this a good prescription in discharge, its also good prescription in the pernancy, for the fourth part of the tyths, although it had been better to prescribe generally, for the fortieth part of the hay, as decimam garbam; but in 2 Co. 55 its said he may sue for this in the Spiritual Court; but however, the plaintiff cannot take it of the tenant, yet the discharge is sufficient against the parson. Windham said, that every custom reasonably begun, cannot discharge, for thus composition might do it; but it must be of a reasonable and common intent to discharge, which appears not here, but the contrary, for they should have been several, so much for the quitrent, and so much for the tyth. Also the lord and parson were several, and the acceptance of the lord cannot discharge the parson; and if the lord should grant away the impropriation, it cannot appear what the parson shall have; also although the lord might prescribe in such discharge, yet not a copiholder, especially for lands not belonging to his copihold. Adjornatur.

50. THE KING *against* PRITCHARD. *Ante*,

Priviledge.

The Parliament by prorogation is quasi ended, and were the prisoner committed for a contempt, the Court might in convenient time have bail'd him: but here the want of the day of the taking is material, being in the knowledge of the serjeant at arms, therefore it shall be presumed, the taking was after the rising of the Parliament, which Court consists of King, Lords, and Commons, at which time all the priviledges of each particular House ceased; and each prorogation is a new Parliament, and the bill twice red before, must now be begun anew; and therefore we cannot bail him till the next Parliament, but the party ought to be discharged, Parliament, Br. 86, and 4 Inst. 1 H. 7, 20, in *Flowerdieus case*, by Windham, recognizance taken by Parliament, is fruitless by their session, but judgment given there is delegated to the Chancellor, being as a thing finished, but this is but process: and by Twisden its all one, whither he were taken sitting the Parliament or after, for that's but a contempt to them, which this Court may discharge; and in *Cherryes case*, in this very Parliament, I heard it declared, that whatever is done, must at the next **[888]** prorogation

be begun anew, except in error, where scire facias may be retornable at the next sessions, being grounded on judicial record; but this is but matter of contempt, which is discharged by the session of Parliament: Hyde Chief Justice, 22 Ed. 3, 23, determins this case, & omnes in omnibus concurred clearly, that he ought to be discharged.

51. MERRILL *against* RUMSEY.

Wales. Siderf. 247, pl. 12.

In ejectment of lands in Mounmothshire, special verdict find Edward Williams seised in fee, and in consideration of marriage with Walter, covenanted to levy a fine to Powell, to the use of the conusees in fee, till a recovery, and as after to the lands in Landsawee, to the use of Edmund and Dorothy, the intended wife, for their joynt lives, and after either of their decease to her heirs by him begotten, and for want of such issue to the wife for life; she surviving, the remainder to the right heirs of the husband for ever. The jury find the marriage took effect, and that after a fine was levied, but no recovery, in which case the conusees were to stand seised to the former uses; and that the husband had issue Rachael, whose issue is lessor of the plaintiff; and the difference is now between the mother, who is the defendant, and the children; the husbands design was to provide for the children, and to make a joynture for her, of the latter lands. Winnington for the plaintiff, The freehold on which these limitations do depend, doth determine by the husbands death, though lands given to two generally, as 5 Co. 9, *Brudnells case* is for their lives, and the longer liver: but when there is any other collateral limitation, its otherwise, as here. 2. The next immediate limitation to the heirs of the wife, are not words of limitation, but of purchace, and is a contingent remainder, and not in nature of a discent from the mother, 1 Inst. 22 b. must stand on this difference, where the freehold is absolute, and not determinable on the life, for else the limitation and particular estate cannot be consolidate in one intire estate; but as, when lands are given durante viduitate, the remainder to her heirs generally, this is a contingent remainder, and by her marriage the freehold is determined, and cannot be consolidate, 10 Co. 85, in *Loveyes case* doth explain the rule of my Lord Coke: also this issue cannot be heir during the wives life, therefore as 3 Co. 20, this contingent remainder is destroy'd, else the freehold **[889]** would be in abeyance, and none to take as occupant, or otherwise, and these heirs must be really so, Hub. 30, and not in appearance only. And 3. The consequence hereof is, that the wife surviving, it's a question whether she can take, because none could have an heir, though they may have issue during their lives; and on construction of this clause depends the whole case; and this must be made, as 1 Co. 45, rather to make the limitations good, then void.

1. Powis for the defendant, This is an estate tail executed in the wife, and a special verdict obtained by importunity; for had the wife died first it's clear, and the dying of the husband first will make no alteration: this case is within the express rule in 1 Co. 104, *Shellyes case*, which is indefinite where a freehold (be it for the life of the same person, or a stranger). Perkins sect. 337 is a stronger case then ours; lands given to A. and B. during the life of J. S. remainder to the right heirs of A. on the death of J. S. the estate of A. is consolidate, and during the coverture she hath but for life; but on his death it's an estate tail executed, there being once a freehold in her, which she shall be admitted to plead, and shew how by after limitation it came into an estate tail, which it attracts as a loadstone; but if the inheritance had been dubious, as Dy. 99, there the freehold might be said in abeyance, Pasch. 1652, *Goffage* against *Taylor*, Stiles ruled by Brief F. 81. But the special verdict is ill, there being another limitation of other lands, which is indisputably good, and they are not distinguished by any ad tunc existens, part or parcel, &c.

1. Keeling, as to the main, conceived it an estate tail on Littletons case express, and executed sub modo, not presently by severance of the joynture, as it would do by a several conveyance; but on the death of him whose life keeps the estates asunder, they are united and executed: and the exception also is fatal to the verdict, which Windham agreed; and that he did never see any case argued more up the hill, here being no contingency in estate or person, but as *Wiscots case* the

remainder doth not drown the joynture, but by the death of either her heirs are in by discent; and were this by way of limitation of a fine, the heir might have a scire facias or a formedon to execute it: also issue and heirs can be but one in this case. So Twisden, and Hyde Chief Justice, and all conceived on gift durante viduitate, remainder in tail, that on marriage she is tenant in tail. Judgment for the defendant.

[890] 52. HUNT *against* SWAIN. *Friday, April* 28.

Heir. Siderf. 248, pl. 13. 1 Roll. 28, § 57. Debt, F. 139. 5 Ed. 4, 99 b. per Moil.

In an action upon the case against the defendant as heir on obligation of 100l. by the father to pay 50l. laid, that in consideration of the premisses, the plaintiff would forbear to sue the defendant, as son and heir, he promised to pay. Wild prayed judgment after verdict, though it be not alledged that the obligation was of H. and his heirs, as *St. Paul* against *Rivers* 1656, which was grounded on the common presumption that all bonds are so, and that the defendant hath by this plea and consideration admitted himself bound for the forbearance, is the meritorious cause, which Windham agreed: but by Twisden and Keeling, it must appear how the defendant is liable; and consideration of forbearance doth not make general indebitatus good without shewing cause; but is good of it self, as to forbear rent: also executors are bound without naming, but not the heir, which Hyde agreed; and that lien shall never be intended, unless expressed.

53. KNIGHT *against* JAACOB.

Slander. Siderf. 248, pl. 14.

Coleman prayed a prohibition on a libel, for calling the plaintiff cuckold, which, as in 1 Cr. 110, *Eaton* against *Aylet*, is no scandal. Twisden and Keeling clearly it's grantable; but Hyde and Windham doubted, but ordered cause to be shewed why prohibition should not be granted.

54. ROGERS *against* MARSHALL.

Trespass. Siderf. 248, pl. 15.

In an action of trespass and false imprisonment, the defendant justifies by virtue of attachment and capias that issued out of the Palace Court, on plaint there in an action upon the case against the plaintiff by one Cave. To which the plaintiff demurred, because 1. This is an action upon the case where the first process is a summons at common law, as it must be here intended, being not within the statute, and being a void process of Inferiour Court, false imprisonment well lyeth, as 1 Cr. 394. Pemberton, The original process here is a pone, &c. and no summons: but, per Curiam, This is not trespass vi & armis, nor doth 19 H. 7, cap. 9, extend to this Court; nor is it specified of what na-**[891]**-ture the action upon the case was, and here being no appearance made it's not cured; also the jurisdiction is not circumscribed, nor the patent profer'd into Court. Adjornatur.

55. DAKIN *against* HULME. *Saturday, April* 29.

Execution.

The plaintiff being over-ruled at the Assises, that ejectment lyeth not against tenant by elegit, though he be satisfied at the extended value, brought a scire facias ad computandum, and notwithstanding the defendant offered to plead, the plaintiff entred judgment, as, per Curiam, he may, being in actual possession by satisfaction of the elegit; and they wondered at the Judges opinion, unless it had been on a judgment which is uncertain for costs and damages: but they agreed the party ought te be punished for his miscarriage; and here all appears on record, so not like the abuse of the process of the Court in getting possession, to which the plaintiff hath just right: referred to the Secondary to examine if satisfied.

56. RABIE *against* ROBINSON. *Ante.*

In Enfant, F. 6.

Baldwin for the plaintiff, who demurred on the plea in bar; and the sole question is now, if this recovery may be avoided within age only, or at any time; and he conceived that at any time, notwithstanding F. N. B. 104 K. So is the Lord Dyer 232, 1 Inst. 380, for in fine and recognizance, there are persons appointed to inspect the party, but in case of a judgment conus by attorny, or in person, it's reversable at any time, he being not examined, 3 Cr. 565, *Sedgborough* against *Rant*, and he shall not be inspected, though he reverse it during nonage, Moor 460, *Randalls case*, 9 Car. 1 Cr. *Newport* against *Mildmay*, idem quod *Blunts case*, Hub. *Locko* against *Palfryman*, 1650, agreed that 10 Co. 43, *Portingtons case* was no law, that feme covert or infant should be examined on recovery, 2 Inst. 673. Bargain and sale by infant is avoidable at any time by entry, and common recovery is but a common assurance, is as well to be avoided by error at any time, 6 H. 8, Saver Default, Br. 50. Recovery against infant by guardian, being presumed on contempt bound by his appearance by guardian, but our common recovery is without title: on the reason of our case is *Daux* against *Paiton*, P. 1650, Rot. 306, Stiles 216. Judgment in **[892]** trespass reverst for this error at full age, that it not appearing otherwise, it will be presumed that he appeared in person, which is error, *Holland* against *Johnson*, Bridgman 69, a recovery was reversed by error at full age on his appearance by attorny, which is all one with his appearance in person within age, for this shall be tried in pais, as *Bartholomew* against *Hobs*, 3 Cr. 323, pl. *Hopton* against *Johns*, *Aylet* against *Walker*, Trin. 1649, Rot. 220, was only if an infant might enter on the recoveror coming in as vouchee in person. 2. The writ of error was of a recovery suffered by A. to B. in C. B. not saying Curia nostra, coram justiciariis of the said Court, not saying coram the Chief Justice & sociis suis, which per Curiam, is ill; but being in the late times, is not to be stood on.

2. Wild, for the defendant, agreed an infant may have a writ of error on full age, but cannot assign this error of his own infancy for error, nor was ever any recovery reverst for this error; but when he appears by attorny, it reflects not on the honour and duty of the Court, therefore that may at full age be assigned for error, and tried by pais; and it's a secret trust reposed in the Judges, and stronger then on statutes, Moor, 76, which yet shall not be avoided by bare averment by aud. quer. And if this error be to be admitted, it will breed an earthquake in common recoveries, and none can be sure of their estates: also this is in effect an error against the record, for infant cannot so appear, 11 H. 6, 42, and by this averment the record would be avoided, Dyer 104. Error of a judgment in dum fuit infrà ætatem on default, adjudged that their age should be tryed by inspection, being by title. Twisden, As no great friend to recoveries suffered by infants, conceived recovery by double voucher, which may be presumed by warranty of his own, is as well avoidable as single voucher, which is presumed on the lien of his auncestor: also this trial may be by inspection or per pais, as it may be more dilatory, or not; as if it be assigned that he was, and yet is within age, it's triable by inspection: so when an infant prayeth parol may demur for infancy; but in account against baily, Account, F. 121, & 12 Ass. 37. Infancy was tried in pais, and in assize by guardian, it being matter of fact, was tried by pais, 3 Cr. 853, *Deighton* against *Bartholmew*, it's quære: but 3 Cr. 818, *Green* against *Rosse*, resolved it's triable where the land lyeth, which is no more against the honour of the Court, nor more prejudice then when his appearance by attorny is assigned for error: also as 9 Co. 30 b. *Stratamarcella's case*, inspection is as much to **[893]** prevent delay, as for the manner of trial. Keeling inclined the same way; and said it was so agreed by all the Judges in *Newports case*, although not reported by 1 Cr. 307, but he could not reconcile himself, why it should be here more then in a recognizance reverst, only during minority, therefore would deliver no opinion; but in omnibus agreed with Twisden, and said it was an excellent difference, and will go a great way, that the trial may be by pais or inspection, as best may prevent delay: also recoveries may be on title by appearance in the office, and the coming to the Bar is but the great care of the Judges. Windham always conceived

that judgment by default, as Dyer 104, was only reversible during minority, which is intended before appearance; and there is the same care in recoveries as in fines; and the reason why appearances by attorny, being infant, shall be tried by pais, is because there is in such case no warrant of attorny, which is aided but in some cases by statute; and I took it as setled, that infant could not reverse recovery suffered by guardian at any time within, nor at full age. Judgment in dower on default after default, is not reversible by infant during nonage; *Hoptons case* might be during minority though second husband: the time also may make things otherwise triable by certificate, as profession triable by pais: if the question be, if H. were professed at such a time, or not; and so the time made parcel.

57. BAKER *against* BERISFORD. *Ante.*

Administrator.

Jones waived the demurrer for the plaintiff, as no sufficient title: but by Windham and Twisden, the title is sufficient; for when it's said the administrator paid so much mony, and in lieu thereof did eligere & acceptare to take this term in satisfaction; it is to be presumed that he paid out of his own mony, and not of the testators mony; the same where it's said to pay debts, which Keeling agreed. Judgment for the plainiff, nisi.

[894] 58. BREWEN *against* ROWE.

Merchants.

The Court on special verdict on trover and conversion, conceived no doubt on 3 H. 7, cap. 7, but that the statute is meant of goods carried from port to port by sea, and not by land: but the doubt is, if seizure by customer of goods, on suspicion of non-payment, be sufficient to charge him in trover and conversion, the custom being duly paid. Also 2. If this judgment in the Exchequer for seisure be not sufficient to justifie the detaining: and per Curiam, Trover well lyeth notwithstanding, for the seizure must be at the officers peril, and the judgment in the information in the Exchequer is behind the parties back. Adjornatur.

59. WHITMORE EXECUTOR *against* SIR J. JAACOB. *Monday, May* 1.

Executors. Siderf. 249, pl. 16.

In scire facias on judgment had by the testator, he need not say in the writ profert literas testament. And Raymond having for want thereof demurred, was over-ruled, per Curiam, on reading the record.

60. THE KING *against* HILLARSDEN.

Way.

In indictment for not repairing a way, which she had made in lieu of auncient way, the Court would have no exception till repair, in arrest of judgment; but ordered her to lay down the former inclosure, till the latter way be repaired: and per Curiam, In *Sir Edward Duncombs case*, 1 Cr. 366, it was resolved in this Court, that its not sufficient to keep such new way better then ever the former was, but must keep it in sufficient repair, for the Kings people to pass.

61. LATCHFORD *against* ELLIOT.

Trespass. Siderf. 249, pl. 17.

In trespass, for casting of twenty logs into his ground, continuando is well enough on 20 H. 7, 3, by Wilmot, who therefore prayed judgment for the plaintiff, 1 Cr. *Bret* against *Shirly*, in trespass for entry into close, may well be with continuando, though where several entries are specified, the continuando will not couple them:

and Keeling conceived it well enough, because the trespass doth con-[895]-tinue, as where its for putting in of cattle, and though it be said transgr. prædict. quoad ejectionem ligni prædict. diversis diebus & vicibus, it will refer only to that which is a trespass, which is the being of the wood in his ground; the Court conceived after verdict, this would be well enough, had it not been specified, to be only quoad ejectionem, for this makes it like cutting trees, or taking a horse, which is but a transient act: and Keeling on oyer of the record, conceived the quoad tyed up the trespass to the casting only, but the trespass being quod jecit & locavit lignum tam propè to his celler, that he lost the use thereof, therefore the quoad ejectionem is void; and should have been quoad ejectionem or locationem, and therefore the continuando is well enough. Judgment for the plaintiff.

62. COXE *against* GRIFFITH. *Tuesday, May* 2.

Chattels.

In ejectment, on special verdict it appeared, that lessee for 99 years assigns so much of his term as shall be unexpired at the end of three lives to Barnsby, who assigns the said indenture, and all his estate, title, and interest, reciting the several deeds of trust, with covenant against himself, only, that the plaintiff should quietly enjoy, and that he had power to grant, and whither by reason hereof, because this grant is uncertain and void at first to B. the covenant be broken: Twisden and Windham doubted, but by Keeling, this was only intended of the title of B. not to make any other; but had there been no recital of the trust and estate, a grant by cestuy que trust, with covenant for quiet possession, is broken. Adjornatur.

63. WILKINSON *against* BOLTON. *Ante.*

London. Siderf. 250, pl. 18.

Custom, that if citizen dye, leaving issue under 21, the mayor and alderman used to have custody, as well of the body as lands, or till female do marry; that for the ending of all causes touching such matters, there is a Court of Record of Orphans, that the mayor and aldermen have used to commit the custody, and that if any person take away the orphan from such committee, and it sufficiently appear to them, they have used to commit the offendor to Newgate, if he refuse to discover where the ward was, until he produce the ward, or discover where it is, or [896] be discharged by due course of law. 1. The custom, that if such person appear in Court, they may commit, and do not say upon summons, is good enough, this being a theft, and the summons need not be pleaded where the person is present: also this is in bar not in a count: also this being a Court of Record, and the highest priviledge of citizens, they cannot be presumed to do any thing precipitantly; also this is a criminal case, Hutt. 30, *Andrews case*, and Hub. 247, *Lucks case*. And. 2. The proceeding and trial in this Court is examination, not by jury; and as to this the custom is well enough, and so is the commitment, till he produce the person, Register 79, as in hom. repleg. And this may extend as well to peers as others, as 11 H. 4, 15, also F. N. B. 42, is but by committee for damages, but this remedy is to produce the body it self. 3. This offence appears, therefore not like *Specots case*, also it appears by examination, the Court conceived each particular process needless: also trial by examination is not unreasonable, the like being by several Acts of Parliament referred to justices of peace: also by Keeling, This being matter criminal, the commitment is well, and most suitable to be till the infant stoln be produced, 2 R. 3, which confirms the customs, is no particular recital, as is mentioned on the roll, but in the exemplification, which in that time was used only to be sent to each party, and a short memorandum only entred on the roll: therefore though general Act do not confirm any ill customs, yet Acts that particularly recite them, do. Windham held this the best way to proceed against an offendor; and their rule must be custom: also it's a derogation to any Court that hath jurisdiction, to shew the evidence there, which was the ground of their sentence, and the commitment is but lex talionis, and most reasonable. Judgment for the defendant, nisi.

64. THE KING *against* THE LORD MORLY AND TREVOR. *Wednesday, May* 3.

Coron.

The grand jury being unwilling to find a bill of murder, were brought into Court to be directed on the evidence, which being clear, that he killed one Hastings; but against Trever it was only, that his sword was drawn when theirs were, and that he was with him at the tavern, and time of the murder; therefore they conceived what he did was to part the quarrel, would find nothing a-[897]-gainst him, but by Windham, & Curiam, unless he cryed out, or sought to stay the murderer, they ought to find billa vera, which is only as much as that the accusation doth not proceed of malice, but from probable cause, which is sufficient to find, and the party is never the nearer, being guilty or acquitted; but this is but in order to a fair trial.

65. THE KING *against* LUCAS.

Taxes.

He being convicted, in action upon the case on 14 Car. 2, for beating an officer of customs, prayed to be discharged, paying his fine, in regard the Exchequer cannot free him, till it be estreated, as was agreed on motion there; and the estreats are only delivered in there at the end of Hil. and Trin. terms: but, per Curiam, the paying of the fine is the principal, and on certificate thereof by the Court, or by return on habeas corpus thither, the Exchequer may order his discharge, or else the Court on motion, and good cause may carry the particular estreat of this fine thither, and so they ordered to be done here.

66. MOYL *against* CLAPHAM. *Ante. Friday, May* 5. In Cond. Br. 195.

Condition.

Proviso, generally, as 1 Inst. is a condition, unles it be someways restrained by other words to a covenant, as 3 Cr. *Cromwells case*, and being in articles of agreement, it must wait on the execution of the conveyances, Yelverton 206, *Bristow* against *Kinke*, to which it refers, as bond to perform marriage, and therefore Edkins prayed judgment for the defendant. Jones for the plaintiff, This is but a covenant, and being to pay out of the first three years profits, the averment that he did receive so much profit is sufficient; and if no conveyance were made, there is remedy on the articles; and there are no words that refer or direct to any proviso to be in the future grant, nor would the matter bear it, for its an office that relates to justice, and therefore could not be reduced on breach of the condition: Moyl was to surrender to bring the other in, but could not reenjoy it, on breach of condition; also proviso is a word as natural for a covenant, as a condition. Keeling perceived not much difficulty in the case, the intent being plain, that if so much profits were received out of the of-[898]-fice as is confessed by the demurrer, the defendant is to pay 500l. Also this proviso can never have any effect as a condition, therefore must be construed by the agreement of both parties, to be covenant. 2. So Windham, The count is sufficient, as its usual in covenant to say he hath performed all on his part; and the words are sufficient, by proviso to pay, else it would have been said, that in future conveyances there should be no such proviso, and if, as Stiles 406, pl. 868, *Porter* against *Swet*, in B. R. & Dy. 57, yealding and paying hath been adjudged an express covenant, its not to be doubted at this time of the day, whither a proviso will amount to a covenant. 3. Twisden agreed the proviso but a covenant, but conceived it referr'd to a future conveyance, and it should be averr'd, that he had made a conveyance of the office; and licet he hath performed all covenants on his part, is not sufficient; but by the other opinion, judgment for the plaintiff.

67. HOWARD *against* SPENCER. *Ante.*

Common. Siderf. 251, pl. 20.

In trespass, the defendant as commoner justified to fill up trenches made by the lord; to which the plaintiff demurred on Yelverton 104, because there is a time when the lord may put in his cattle, therefore action upon the case lieth only; but where he hath the sole common, he may fill up: but by Lindly, 15 H. 7, 10 is, that a hedge set on the ground where common is used, may be demolished, which Windham agreed: but by Twisden and Keeling, He hath no remedy, unless by the hedge he be totally hindred, and cannot take common with it on either side, but the form of pleading must be, that a commoner opened only so much as was sufficient, 2 Cr. 230, 195. Adjornatur.

68. MARKE *against* JOHNSON. Entr. Cong. 68, Br. 2.

Leases. 4 Co. 72 b. Dyer 51 b. Poph. 22 b. & 53.

In ejectment, special verdict find lessor of the plaintiff, was lessee for years of the King, with proviso, that if the rent were behind, that the lease should be void: the rent is arrear; and the conclusion is, that if this do make the lease void without office, they find for the plaintiff, else for the defendant; but by Keeling, its provided by 21 Jac. cap. 5, that no advantage shall be taken of arrears by entry or cesser, &c. so the duty be answered afterwards, before any commission goeth forth to enquire of such forfeiture: but by Jones, The point intended was not on this statute, but **[899]** whither on Moor 291, pl. 440, this proviso did so determin the lease, that the King might make a new grant to the defendant. Adjornatur.

69. NICHOLAS *against* STOKES. *Ante.*

Bail.

The Court held, that the bail must render the principal sitting the Court, the day of the second scire facias; and though it were the 30 Jan. a day of humiliation, yet render in afternoon was ruled ill: so per Curiam, It is on declaration by the bye, which must be sitting the Court before they rise the last day of the term. Judgment for the plaintiff.

70. NUTLEY *against* NORTON.

Heir.

In scire facias against the auncester, on judgment in debt against the defendant, as heir and tertenant, he shews an entail to the grandmother, and her heirs in tail; and that after her death, the defendants father was seised in tail, viz. to him and the heirs of his body: to which the plaintiff replieth, that there was a common recovery suffered by the father, by vertue whereof he was seised in fee, and dyed so seised, absque hoc that he dyed seised in fee-tail; to which the defendant demurred, specially, because the traverse is idle: North for the plaintiff agreed, traverse of impertinence as latter lease, in Hub. 101, *Fitzherbert* against *Digby*, doth make the plea void; so where the matter is before confessed and avoided, unless as here it be only argumentative, as Hub. 80, pl. 105, *Newman* against *Moor*, and 1 Cr. 61, pl. 67, *Fenner* against *Nicholson:* also the bar is ill, the viz. being of another estate, not repugnant to the premises. Keeling held the traverse void, being no confession of such an estate which cannot be given but by rightful conveyances as an estate tail, which is the reason of *Helliars case*, 6 Co. 14 b. but if it were to an estate in fee, because that may be by wrong, the seisin thereof is traversable, but the plaintiff prayed leave to discontinue, which the Court granted, it being for a just debt.

[900] 71. THE KING *against* PERCIVALL, GODFRY, &c. *Ante. Saturday, May* 6.

Peace.

Jones excepted in arrest of judgment before the fine set, which is necessary after conviction on information of riot, assault, and battery, &c. That the venire facias and distringas was vicecomittibus Cantiæ quod venire faciatis, and the retorn is only responsio Richardi Jennor, which is ill, and not amendable on the Crown side; and though here be but one sheriff in fact, yet the Court must judge on the record; and it hath been adjudged that one cannot make a retorn out of London, which Twisden agreed: but by Windham and Keeling, Certiorari Coronatoribus, where there is but one, is well enough, being ministerial, and in execution of justice: also this being at common law, and not on any statute, it's within the statute of 21 Jac. cap. of Jeoffails, wherefore they conceived this well enough, and at worst amendable. 901, pl. 75. Sed adjornatur.

72. HUNT *against* SWAIN. *Ante.*

Assets.

Leek prayed judgment for the plaintiff, sed Curia contrà, for though they may intend assets, yet they will not intend a lien; and so was the opinion of the Judges at Serjeants Inn. Judgment pro def. quod plaint. nil capiat per billam. Twisden said he was never satisfied with *St. Paul's case.*

73. AMPCOTS *against* AMPCOTS. *Ante. Monday, May* 8.

Error.

Wild alledged variance between the original certified on diminution alledged, which was formedon per breve Oliveri Protect'. And the record of the writ of error here was of a record in formedon per breve Richard' Protect'. Et in nullo est erratum being pleaded, the Court hath no record before them, and though there might be another original, yet because the defendant hath not alledged diminution, the Court hath no sufficient commission to reverse this judgment. Sed Curia contrà; for had there been no original, the Court would have proceeded to reverse the judgment, though it were before any Statute of Jeoffails, and would not abate the writ of error for this cause. Judgment affirmed.

[901] 74. THE KING *against* BREIN BAYLY OF THE SAVOY.

Sheriffs.

He came in by attachment, having levied goods, and yet retorned nulla bona, for cause whereof, he saith, that one Verny, at the time of the execution, shewed a bill of sale on good consideration, whereby he was lyable to an action, therefore, without security to save him harmless, he refused to make any other retorn, which Keeling agreed; and the Court ordered the mony to be brought into Court, and as the trial goes between the sheriff and Verny, the retorn to be amended, or not.

75. THE KING *against* PERCIVALL, GODFRY AND GILFORD. *Ante* 900, pl. 71.

Sheriffs.

Keeling said, If there be more then one sheriff, such retorn is ill, 14 H. 4, 34, but if there be no more, its well enough, as 39 H. 6, 40, and the sheriff shall be called into Court to amend his retorn, and say there is but one, which the Court agreed, which he affirmed on examination in Court: but Twisden doubted, after trial had, no such

amendment can be made. 2. Twisden and Keeling, that this information is not amendable within the Statutes of Jeoffails, 1 Cr. 132, *The King* against *Sherrington*, Talbot But by Keeling and Windham, It's amendable at common law, being information: also by Windham, Though the writ be vicecomitibus, we shall intend but one, unless more appear, especially the retorn being by R. S. vicecomes, and not unius vicecomitum. Judgment that Percivall, as the beginner of the riot, be fined 500l. G. and W. aiders and assisters 500 mark apiece, all committed for a month, and each find surety of good-behaviour for seven years.

76. THE KING *against* BENSON, GOLBORN, &c.

Force.

Jones excepted to an indictment of forcible entry into lands which the defendant held for term of years, and doth not say (yet enduring); which, by Twisden, is an old exception; but being further jam ultime elapsos it was worse, and it was quasht per Curiam.

[902] 77. MASON *against* ELLIOT.

Slander.

Action upon the case for calling the plaintiff rogue and thief, and stole the sword of J. S. and he would arraign him, and hang him for it. The defendant justified, as Latch. 54, & Hub. , *Rawdon* against *Strut*, because the plaintiff clam & secrete, from the Parson of S. stole away his sword against his will: and the plaintiff took issue quod non cepit clam & secrete, which is found for him, which, by Winnington, is jeoffail, being found for the plaintiff that pleads it, being not said felonice cepit: but by Jones for the defendant, The matter disclosed is felonice, and such conclusion is needless, unless in an indictment. Also here no debt is confessed as in the former cited cases, which the Court agreed on *Nichols's case*, , & Hutt. , and intent being to common understanding, is sufficient. Sed per Curiam, The plaintiff might have demurred on this plea: but being after verdict, judgment for the defendant.

78. SHIPTON *against* SHIPTON.

Error.

Nota pro regula, if writ of error be not signed by the Chief Justice, the party on motion may take out execution, unless a new writ be taken out on notice within a week, or a short time; but if it be signed, though not retorned, the Court will give rules to certifie the record on a second writ of error delivered, which in this case is a supersedeas.

79. WORRALL *against* BRAND.

Abatement. In Error, Br. 117.

Jones on affidavit of the death of one executor, in an action of debt against two, on contract of the testator, which also appeared by the record to be after issue, he prayed no judgment might be against both on *Greisbrooke* against *Fox*, Pl. Com. 186 b. But, per Curiam, On the death of one plaintiff they may stay judgment, but not of defendants, unless in trespass, which is several; for by Windham, They are but as one person, and one may proceed without the other on his default or death.

[903] De Termino Trinitatis, 17 Car. II. B. R. Die Veneris, Maij 26, Anno 1665.

Twisden; Windham went off sick on Friday, June 9; Keeling.

1. Bradshaw *against* Savill.

Certiorari.

Mr. Attorny prayed the sparing of an attachment on 21 Jac. cap. for that it appears by affidavit, that the cause of action is under 5l. and the steward a barrester of above three years, in which case the cause is not to be stayed below: but, per Curiam, If the cause appear by the declaration to be above 5l. he cannot proceed, as here, after habeas corpus to remove the cause delivered; but whether it be under or above cannot be made out by affidavit, but must be retorned so by the steward, and he ought to allow the habeas corpus, whether it be above or under; but if it be under, he may proceed notwithstanding such allowance. Sed adjornatur.

[904] 2. Bevin *against* Clapham. *Ante.*

Bayl.

In error on judgment in debt on a judgment, which was had in debt on an obligation, Williams prayed a supersedeas without special bayl, it being not within the statute of 3 Jac. this being a debt, not on any bill, obligation, nor contract: sed Curia contrà; the contract is the foundation of all, and the statute as well intended to reach all judgments, as to the original thereof, for the inconvenience; and the Court would not allow this writ of error without a special bayl put in, not to be any supersedeas.

3. Ullocke *against* Temple. *Saturday, May* 27.

Error. Siderf. 257, pl. 1.

In a writ of error on a judgment by a confession relicta verificatione in C. B. and good errors assigned: to which the defendant pleads a release of errors: to which the plaintiff replys non est factum, and at the trial would not appear, therefore it was entred on the roll quod querens non est prosecutus. And now Wild, the Kings Serjeant prayed the judgment might be affirmed nisi, as is used in the Exchequer Chamber in error on judgment in B. R. To which Twisden inclined, because by the issue on factum, or not, the errors are out of Court; and now, though the errors be good, yet the judgment, as to this writ of error, must be affirmed; sed Keeling contrà, the errors being good, this Court cannot affirm the judgment, because the issue non est factum was never tried, nor nothing pleaded to the errors themselves, which the Secondaries and clerks agreed; but by both, the party may have another writ of error, but that will be no supersedeas. Adjornatur.

4. The King *against* Gurnye.

Lieu.

Edkins excepted to an indictment taken at Stoke upon bar by jurors of the liberty of Guilford, juxta Guilford, for an assault and battery of an officer in executione officij, because it's not said that Stoke was within the jurisdiction of Guilford, and by the Court, Windham absente, it was held a good exception, and quasht.

[905] 5. Whally *against* Anderson. *Ante.*

Parliament.

Bigland prayed till Wednesday next to argue the special verdict, which Jones for the plaintiff opposed, because it hath been a question, whether the Lords have forty, or only twenty days before each session of Parliament, and they had ventured to

proceed notwithstanding they were served within the forty days, with a writ of priviledge of my Lord of Newcastles, but that Wednesday would be within the twentieth, which they durst not venture: but by Keeling, They have no such priviledge of forty or twenty days; but Windham doubted; however the Court would give no farther day.

6.

Walet.

Williams prayed a prohibition, on 1 Cr. 531, & 595, and Anderson 279, because though the English bill in the marches be proper in nature of a discovery, what mony was won or lost at cards or gaming, by way of trover and conversion, he agreed the bill good, and the exeamination of witnesses to preserve their testimony; but they proceeding not by jury, having assessed damages, though it be within their jurisdictions, yet being not within their jurisdiction by the common law, their instructions are not sufficient: but per Curiam, They will not overthrow their course upon a motion, therefore would make no rule.

7. JOHNSON *against* PIE. Siderf. 258, pl. 3.

Enfant.

In action upon the case against an infant, who being 20 and ½ and appearing to the plaintiff to be of full age, did falsly and fraudulently affirm himself to be of full age; and as of full age seal'd a deed of mortgage to the plaintiff, which he after avoided for infancy, to his damage: on not guilty pleaded, and verdict for the plaintiff, and 300l. damages, and judgment ex motione Jones stayd, Winnington prayed judgment; but Windham absente, the Court would do nothing: but by Keeling, The judgment will stay for ever, else the whole foundation of the common law will be shaken, for this was but a slip, and he might have pleaded his minority here.

[906] 8. WILKINSON *against* RICHARDSON. *Ante.* Siderf. 258, pl. 4.

Tyths.

The prescription, to pay mony as well for the copihold rent as for tyths cannot be good, because the parson cannot libel for the rent, nor the lord for the tyth; and though the parsonage be united to the manner now, yet it may be separated, & non constat. what each should have, therefore Pemberton prayed a consultation, which the Court fully concurred to grant, as well for the former reason as for that, Boltonfield on 3 Cr. 587, cannot be intended parcel of the copihold, as it might have been of the mannor in such prescription by the lord: also, per Curiam, The person must have a satisfaction, else no prescription can be in discharge; and here its uncertain what the parson shall have: also, by Keeling it doth not appear this is copihold: also, by Windham all appropriations are preternatural, and the church during such time is in bondage; and therefore by presentation is made presentative. Also by Twisden the plea is pregnant, that the manor and rectory were time out of mind held simul & semel, for he should have said, they are and were always so held, for else, though they were so held anciently, they may now be sever'd: also the lease hereof is not said to be by deed, which being on demurrer to the prohibition, is ill. Consultation awarded.

9. WORRALL *against* BRAND. *Ante.*

Abatement. Siderf. 259, pl. 5.

Jones now prayed judgment might be staid after imparlance, and issue in action upon the case by two executors, on promise of the testator; one of them dyeth, which, by Jones, abates the writ, this action being founded on contract, as debt or account, which must be brought against all concerned, being intire, 40 Ed. 3, 26 b. pl. with

which agrees 50 Ed. 3, 7, pl. Brief, F. 263, 344. And for authorities in the case of executors, Pl. Com. 186 b. is express in debt on obligation of the testators against two executors, 37 H. 6, 16. 10 H. 4, 18. But where the action is grounded on the wrong, death of one shall not abate it. Pemberton for the plaintiff contrà, 50 Ed. 3, 7, was where one executor was dead before the action brought. Also Pl. Com. 186 is only Plowdens judgment, but nothing appears by the book, 1 Cr. 308. But *Tiffins case* is express, that one of the parties death doth not abate the writ, 41 Ed. 3, 3, & Respondre, Br. 4, is of the same opinion in account, that one shall answer; and there is no dif-[907]-ference between trespass and contract: also the plaintiff can have no other action, nor better; also utlary of one is but as a death: also 37 H. 6, 16 must be intended, if the party will plead it; and here the death is not pleaded, but only suggested by the plaintiff on the roll, before the venire facias awarded, which was only against one, and no notice taken thereof at the Nisi Prius, but where they are plaintiffs, and there be no summons and severance, *Read* against *Redman*, their writ shall abate; not so of defendants, in personal actions.

1. Keeling held this different from an action brought generally against two that are not executors, for there is quasi several contracts, but here is but one; and the representation remains still as well as before: also by proceeding against one, there is no prejudice to any: which Twisden and Windham agreed, and there being no express authority to conclude the Court, they will consider the reason of the point; and they doubted, this being not urged by the defendant, nor relied on to abate the writ, but proceeded after to trial of the issue, but this is but a dilatory, and no abatement in fact, unless pleaded.

2. Windham said, The judgment may yet be given; Keeling said, he took the rule to be always, that an actual abatement was when any thing appeared on record, howsoever it be by suggestion or issue or as amicus Curiæ; but the writ was only abatable when the matter alledged doth not appear on record, but is dehors: Wild for the plaintiff offered to go to new trial, if the defendant would agree to mend all, and try this term in London; & adjornatur to consider thereof.

10. THE KING *against* GLOVER, &c. Endictment Fitzh. 28.

Amendment.

Paulet, on 8 H. 5, 8, pl. 4, opposed an amendment because though it may be by venire facias to the coroners to come into this Court, being in the same county where the inquisition of felo de se was taken, yet when they are in different counties, there goeth, as 2 Ed. 3, 1, pl. a writ to the sheriff to send a better enquest, and the like is unto the coroners 2 Ed. 3, 18, if they have any, for they must return what the jury find; and this case being taken in a forreign county, he prayed there might be no amendment; sed Dolbyn contrà, these amendments being done by rule of Court, and not in parts material; the inquisition being taken on the [908] view of the body there dead, and so the not saying afterwards, (of which said drowning he afterwards there instantly dyed; and so was a felo de se) is but what was before, and in common understanding of jury was shewed, and the coroner is sufficiently informed, which Twisden and Windham agreed: but by Keeling, This is the point of the action as a conclusion of (& sic J. S. murdravit) which must be answered, and nothing shall be taken in such criminal cases by intendment, which the others agreed, when the inquisition is return'd; but here if the notes taken by the coroner be sufficient to warrant such an enquisition, its well enough, as the clerks of the assize notes of a verdict: but on reading the enquisition, it was & sic voluntarie & felonice seipsum murdravit & interfecit; wherefore all agreed, that the saying (whereof he dyed) is but form: and per Curiam, and the clerks, forms may be amended here by coroners of any county in England, but not substance, and so is the course.

11. ROGERS *against* MARSHALL. *Ante.*

Trespass.

In trespass of assault, &c. the defendant justifieth by process out of Pallas Court, in trespass upon the case by plaint there levied by one Cade, for that there was a pone per vadios retorned nichil, and thereupon a capias, by which the defendant took the plaintiff here at Barnet: and to this the plaintiff demurs, because its not specified what action, whither assumpsit, &c. which by Pemberton is needless. 2. The process is F. N. B. 92, in all actions upon the case, pone, and not summons. 3. The letters patents by vertue of which the Court is held, need not be shewed by the defendant, being but baily, on 10 Co. *Dr. Leyfields case*, as 26 H. 6, 42, of subcollector; and 36 H. 6, 14, so of undersheriff, they having no interest in the patent, nor can command it. 4. Its not said of what sum the plaint is, nor where the arrest was, therefore the Court is not entitled to jurisdiction, which is needless, being Court of Record; and plaints there are not levied to any sum or damage, but shall be intended of greater, till the contrary appear, as on conusance demanded. Also the place of the arrest must be traversed on the other side. 5. That here no capias lieth; this strikes at the root and branch of all Inferior Courts; and to say no capias lieth at common law, and the statute of 19 H. 7, cap. 9, doth not extend to Inferior Courts, is not sufficient; for the Court have, (as 10 Co. 76) a general jurisdiction of the case, therefore the officer is excused also: the equity of this statute may as well **[909]** extend to Inferior Courts, as debt on escape by W. 2, but this statute doth not give this process, but its where a pone is the first process, and not a summons: and this is evident by originalls in trespass upon the case retorn'd here, without vi & armis, but as 35 H. 6, 6, pl. 22 H. 6, 13, this statute giveth only the exigent, & Rast. Entr. 293, and the capias was agreed to be, and still is in all Inferior Courts; which Windham agreed, and that the capias was a process before the statute, but that process was infinite; and by Keeling they could not imprison any by capias at common law, unless in actions vi & armis, or at the Kings suit: also this action upon the case is only summonitus, unless F. N. B. 101, it be for a disceit: also they ought to set forth the letters patents, per Curiam, or to say prædict. A. B. & C. grant also this virtute cujus is not traversable, as in a retorn, 1 Cr. 45, and other presidents are to be searched. Adjornatur.

12. WHALLY *against* ANDERSON. *Ante. Tuesday, May* 30.

Treason. Siderf. 260, pl. 8. 2 Cr. 114, pl. 12.

Wilmot for the defendant, that the residue is certain enough, though the value be not found, as 1 Cr. *Colliers case*, and 3 Cr. 449. Contrà of the 4 resol. in *Adams* against *Lambert;* for there the residue was not disposed over, as in this case it is, therefore shall be presumed of greater value, being not found less; and the mortgagee ought to have proved the land was not worth his 200l. per annum to entitle himself wholly to it: also no ejectment lieth against the Kings title: sed per Curiam, a Rege inconsulto is in nature of a prohibition, and lieth not after a verdict. Windham agreed, that the residue being for the provision of the wife of person attainted, shall be presumed on a verdict; and though Edward Whally could not by subpena have had the trust executed and drawn out of Springat, yet as he that hath the residue after the first vesture, hath enough to denominate him owner of the land. Twisden, Hub. recites that *Sir John Dackans case* was, that a trust was not forfeited, was not resolved, and in *Hollands case* Stiles the land is at this day enjoyned against the King, and the alien also by the tenant then in possession; but in our case trusts are expresly forfeited, yet no otherwise then in the party who hath none but an equitable right to redeem, which Keeling agreed clearly. Windham said, If a lease were made in trust for Edward, paying 200l. per annum out of it, Edward might have com-**[910]**-pelled the execution of the estate, but now here Edward Whally was not trusted to pay his son, but Springat. Adjornatur.

13. OPIE *against* THOMATIUS. *Ante.* Siderf. 260, pl. 9.

Powers.

In ejectment on a devise of Ashborn, special verdict find, that Rous father and son seised in fee made a lease for 99 years to T. if three so long lived, and after by indenture between A. Rous, there was a covenant to levy a fine of the reversion to him for life, remainder to Ambrose, R. and remainder to William Rous, proviso, that it shall be lawful for A. or any of the remainder, to make a lease for one life, or 20 years in possession, or reversion, or for any number of years, not exceeding three lives, or determinable on one, two or three lives; they find the fine levied, and the death of Anthony, and Ambrose; and that William devised to John Thomasius before the expiration of the former lease, the former lives being then living; and after conveyed the inheritance to Opie by fine, who made a lease to the lessor of the plaintiff. The points therein are. 1. One seised in fee of lands, partly in lease, settles as aforesaid, whither he may make a new lease, whiles the former lives are in being: and Jones for the plaintiff, conceived they could not, 6 Co. 33, *Wraths case*, in that generally the law doth restrain such powers to possession, with which agrees, 3 Cr. 5, which is intended an actual possession, not such as is so pleaded as of reversion, which is quasi so; for all the instances in the powers of this deed, are, that none should exceed three lives, and this is but a stretch, and conveyances must ensue vulgar speech, as a bond made payable the first day of the term, is intended the 4 die post. 2 Cr. 318, *Hawkins case*, is in terminis with our case; and adjudged a void lease: the second point is, tenant in tail of a reversion expectant on lease for 99 years, makes a second lease before the expiration of the former; and after issue in tail levieth a fine, if his conusee may avoid it, being not only voidable but void, as appears by the Statute de Donis Cond. for though the donee cannot alien to the prejudice of the issue, yet for his benefit he may, as his grant of rent-charge, or lease without rent, Pl. Com. 436. 12 H. 8, 8 are ipso facto void by his death, being an apparent prejudice to the issue in tail, and no appearance to his advantage; and such leases in futuro are as apparent prejudice to the issue, who cannot alien nor lease till the former be expired, 6 Co. 41. 1 Inst. 223, the te-[911]-nant in tail cannot be now restrain'd to lease for lives, because the law giveth him this power, but the restraint had been good on the Statute of Donis. 2. This lease by way of future interest, doth not change the land into possession, but that discends to the issue, as *Sir Anthony Mayns case*, which sheweth, that hinders no uniting or executing of estates, being no part of or estate in the land, till executed, 2 Cr. 445, *Griffins case*, lease by tenant in tail, to begin after his death is void, Dyer 279, pl. by Manwood, Tenant in tail cannot make a lease to begin in futuro, especially if the tenant in tail dye, as in our case before the lease begin. 3. Though the lease were only voidable, yet the conusee hath the same power to avoid it, as Pl. Com. 437. 1 Inst. 46 are, so in case of a feoffment, which cannot be different from a conusee; those cases that are objected out of Dyer 51 nothing resemble ours; for lease by tenant, and his feoffees, before the statute of 27 H. is a discotinuance, and the lease of him, and confirmation of the feoffees are unavoidable by the issue, there being no remitter to the tenant in tail, as *Amye Tounsends case*, Pl. Com. he being the first taker: also *Croker* against *Kelsea* in 2 Cr. 692, is as little to our purpose, for that was, baron & feme, tenants in tail, have issue, and after his death the issue levieth a fine, whereby the tail is gone, and therefore the conusee shall not avoid lease made by the feme in her lifetime afterwards, in that the issue could not have avoided it till the death of the feme. Winnington for the defendant, There is a covenant by the issue in tail against incumbrances, which particularly excepts the lease in question; agreed the intent to be to have only three lives out at a time by any one party seised, and the lease in question is for years determinable on one life, in C. B. Hill. 12 Car. 2, Rot. 1586. Sir Charles Howard leased the manor of Clum for a year, and after setled it to himself for life, with divers remainders, with power, as this case is, that any one possessed of the freehold might lease for three lives, or 21 years; here it was adjudged in C. B. that this was a good lease; and *Slocomb* against *Hawkins case* 2 Cr. 318 is reported by Yelverton 222 in different manner, that the second lease was made by him that had the freehold in possession. 2. This lease is at worst if not pursuant to the power,

only voidable by the issue, and therefore conusee cannot avoid it, Pl. Com. 434 is direct in this point, and the whole argument had been else to no purpose; 1 Inst. 46. Dyer 279 is but only opinion, Catline against Manwoods opinion, and there is a difference, **[912]** where the thing it self is granted, as by a lease, as Hutt. 102, and where only something out of it as a rent. 3. Its become absolute by this fine, for the issues are only enabled by the Statute de Donis to elect, for before he was bound post. prolem, &c. and the conusee cometh not in privity of the estate tail, but in the post, and he cannot claim an estate tail by a que estate, 7 Co. 9 doth expound the reason of Dyer 51 to be, because such lease was only voidable, which the Court agreed, this being a present lease in possession; but here the issue could never elect, yet his alienee shall not have more power then the issue had, else should tenant in tail make such lease in futuro, and conusee avoids it, and after the fine be reversed for error, the issue would, as Dyer 263, pl. be at great inconvenience.

1. Keeling held the first the main point, in that all did see the charge of a lease in being, and this power ariseth out of the settlement, which was intended to have some effect, as *Sir Robert Hawards case* inter *Perry* against *White;* but certainly lease in futuro by tenant in tail, cannot be void, but yet conusee shall have the same power as the issue had, this power being in futuro; also the case of the feoffment is as strong as a fine.

2. Windham said, Had the words in possession been left out, the case had been strong against the plaintiff, the settlement being of a reversion; but such power on a settlement in possession must be intended also in possession: and Dyer 357, pl. the Judges agreed, that on such general power, a lease in futuro was good, the thing to which this power is annexed being a reversion; and there is a great latitude to be given to these powers: also the words in possession, will not make much alteration. 2. Lease by tenant in tail without rent, is not void, because election is beneficial to the issue; so of baron & feme; so of lease by tenant in tail, to begin after his death; and if tenant in tail covenant to stand seised to the use of himself for life, remainder to others, this hath been void; but the law is otherways now; also here the issue never had any election.

3. Twisden agreed the lease but voidable, the tenant in tail having an inheritance; so if there be rent, or not, the issue hath election; but the conusee cannot have this election, for the estate tail is barred, and matters of election are not transferrable: *Shellyes case* was argued till by an old womans death, on whom the matter depended, it fell. Adjornatur.

[913] 14. CORNWALLIS *against* GAVILL. *Wednesday, May* 31.

Priviledge.

The plaintiff being a priviledged person, the Kings servant, brought an action against the defendant for a battery, for which the defendant also would have sued the plaintiff, and took out process against him; but he stood on his priviledge, and the Chamberlain would not give leave to sue him, therefore the defendant prayed the plaintiffs suit might stay against him, unless he would appear to the defendants action, being cross actions in the same Court, and only for a battery, which the Court granted; but if it had been debt, or such like, they would not stay one suit for want of appearance to another.

15. MOUNFORD *against* PATE.

Poor. Siderf. 261, pl. 10.

Jones on the statute of 23 H. 8, cap. 15, prayed that the plaintiff, in forma pauperis, might be discharged of costs, there being none at common law, and paupers thereby discharged. Twisden said that Justice Jones said, that unless the pauper would submit to be whipt, he must on nonsuit pay costs: but by Jones, This was trover for bonds, and it did appear there were bonds taken away, but the dates were not known, therefore thereupon he was nonsuited, and it's in the discretion of the

Court to consider whether the suit were vexatious, or not, and accordingly to inflict their punishment. The Court agreed with Twisden, that the continual practice being to assess costs, the plaintiff must pay them, or submit to be whipt at election.

1925 a.b. 19.

16. JOHNSON *against* PIE. *Ante.*

Trin. 16 Car. 2, Rot.

Enfant.

Winnington prayed judgment in an action upon the case on communication of lending 300l. and that the def. was therefore to mortgage certain lands; and the defendant affirmed himself to be of full age, and so intending to deceive the plaintiff, and being in appearance a man, and avers he was twenty and a half; the defendant pleads not guilty, and there is a verdict for the plaintiff, Pasch. 16 Car. 2, Rot. 401, *Grove* against *Nevils case*, in this Court is the nearest to this, **[914]** on deceitful affirmance of a stone that was but Bristow, to be a diamond, and his own, there on demurrer judgment was against the plaintiff, because it was matter of contract; but this a cheat and a tort. Keeling said, Such torts that must punish an infant, must be vi & armis, or notoriously against the publick; but here the plaintiffs own credulity hath betrayed him: also by Windham, The commands of an infant are void; and for such he shall never be attainted a disseisor, much less shall he be punished for a bare affirmation, which Twisden agreed, and that there must be a fact joyned to it, as cheating with false dice, &c. Also by this means all the pleas of infancy would be taken away, for such affirmations are in every contract. Windham said, that had any other person affirmed the infant of age, an action would lye (the case of *Grove and Nevill*, the defendant pleaded infancy, to which the plaintiff demurr'd in an action upon the case, for falsly affirming a jewel to be his own, which was another mans) the Court awarded on the plaintiffs prayer a nil capiat per billam.

17. WINNE *against* LLOYD. *Ante.*

Costs.

In error of a common recovery, Williams for the defendant, on affirmance of the judgment by 3 H. 7, cap. 10, prayed his costs, though none be due in the original action, as Co. Entries 162, on 2 Ed. 6, in debt for tythes, and 3 Cr. *Graves* against *Short* in a formedon, and 3 Cr. 659, *Penruddock's case*, in error on a quod permittat, there being as great mischief by delay, as in delay of execution, and here in common recoveries there is no real execution done, which Keeling agreed; but this is the reason why here the party cannot be said to be delayed no more then in error brought on judgment after execution: also by Windham, This is intended only in writs adversary, not common assurances, as this is taken here to be; and by Twisden, The record saith execution is done; and though this be but private entries among the attorneys, yet appearing on the record now, the Court cannot say contrà; but they agreed that where execution is delayed by such error, costs are due, though no costs be given in the original action.

[915] 18. LOWE *against* BERDMORE. *Ante. Thursday, June* 1.

Conspiracy. Siderf. 261, pl. 11.

Wild prayed the opinion of the Court in an action upon the case for indicting the defendant for a rescous, well knowing that he was not present at the time of the rescue, and the jury have found it malitiose. But by Powis for the defendant, This is but the common form, and this founds not in slander, as in the case of *Langly* against *Clerk*, an action for indicting him of assault made with intent to ravish the defendant; and in the case of *Prescot* against *Chamberlain* in Newdigates time in B. R. it was held, that an action lay on indicting one joyntenant for falsly suing in the

others name without his consent; but this judgment was reversed in error, and the common opinion of later time hath been, that it lyeth not, and so the Court inclined; and this lyeth properly in the discretion of the Court, before whom the cause was tried, if there be probable cause, as that there was a rescue, and any person like the plaintiff; but if there be no such cause, then constantly the plaintiff is nonsuited. Also such indictments must be sworn, and it's a prosecution for the King, therefore more to be countenanced then this action. Twisden also conceived the count should be special ea intentione, and with design of revenge, &c. Also by Keeling, This indictment is not only the prosecution of a single person, but the oaths of a jury, and therefore unless some practise or design of lucre appear, these actions are always discountenanced, in that else all presentments would be discouraged, Marches Rep. Adjornatur.

19. JEMOT *against* COOLY. *Ante.*

Trin. 16 Car. 2, Rot. 481.

Rents. Siderf. 262, pl. 12. Debt, Fitzh. 136.

In ejectment the plaintiff declares on a lease of Sir Ralph Bovey, special verdict find Drake for 6000l. granted to Sir R. B. a rent-charge of 400l. per annum, to him and his heirs, payable in January and July, and that if the said rent be behind, that then he might enter and retain the said land to his own use, until he were satisfied and paid the said rent, and that for rent arrear the lessor entred, and demised to the plaintiff, and if for plaintiff, for plaintiff, &c.

[916] 1. Jones for the plaintiff, It's not now before the Court, whether this interest be a fee, a freehold, or a chattel, because Sir Ralph the grantee makes the entry, and not his issue or assignee: but the only question is, whether that of this interest the plaintiff may have ejectment; and on Litt. sect. 327. I think he shall, as well as feoffee, for on entry on condition broken the whole estate is avoided, and therefore this interest is a chattel, 1 Inst. 217, or in the nature thereof, created by agreement of parties: and though Litt. doth not put the case to be by deed indented, yet it must be so intended, else no rent can be reserved since the statute of Quia Emptores, 1 Inst. 143, it's holden a rent may be reserved by deed-poll, but Dr. & St. 74. 11 H. 7, 22, & 14 H. 7, 36 are contrary, because such rent is the grant of the feoffee, and so is this entry also: and also it's granted as a penalty annexed to the rent on the profits of the land, and always ensues the rent, as 2 Cr. 510, *Havergill* against *Hare*, after grant of a rent, there is a fine levied of the land, if the rent were behind, to the grantee and his heirs, this can be no contingent use, as it must be if it were a distinct estate by it self, therefore it's annexed to the rent, and created by agreement of parties, and doth go along with it, else the grantee having assigned over his interest before any thing was arrear, the use would have been destroyed: and although by reason here the words be, that the lessor and his heirs may enter, yet this gives no estate, but only sheweth that the remedy shall so long continue, Hill. 13 Jac. Rot. 868, in C. B. *Brown, Lessee of* ——— against *Haggar* in ejectment on special verdict, rent granted out of land, as in our case, in dispute between the heir and executors, it was adjudged that this interest is a chattel. 2. That it's such a chattel whereof the lessor may make a lease, in that he hath an interest till the duty paid, which is incertain, yet so is the interest of tenant by elegit, yet continual experience shews he may make a lease; so Mich. 1657, *Harrison's case*, and in C. B. *The Countess of Pembrokes case*, of tenant-right, that the lord by custom may enter until the fine were paid, and adjudged that this was a sufficient interest to maintain an ejectment: so lands given to executors for payment of debts, they may lease. I agree that livery were needless in the case of Accruer in Litt.

2. Thirsby for the defendant, That for want of execution of this deed the grantee is only tenant at will, for Lit. sect. 380. Estate to baron and feme during the coverture is on enumeration of estates held a freehold: so 37 H. 6, 26, tenure dum sola, or quam diu se bene gesserit; and 4 Co. 30, **[917]** estate durante viduitate must be intended for life, for less it cannot be, leases, Br. 76. Pet. Br. 462, so of lease till 100l. be paid, Pet. Br. 463 & 468, no livery

appears whether made or not, 14 H. 8, 10, per Brudnell, 8 Co. 96, *Mannings case*, though such estate may be created by devise, 3 Cr. 315. 3 H. 7, 13, yet 4 Co. 82. 1 Inst. 42, and *The Bishop of Baths case* by grant it cannot be; also the reason of law is, that it can be no estate, for else it would be a perpetual chattel, and Yelverton 258, *Green* against *Edward*, that is held void; but such estates may be created by statute, as on the elegit: also as 10 Ass. 8, such things as lye in grant, 17 Ass. 7, this is as sufficient to pass a freehold: so 8 H. 4, 17, grant by the King quam diu in propriis manibus, &c. for no other ceremony or livery is necessary to execute the estate: but the case at Bar is a grant of land, which must have some execution, unless in case of a will, as before, 44 Ass. 3. Pl. Com. 524. Bar. 280. Done 210, open the reason of Lit. sect. 327. That this is only a pledge, not any estate, which is suffered, least the whole estate should be defeated by the entry on the condition: and they that have the fee may restrain it to a less estate. A grant to distrain goods irreplevisable is void 1 Inst. 146, but on feoffment in fee by condition, that if goods be replevied the feoffor may enter, it's good enough; and though tenant at will may make a lease to try a title, yet not against his own lessor. Also it's here expresly found, that the grantee entred by command of the lessor, so the will is thereby determined. Windham said *Littletons case* is good law, and that the rent is created by grant of the feoffee, but more properly by reservation of the feoffor for assurance, and making good by the livery what was granted by the feoffee; nor hath this been doubted on a feoffment to uses, which is used in conveyances on death of issue male, to put the lands in the hands of trustees till portions raised; but of later times this way of grant hath been used, as in this case, which hath in all times been a doubt, whether it can create such an estate; and the difference usually taken is, that when the grant is in consideration of mony, the land on non-payment will come by way of use, so on grant of such rent to his son, with clause of re-entry, this on the strength of natural affection on non-payment will become as a covenant to stand seised; but a voluntary grant, as to my servant, &c. would not be sufficient to pass any estate in the land. Keeling said he was more satisfied with the authority, then with the case of Litt. sect. 327, and if it were a new authority, it would be of little weight; for as he in remainder is subject to all the terms con-[918]-tained in a lease, to which he never sealed, so here he hath a modus tenendi only, for in all the former cases, the estate is but a chattel, and shall go to the executors; therefore it will be difficult to shew how the consideration of affection, which is to the heir can raise an estate to the executors, who are strangers: Windham agreed this was impossible, but this will enure as a covenant to stand seised to the use of his son, and his executors; and the son hath the whole estate: but in *The Lord Pagets case*, the covenant was immediate to the use of the executors of the son; Twisden, This power of entry is given to the grantee, and his heirs; and therefore the estate must go in the like manner, therefore if it should be a covenant, it must be enrolled. Adjornatur.

20. PLEDALL *against* THE INHABITANTS OF THISTLEWORTH. Sid. 269. pl. 13.

Freshsuit.

In action upon the case, on the Statute of Hue and Cry, which is in nature of debt; but the damages being the principal and without loss, no action lieth on the robery, therefore is like trover, and being de uno mamillari & manicas lyntеareas Anglice, a gorget and cuffs: this by Jones for the defendant in arrest of judgment is uncertain, as trover de virgis and velis, *Clerk* against was adjudged ill, the certain number not appearing: so by Twisden of a dublet and breeches. Adjornatur.

21. LYDEAT *against* BUTLER. *Ante.*

Pasch. 16 Car. 2, Rot. 378.

Slander.

In action upon the case for words spoken at several times, the defendant pleads that the words laid in the declaration were not spoken within two years last past, to which the plaintiff demurred for the incertainty, specially because its not said, which

words were before; and if the jury find any of the words before, its against the plaintiff: and Keeling inclined, that this is a good issue, as well as non assumpsit, pleaded generally where several promises are in the declaration: but by Twisden and Windham this is a good issue, contrà that the promises in the declaration were not within that time: its true, the jury are not bound to find any of the words more then the issue: on non debet in debt for **[919]** 10l. without saying nec aliquem denarium inde, the jury are not bound to find less, but may find only 5l. due. Sed adjornatur.

22. MARKE *against* JOHNSON. *Ante.*

Hill. 15 & 16 Car. 2, Rot. 515.

Patents.

Jones prayed judgment for the plaintiff, in that the verdict concludes on a special point, that if the lease be void by non-payment without office, then for the defendant, &c. so 21 Jac. cap. 25, cannot aid this, whither it be within one clause or the other, for if it be void at common law its so now: the Court agreed the lease to be void at common law, but by this statute his leases have continuance against the King, to the intent the party may tender till office found: but by Jones, the King may enter as well as have an office found; and if he had enter'd, the party could never tender afterwards; but there being no title appearing, the Court cannot intend a title by tender, &c. Also special verdict, unless title be for the plaintiff, is not sufficient for the plaintiff: but by Keeling, There is no advantage shewed to be taken of this forfeiture; and therefore it continueth, which Windham agreed, contrà by Twisden: and also had there been a grant over by the King, it would be intended he enter'd, and may be void without office for the King, or it may not be void if no advantage were taken: therefore by Windham and Keeling a venire facias de novo ought to go, because the verdict is not sufficient. Adjornatur.

23. MARKE *against* GUILBERT. *Friday, June* 2.

Prohibition. In Disms Br. 11. Siderf. 263.

Lindly prayed a prohibition on libel for a mortuary by the vicar, suggesting that he had paid it to the impropriator, who ought time out of mind to have it: but by Keeling and Windham, This being in dispute only between the parson and vicar, no prohibition lieth on 21 H. 8, cap. for this enacts nothing de novo, but leaves mortuaries to be paid as formerly; and they being originally suable there, the incident question of property shall not alter the jurisdiction, especially between the vicar, who is but as tenant at will of the parson, and the parson, which Twisden agreed: and by Windham, This is like tyth fish, where if payable its **[920]** tyth; but if the defendant will suggest that by custom he payeth none, that shall be tryed at common law, 1 Cr. 237, *The Archdeacon of Chesters case*, the Judges were divided, which Keeling agreed, but Twisden doubted, being a prescription in non decimando: but by Windham and Keeling a mortuary was due of common right at common law, without any prescription, which is secundum melius animal, after the lords heriot paid.

24. THACKER *against* ULLOCK.

Patents.

In trespass, the defendant justifie as servant to this King, to whom the lands discend from King H. 8, to which the plaintiff by replication confesseth them in H. 8. but saith that H. 8. granted to the plaintiffs auncester; and doth not traverse absque hoc, that the King, Car. 1, dyed seised on the case of *and Fitzherbert*, Hub. The defendant rejoyns that Thacker the auncester granted to J. S. and so conveys under him to the defendant, to which the plaintiff demurred, as a clear departure, which the Court agreed; but if the replication be ill, the plaintiff cannot

have judgment; and Windham said, this being fee may be gaind by wrong; and so not like *Heliars case* and the plaintiff hath not answered the whole title of the King, therefore on Dyer 107, pl. the plaintiff ought to take a travers, which Keeling agreed, but Twisden doubted, and being but a trivial action against three schoolboys, for playing in a courtyard near the school, where of long time they used so to do, adjornatur.

25. BREWEN *against* ROWE. *Ante.* Siderf. 264, pl. 15.

Taxes.

Winnington insisted on it, that being found that the defendant was an officer, and seised goods on suspition, that custom was not paid, Da. 8, a surveyor having color so to do, though it be found that the duties were really paid, yet not being found he knew thereof, this demand, on 10 Co. 47, is no sufficient conversion to charge the defendant in trover. 2. The condemnation in the Exchequer, though the certificate of payment be necessary, yet doth bind the right till taken off, being a judgment. Polyxphen, The verdict shews no cause of suspition: also the verdict finds he converted expresly to the Kings use, and his own; also the information in the Exchequer affects not the goods.

[921] 1. Keeling said the defendant should have pleaded specially, that he seised on suspition, until he were satisfied the custom were paid, but this is no plea to the conversion: also the jury have not doubted but that there is a conversion; and the information in the Exchequer, doth but aggravate that tort that was before committed: but if the Exchequer had sold to a stranger on condemnation afterwards, it would have excused him, but not the tortfesors.

Which Windham 2 agreed, and as sheriff must seise goods at his peril; and not because he suspects them to be the goods of the defendant: also the sesing, carrying away, and yet deteining as is found, is a sufficient conversion of it self, which is but aggravated by the demand.

3. Twisdem ad idem, This is as gross an actual conversion as can be, as taking my hat off my head, which need not be demanded: all agreed that on his suspition he may keep them safe, where he seiseth them, but cannot carry them away. Judgment for the plaintiff.

26. DAUSE *against* LUCE. *Ante.*

Trespass.

Keeling held the difference 2 Inst. 216, on the Statute of Gloc. good law, and that the defendant in appeal of maihm may justifie; and therefore son assault demean is a good plea, and it lieth before the Judge to direct the jury according to the manner of the assault: whither only by lifting up the hand, or running at him with a sword, which Windham, who before doubted, did now agree: and by Twisden this is a very good plea as before; and the assault must be such, as is just ground of terror, as holding up a sword, which is only examinable on evidence. Judgment for the defendant.

27. LOCKE *against* ETHERINGTON. *Ante. Saturday, June* 3.

Pardon. Siderf. 264, pl. 16.

Keeling, The debt is discharged not by way of pardon, but by way of release, this being a thing vested in the King, only as a chose in action, and in the same condition, that it was in the hands of the obligee; and so is capable of being released by the Act of Oblivion: and the difference was taken where an office is found before the Act, of chattels real, they are actually vested in the King, and cannot be released, as the case of *The King* against *Ward*, Mich. 15 **[922]** Car. 2. Also felo de se cannot have executors, and therefore the case of *Tomes* against *Etherington* was, the executors could not have this debt: also here need no averment that he is a subject, for that is implied by law, for an Act of Parliament cannot work to an alien, but as expressio

eorum quæ tacite insunt nihil operatur, but particular qualifications must be specially averred.

2. Windham, The case is no more then if the King before his retorn had lent 500l. and taken bond for it, be discharged by the Act of Oblivion; and its agreed, that in case of a lease for years, there is no discharge; and the intent of the Act was only to release pains and penalties, and sums of money are only as such interspersed, as what was contracted by the exigence of the war, not to discharge real debts, which nothing related to the times. 2. The averment, that he is modo subditus, doth imply he was no subject at the time, but as *Caudryes case*, in special verdict this shall be supplied, but not in pleading; and in action, on 2 Ed. 6, its always aver'd, as *Kiffin* against *Swain*, 2 Cr. 324, that he is a subject, and this is like nuper episcopus, which implies, he is not so now, and therefore judgment ought to be for the defendant.

3. Sed Twisden contrà; he agreed with Keeling, that the debt is pardoned or releast, which 1 H. 7, 13, & 11 H. 7, 10, are all one in signification, so in action popular, Br. 4, where the King pardoneth i.e. releaseth the punishment, &c. and this is to be extended as far as it may; and the constant practice of the Exchequer is to discharge whatever is not within any of the exceptions, as recognizance, statutes, &c. 2. There need not be any averment that he is a subject, but the disability must be shewed on the other side; and whoever live here, being under the Kings protection, are generally subjects, and so within this general qualification, for as Hub. 207, they are capable of such pardon, being local, though not natural born subjects; and its a strong presumption that every man that is in England, is a subject; and therefore in actions at common law brought by any, its intended they are subjects prima facie; and therefore if they be not so, it must be shewed on the other side; and this is the reason of Dyer 329, on the Statute of Wills, and *Caudryes case*, that no averment needs be that lands were soccage, Tr. 1649, *Johnson* against ——— or that he that sueth is a subject, Co. Entries 35. And it need not be aver'd that he that set out his tyths was a subject, nor need the statute of 2 Ed. 6 be recited, but may better bring debt for **[923]** them, and the particular value, and that the defendant did not set them out contrà formam statuti, therefore judgment for the defendant.

28. HELIAR *against* CASEBROOKE. *Ante.* Dett. Br. 94.

Administrator. Siderf. 266, pl. 17.

Keeling put the case, that George seised in fee of a house in Bristow, makes a lease for years to his brother Samuel in Lond. who married the defendant and dyed, she assigns, and after an action of debt lieth against her in the detinet, for an executor stands in representation to answer all contracts of the testator; and he is chargeable no farther then he hath assets; so there is no inconvenience. I agree *Ungle* against *Glover* good law, so of the case of *Marrow* against *Turpine*, but *Overton* against *Sydals case*, as in 3 Cr. 553, is good law, but not as reported in *Walkers case*, for there it is mistaken, which hath deceived many; for there the privity of contract was destroyed on both sides, but where the privity on one part remains, the executor is chargeable, as where lessee doth assign, if no rent were ever accepted of the assignee, the executors of the lessee are chargeable. 2. On *Hargraves case*, while the executors are in possession, they come into the estate of the testator; and as assignee, therefore are liable in the debet and detinet; but after an assignment made by the executors, he is only chargeable in the detinet. 3. This action is brought in London, of lands in Bristow, which being in the detinet only, which is in respect of the contract, and trasient, may be laid any where; but action in the debet & detinet must be brought in Bristow; but for arrerages in the lifetime of the testator, the action being grounded on the contract, it was in resolved in the C. B. that it may be brought any where: also, notwithstanding this action here, an action against the assignee may be brought in Bristow; for using one remedy, doth not destroy the other.

2. Windham, This case hath been questioned and doubted in all ages, and *Walkers case* is a plain authority of my Lord Cooks opinion: but before that case it was doubted, whither lessee himself were chargeable after assignment; and the reasons of

that and this case are all one, for the executors may as well sever the contract as the testator, for the contract remains with them: also they may wast, as the lessee there, and then assign it to a begger, and so keep the goods in their hands, and pay no body; also the mischief is the same in both cases, the executors are bound by the yealding and paying, which amount to an express contract, and sometimes, as Dyer 57, pl. its said a covenant, and *Porter* against **[924]** *Swetnam*, resolved that thereupon an action lay against an assignee, as on an express covenant, therefore the executors are hereby bound for the goods in their hands, as strongly as the testator, or for any other debt or covenant: also should the reservation be of more then the land, the executors cannot wave it, if they have assets, for they are bound by the contract as to the detinet, though they do waive the term; and in an action in the debet & detinet, on nil debet pleaded, the executors are chargeable but only for the profits of the land; but for the other they may be charged by indebitatus, &c. all which shew the executors are bound by the contract, though they have no land, *Royston* against *Cherwin*, Cr. 225. Wayver Br. 49. Dr. St. 120. Latch. *Hydon* against *Dudley* by all with *Hargraves case* hath been denied; also had the lessee himself assign'd and dyed, the action would lye against the executors, as *Irenmonger* against *Newman*, as well where the contract was made as against the testator: also in the case of *Overton* against *Sydall* the whole privity was destroyed, and in the debet & detinet, there is no color to charge them after assignment, therefore no judgment could be given for the plaintiff; and all the Judges have denied there was any such opinion in the case, as my Lord Cooks opinion.

3. Twisden, All the former cases and grounds I agree, and the executorship being intire, as *Paul* against *Woody*, the executors cannot waive the term, so *House* against *Webster*, Yelverton 103, and if debt will lye, as it doth on yealding and paying in a lease, why not as well an action of covenant, 2 Cr. 238, *Lord Rich* against *Frank*, and in the case of *Calye* against *Johnson* it was held that it was well enough in the detinet; and the difference we all go on reconciles all the books, that so long as the term remains in the hands of the executor, he is chargeable as assignee in the debet & detinet, barely in respect of the profits, and so must Cooke be intended in *Overtons case;* but after the assignment he is chargeable only in the detinet de bonis testatoris, as in the case of *Stillion* against *Smith*, Hutt. 79. Also as to the place, being only on the contract its well enough here: judgment per Curiam for the plaintiff: Keeling agreed the executors cannot wave, but they are chargeable still in the detinet, but they may as to the being charged in the debet & detinet; but if they take the profits, they cannot gainsay the reservation, but must answer for the whole: but by Twisden and Windham on nil debet pleaded, the contract may be apportioned in the recovery, though not in the action.

[925] 29. WORRALL *against* BRAND. *Ante.*

Abatement. Error, Br. 117.

Windham said 37 H. 6, 16, doth expresly agree with the case of *Woodward* against *Darcy*, that the death of one executor that is defendant is an abatement in fact, which the others agreed; judgment for the defendant, which Wild counsel for the plaintiff, prayed for his expedition, being the opinion of the Court, 2 H. 4, 16. 10 H. 4, 18.

30. NEWTON *against* SHAFTO.

Heir. Siderf. 267, pl. 18. P. 39 Ed. 3, 10, pl. 15, per Morris.

In ejectment on special verdict, it appeared that within the mannor of Tynmouth there is a custom, that if any copyholder have above one daughter, it shall go to the eldest daughter at the death of the father, for her life; and that after her death it shall go to the next heir-male of the father that can convey through males, or else shall escheat, and the lands in question, as at common law, discended to the younger daughter, who married Wilkinson the lessor of the plaintiff, Da. 32 b. And by Tourner this is a void custome, being against reason that lands should escheat,

notwithstanding there be heirs left, Dyer 357. Custom that tenant in fee shall not demise but for years, is void: so in our case, the auncester having a fee, though but according to the custom. 2. This custom is inconsistent with and against the nature of a fee-simple. Patents, Br. 104. 1 Inst. 43, on the same reason saith, gift to J. S. and his heirs males, is fee-simple, and not tail: so Da. 35, proviso that females shall not inherit is void on grant of fee. 3. The lessor of the plaintiff is here within this custom, for the eldest daughter is found never to be possessed, but died in the mothers life time, who held the lands for her life by the custom, 1 Cr. 411, *Reve* against *Malster*. Shafto for the defendant, This is a good custom, because it may have a lawful commencement by agreement between the lord and tenants, and they take the lands with this charge, as custom that copyholder shall not alien without licence; and 2 Cr. 368, custom that copyholder might name his successor: and in this case, the lands being in Northumberland, bordering on Scotland, whence were frequent invasions, the females were excluded: and this is a fee conditional, 1 Cr. *Langhams case*, ratione loci: feme covert may contract without her husband in London: also this is in advancement of the male line, who are more worthy, and only fit for wars and government: also this cu-**[926]**-stom doth but direct the manner of the discent, and is not incertain at all, as Da. 32, the case of *Tavestry*. Also these lands being not of their own nature discendible, there must be a special custom alledged, Noy 3. The custom of Taunton Dean, that the feme shall have the whole, doth as much deprive the children; for if she assigns over, they can never take any thing. 2. She only shall have the land in question that is heir at the death of the auncester, Pl. Com. 59 b. which is the eldest daughter, 3 Co. *Lincoln Colledge case*, 9 H. 7, 25, postnatus shall never devest entry for mortmain, &c. So in 6 Co. *Ambrosia Gorges case*, the younger brother cannot assign dower, 2 Cr. *Stephens case*, the eldest sister is not within custom of discent to the eldest daughter; at common law seisin guids the discent, but not so in customs nor Acts of Parliament, as Moor 125. Keeling, The defence cannot be the ground of this custom, for the feme is to have it, and the eldest daughter. Also the males that convey by females, is as fit for defence as the other. Windham held it's a strange custom, but being of a copyhold, it may be good enough. And in the custom of Taunton Dean the feme shall have fee, and on her death the baron shall have it: also the defendant is not well entitled, in that the youngest, on the death of the eldest, in the life of the wife, is become eldest, for she could never here have inherited from the eldest, nor did she ever take any estate for her life: and this construction is the rather to be made, because it's an in-officious custom, as civilians say of wills. Twisden also held it an unreasonable custom, and border-service is the foundation of all the customs in the north. Adjornatur.

31. RANUT *against* KINGSTON.

Execution. Error, Br. 55.

Nota pro regula, though the bayl were not put in within four days after the writ of error brought, according to the rule of the Court, yet its a supersedeas; but the defendant ought to pay all the costs and charges of the plaintiffs proceeding after the four days, by Twisden and Keeling, contrà Windham, ex motione Waller for supersedeas to an execution, being executed after bail put in, but only de bene esse, and notice of it to the plaintiff, which the Court granted.

[927] 32. KING *against* STANDISH. *Monday, June* 5.

Condition. See Moor 861, in Cond. Br. 141.

In debt on obligation, condition that the plaintiff should have, hold, and enjoy lands acquitted from all charges and incumbrances: and for breach, the plaintiff shewed that there was a rent-charge granted by the predecessor, under whom the defendant claimed, which is yet undischarged. To which the defendant demurred, because the acquittal goeth only to the having and holding the land; and it's not shewed that the plaintiff was ever in possession, nor that he was charged or endammaged; to

which Twisden and Keeling agreed: but by Windham, The defendant ought to shew coment he had discharged and acquitted from the very rent, not to let it perpetually hang over him: but all agreed, that if the acquittal refer to the land it self, or to the person, the defendant must shew coment. Sed adjornatur.

33. CHAMBERLAIN *against* CHAMBERLAIN.

Pasch. 17 Car. 2, Rot. 635.

Condition.

In error of a judgment in C. B. in an action upon the case, Jones excepted, that being to pay the plaintiff, being younger son of J. C. and had paid 800l. in mony to take off the sequestration of his father; and if he would forbear to cut tymber on the land, to which the defendant was heir, as grandchild, he would pay the principal, interest and charges, which lying in the plaintiffs knowledge, is impossible for the defendant to know, and the plaintiff ought to alledge notice what the charges were the rather, because the person for whom the mony was expended was dead. 2. The consideration is not good, unless the authority to cut wood given, or alledged to be given to the plaintiff by the grandfather, were executed in his life time, it being but a licence, and no interest, so shall not be intended to continue after his death; so he forbears only what he had no power to do, therefore nudum pactum. Wild for the defendant, The jury have found that at the time of the promise, which is the same day, that the defendant hath alledged he had authority, that he had a power to cut, and therefore this must be intended an interest, for else he revera had no power. 2. There is a **[928]** special request to pay the mony which he averreth he expended, which countervails notice, as *Alford* against *Chute* in C. B. where this very exception was taken on *Holmes* against Hub. and resolved that the demand implyeth notice: so Mich. 23 Car. 1, *Finall* against *Jeoffry*, for it must be according to the duty, Trin. 23 Car. 1, *Tanner* against *Laurence*. But by Jones, The breach of the promise is assigned in not paying at Mich. next after expended; and the request is not till two years after, therefore cannot imply any notice. But by Wild, The day is not material, but however, a request after is sufficient to support the action. 1. Keeling agreed the consideration sufficient, being but an inducement, for he that hath an interest hath power: also here is a certain breach by non-payment of 100l. expended, and the addition of costs and damages is to be valued by the jury well enough. Windham ad idem; A licence on consideration giveth an interest, and is not determined by the death of the party, as a bare naked licence doth. Also costs and charges are here publickly expended, therefore the defendant having undertaken to pay them, he must seek out. Twisden ad idem, All this may be presumed on non-assumpsit, and after verdict. Et adjornatur.

34. RABIE *against* ROBINSON. *Ante. Tuesday, June* 6. Enfant, F. 6.

Enfant.

Maynard for the plaintiff in the writ of error, Jennings an infant seized in fee, suffers a common recovery in person, and after levieth a fine for years, which point was deserted; but the point insisted on is, that an infant may reverse it during nonage, or at full age by writ of error, but it's not void; during his infancy it's triable by inspection, at full age per pais. In case of a fine, or statute, or recognizance, the trial is only by inspection, therefore must be during nonage, which is by positive law, as the cases of bastard eigne & mulier puisne, because it hath been so time out of mind, but not any law grounded on the reason of the thing, from which one may argue a simili ad simile, it was to create a debt, to which the Judges were witnesses, therefore it was not to be avoided but by inspection: so trial of infancy in case of dower is by proofs, in case of death per pais. If the question be infant, or not, if the party be of full age, it shall be tried by pais, Bulstr. in Jac. 9, *Moreton* against *Ords*, 130, on 30 H. 6, 49. 5 Ed. 4, 2. 22 Ed. **[929]** 4, Trial F. 52. 48 Ed. 3, 11 a.

20 Ed. 3, 49. 19 H. 6, 51. 9 Co. 30, all the differences were stated, and in other causes the trial should be by pais, and therefore it should as well be in a recovery, and 1 Inst. 380. Saver Default Br. 50, there is no authority in the law against this, but only Cooks suddain opinion, and the case of 3 Cr. 323 is positive for it, so Dy. 104, for an infant is not bound by any default before or after a contempt: there was no common recovery at common law, nor any need of it, but the use thereof came in on the Statute of Westm. 2, and binds where there is any act of the tenant in tail done as a default; and therefore the strict rules thereof are not to be exceeded; and because its a common assurance, is no reason to uphold it against an infant; but the reason it binds, is on the supposition of a right, which the Court cannot know, but that the plaintiff in the writ of entry hath good right, *Daux* against *Payton* Pasch. 1650, Rot. 306. Stiles 216. Br. Saver. Default 50, refers to error, which is only that the Court, 6 H. 8, 22, Saver Default 53, would not examine whither he that made the default were an infant or not; but the plaintiff holds to it, or not at his peril: Twisden agreed, there was no book exprest that he might not bring it at full age, 2 Cr. 464, *Holford* against *Plat*, an infant may avoid any default, unless it be with contempt; Account 121, by Windham, is, that when the time is parcel of the issue, 12 Ass. 37, it shall be tried by inspection, while within age, but after, as 9 H. 7, 2, by Hussey of profession it shall be tried by jury, because it cannot be the other way: Keeling ad idem, The mischief would be very great, if this as a common assurance should as such bind an infant, and the law having appointed a guardian for him, will not leave him without defence; also infancy may be tried by pais, as in dum fuit infrà ætatem, which in the reason differs not from a recovery; but the Court were not much moved by the argument, de jure positivo, because that might be urged in every hard case, as well as infants confessing judgment in Court of 10000l. debt, but appearing in person is as bad as by attorney, by Keeling. Adjornatur.

[930] 35. PLAYER *against* PETTIT. *Ante.*

Trades. Siderf. 169, pl. 21.

In debt on by-law, that none free of the city shall set any person on work in any manual occupation, unless they have served seven years, and that the defendant had set one Carter a foreigner on work as an upholsterer, which was not a trade at the time of the making thereof, which was 3 Ph. & Mar. & 11 Jac. *Allen* against *Tooly* 2 Bulstr. 190, are no trades within the statute of 5 Eliz. being easily acquitted, as hempdresser: also part of the by-law is, that the mayor may commit such as offend till the penalty paid, which is ill. Wild for the plaintiff, The only question here is, whither or no this Court shall grant a procedendo; and so whither this is a trade or no, is matter of evidence to be determined below by the jury as well as here, and the by-law is of it self sufficient, and the remedy applied to it is sufficient, in bringing debt in the Court of Record, so the commitment by the mayor and aldermen on confession, be it good or not is out of doors, therefore he prayed no habeas corpus may be allowed, but a procedendo be granted, which Baldwin opposed, because the retorn is insufficient; and Twisden conceived this Court may judge of it, as well as London: But Windham clearly, This is matter of evidence, and upholsterers were a corporation in H. 7 time; and Wild said he had seen the charter: Keeling, Were the question only, whither the setting her to sowe hangings were imploying her in the trade of an upholsterer or not, doubtless we ought to send it down, but here the question is, if an upholsterer were a trade or not, and 11 H. 7, cap. 19, being shewed, weighed his opinion, that procedendo ought to go, though he held, unless it be a trade by 5 Eliz. it could not be so before. Sed adjornatur.

36. BAYLY *against* BUNNING AND MAWLY.

Execution. Siderf. 271, pl. 27.

In trover, the jury find special verdict, that one Eden became a bankrupt, 6 June after the 4 June, which was the teste of the writ of execution, but before 14 June the actual service of it, and if that be a sufficient execution before the becoming a

bankrupt, or not, is made one question. 2. If trover will lye against the baily, who took the goods by fieri facias, on the special conclusion of the jury, if the goods were well taken, the judgment was had in Tr. term; and the 11 June the writ taken out the middle of the term, and after the man became bankrupt, and before any com-
[931]-mission, which was 17 June, the writ was actually executed, which the Court and counsel agreed was not sufficient to hinder a division among the creditors: but the doubt was if it be sufficient against the execution. Adjornatur 932, pl. 41.

37. THE KING *against* BOSWORTH.

Force.

Barwell prayed bill of forcible entry and deteiner, found ignoramus as to the deteiner, and billa vera as to the entry might be quasht, which was done by Twisden and Keeling, Windham absente, the offence as charged being intire, they cannot apportion their verdict, as the petit jury on indictment may.

38. PORTINGTON *against* FITZWILLIAMS. *Wednesday, June* 7.

Previledge.

The defendant being an attorny of this Court, prayed the action which was laid in York, might be laid in Middlesex; but the Court denied it, it being only in discretion of the Court, and no such priviledge due to any attorny.

39. TROPPIT *against* WATLIN.

Joynder. In Dett, Br. 5.

Dolben prayed, that in action brought for mony due by bill, and indebitatus on insimul computasset, the plaintiff might (being only on declaration, and no farther proceeding) accept the mony due by bill, and a plea to the other, these being joyn'd by the plaintiff to save costs, which will not be against him, if either part of his action be good; but the Court denied it, and said it was never seen so to divide an action.

40. THE KING *against* EXECUTORS OF SUMMERS. *Ante. Thursday, June* 8.

Slander. Siderf. 270, pl. 26.

Winnington assigned for error, on Hub. 62, that this is no scandalous libel, in that it reflects not on the family, as to say he is of a trayterous breed, &c. Sed Curia (Windham & Twisden & Keeling) contrà. 2. This matter is not indictable before justices of peace: sed Curia contrà, as *Prins case* here, ante, of putting up letter to
[932] person tending to the breach of the peace, and on the same reason barretry is by them tryed, 4 Inst. 180. There may be difference where the words are spoken to the party himself, in which case the heat and danger of the peace is over, but not so when spoken to another; but however between words and writing, there is great difference, this being not only in consequence, but an actual breach of peace. Judgment affirmed, per Curiam.

41. BAYLY *against* BUNNING. *Ante* 930, pl. 36.

Execution.

The plaintiff being creditor by judgment in debt, brings trover against the baily upon the statute of 21 Jac. cap. 19, though the writ of execution 3 Cr. 440. Dyer 76, had been made out the day of the teste, it had not bound the goods being only in posse not in esse; but here the writ was taken out but on 11 June, though it be teste before, and the bankrupsie being by statute and mesne, the writ by fiction

of law shall relate; for the statute was intended of such executions as were fines, & fructus legis, as *Audly* against *Halse* 1 Cr. 148, the execution must be such at least as devests the property and possession of the party. 2. The special verdict conclude, that if the goods were well taken, then for the defendant; if not, for the plaintiff, doth not hinder, as Moor 103, pl. *Lane* against *Cooper*, but the Court may judge according to law, there appearing good or no cause of action, as here it doth, 2 Cr. 244. Trover lieth on refusal to deliver on demand, 1 Cr. *Allen* against *Chapman*, 3 Cr. 195, & F. N. B. 69, though the goods were delivered by the plaintiff, or the defendant come to the goods, as here by process of law: also none can share in the dividend of goods, but they which joyn in the commission, which the plaintiff did not; and if the baily be not chargeable, he may keep them for ever, for the defendant cannot have remedy, they being taken by process of law. Jones for the defendant, The baily is excused of taking the goods; the time of the sealing or taking out the writ, cannot possibly be taken notice of; but the execution binds from the time of the teste, as 8 Co. 171, in *Fleetwoods case*, 3 Cr. 174, but had the execution been teste when it was taken out 11 June, the sheriff must execute it; and take the case as it stands on the execution, and not to return, that he is become a bankrupt before, for then no sheriff could execute any writ against a tradesman: also the property of the goods are not here in question, nor doth the statute look on officers.

[933] 1. Keeling agreed, it were hard to put a baily to discover any act that makes one liable to be after declared a bankrupt: also such a return had been naught, and there can be no trover and conversion against the baily on due execution of his writ, 6 Co. 19 a. being the process of the King, and for his benefit.

2. Windham held the statute never meant to bind goods from the date of fieri facias, which may be kept in an attorneys pocket, but from actual execution; but such goods shall be liable to an equal disposition among the creditors; but no act of justice can be overthrown by retrospect, and therefore the baily is not liable to trover.

3. Twisden, Had this judgment been for security of a debt, it might possibly be executed, but not by confession, for generally the teste of the writ doth not bind the goods, and therefore the goods are not well taken. And Wild the Kings Serjeant said, The constant course in London in trespass against sergeants and bailyes, was only to enquire whether the party were a bankrupt at the time of the taking, or not; which Windham agreed. Et adjornatur.

42. WHALLY *against* ANDERSON. *Ante.*

The Court, ex motione Jones, gave judgment for the plaintiff.

43. THE KING *against* CLERKE. *Friday, June* 9.

Constable. Siderf. 272, pl. 28.

The defendant being indicted for not taking on him the office of constable, being duly chosen: he pleaded, that by the custom of London, all customers, comptrollers, and watchmen in the custom-house have been discharged from bearing office; and sheweth, that he is a watchman; and sheweth also the priviledge under the Exchequer seal; but doth not shew that watchman, &c. is an ancient officer, nor prescribes, nor doth not aver that there are sufficient to serve beside, and therefore, per Curiam, judgment pro Rege.

[934] 44. THE KING *against* WAGSTAFF, CORKE, &C. JURORS OF THE OLD-BAILY. Enquest, Br. 30.

Enquest. Siderf. 272, pl. 30.

Coleman excepted to the return on the habeas corpus, that it's said they went against the direction of the Court in materia legis, not shewing what that materia legis is: but by Glyn, This is a judgment that is returned, and the Court have a general jurisdiction, therefore it need not be shewed why, or the particulars of it; as estreat to the Exchequer is only pro mala gestura. Adjornatur 938, pl. 55.

45. ——— *against* THE EXECUTORS OF MADDOX. *Saturday, June* 10.

Executors.

In an action of against executors, they pleaded fully administred; which the plaintiff accepts, and enters judgment, and must have scire facias when assets happen, on *Mary Shipleys case*, 8 Co. 134. But by Wild, If the judgment be entred, the defendant loseth his costs, which he would have, should the plaintiff take issue thereon. Also in the scire facias, whatever was in the testator at his death, shall be presumed in the hands of the executors, and they must discharge themselves by plea: but, per Curiam, this is not so mischievous as the contrary would be to disallow the entry of the judgment; and though the practise be of late contrà, yet formerly it was, as in *Shipleys case*. Adjornatur.

46. AMPCOTS *against* AMPCOTS. *Ante.*

Costs.

Jones prayed costs in error of a judgment on 3 H. 6, cap. 10, in formedon, as in debt on 2 Ed. 6. The plaintiff hath no costs, but if the judgment be affirmed in error, he shall; which the Court agreed, and awarded costs, Windham absente.

[935] 47. TRAVERS *against* TWISLETON. *Ante.*

Arbitrement.

In debt on obligation on oyer demanded, it appeared the condition was to perform an award made by A. and B. by such a day, and if they cannot agree, then to chuse an umpire the same day. The defendant pleads the umpire made an award: the plaintiff saith, that after that award, the same day the arbitrators did make an award, to which the defendant demurred: and Jones for the plaintiff, conceived this award by the arbitrators void: and Twisden on *Barnard* against *King* in B. R. it hath been agreed, Stiles 306, pl. 664, that arbitrators may chuse an umpire before their time be out, but they cannot be both within the same time distinct Judges: but if the submission be to two, and if they cannot agree by the first of May, then to umpire by the tenth of May; here the umpire cannot make any award, unless there be a special proviso, that if they break off before, then their umpire shall award; but did agree that all being here on the submission, not by the condition of the bond, it's well: and by Keeling, this being to be all the same day, and so the umpires power begins by the disagreement of the arbitrators, it's good. Adjornatur.

48. THE KING *against* DREW. Siderf. 274, pl. 32.

Perjury.

He was indicted for perjury at common law in an answer in Chancery, swearing he never took on him the management of the will of old Drew, which was never charged by the bill, as it appears on the information; and therefore in arrest of judgment, it was alledged after verdict by Scrogs: but by Keeling in the information, it's not material to set forth the particular charges in the bill, which Twisden agreed, as the best way at common law: but on the statute of 5 Eliz. the particulars must be set down, to shew how the perjury is material to the issue; but in the other it's only inducement. Adjornatur.

[936] 49. SCOT *against* LITTLETORE. Debt, Fitzh. 7.

Joynder.

In debt on joynt obligation against the survivor, the defendant pleads, that one of the obligors, viz. Tridderly, died, and that the plaintiff after released to his

executor, viz. one Vesye; to which the plaintiff demurs; and per Curiam, this release is void; but had the obligation been joynt and several, the release had been good. Judgment for the plaintiff.

50. HOWARD *against* SPENCER. *Ante.*

In common, Br. 9.

Jones for the plaintiff on 2 Cr. 195, 230, & Yelvert. 104, conceived that a commoner cannot fill up a ditch, because here the soyl is intermedled withal, but in 15 H. 7, 10, the taking down a wall or gate doth not hurt the soil, 2 Inst. 88. So of breaking hedge, which Twisden agreed: but by Keeling, all is one; yet it will be hard to reconcile 15 H. 7 with later authorities; and the better opinion is, that a commoner cannot dig a trench to meliorate the ground, *Rolt* against *Bugby* for digging turff in Bedfordshire, the tenant of the common could not have trespass against the owner of the soil: and the averment that the commoner could not enjoy his common tam amplis modo & forma, is not sufficient; so had he aver'd that he had not sufficient common. Sed adjornatur.

51. OSBORN *against* CROSLAND, EXECUTOR OF CAUTHORN. *Ante.*

Trin. 16 Car. 2, Rot. 244.

Joynder. Debt, Fitzh. 51. Siderf. 272, pl. 29.

In debt on obligation which was joynt, on oyer demanded it appears to be a bond made by three, and thereupon the defendant demurs to the declaration; oyer setting forth the bond to be by three, and the count being general: and per Curiam, had the declaration been on a joynt bond, the plaintiff must aver the death of the others, or that they had never sealed: but here the joynture appears on oyer demanded, and therefore the Court will intend they are dead, or that they never sealed, on 28 H. 6, 3. In Debt, Fitzh. 51, & Brief, Br. 26, seu 27, & Trin. 7 Car. 1, in B. R. Rot. 1630, *Lovell* against *Biggot*, where the difference was taken between the plea of the defendant, and the count of the plaintiff. Adjornatur.

[937] 52. WINNE. *Ante.*

Wales.

Williams prayed a prohibition to an English bill in nature of trover in the marches, in regard here the damages are incertain, though a bill, as in the Star-chamber, or where the damages are certain it may lye; the Court were very unwilling, but on offering to put in the suggestion, to which the plaintiff may demur, or take issue; and on affidavit that notice was given to the lord president and the party, the Court ordered them to shew cause why it should not go, but would stay nothing in the mean time.

53. ANDREWS *against* TANNER.

Condition.

In an action of covenant to perform articles, which were, that the plaintiff should hold and enjoy lands free from all titles and incumbrances: and for breach the plaintiff sheweth B. dyed seised, and that his wife had title to dower; to which the plaintiff demurred: and, per Curiam, this covenant goeth to the land; and there can be no difference between a covenant to discharge the land of all titles, and that the defendant shall hold the land so discharged. Judgment for the plaintiff, nisi.

54. COXALL *against* SHARPE.

Arbitrement.

In debt on obligation, which (no oyer being demanded) is intended a single bill; to which the defendant pleads an arbitrement; to which the plaintiff demurred: and per Curiam, it's no plea, but inter alia a bond may be put in arbitrement. Yet by Jones for the plaintiff, in such case the arbitrement cannot be pleaded in bar of the obligation; but the party hath his remedy on the promise or agreement to perform the arbitrement, which the Court doubted; but in the principal case, judgment for the plaintiff.

[938] 55. THE KING *against* WAGSTAFFE, &c. *Ante* 934, pl. 44.

In enquest, Br. 30.

The jurors being severally fined, and imprisoned till payment, as it appeared by the retorn of the habeas corpus made by the Mayor, &c. of London, or till they were otherways discharged by due course of law: the defendants offered to bring the mony into Court, and so prayed time till the next term: and there can be no inconvenience, for the persons are committed but till the fines paid, and they do thus pay it under a rule: but by Twisden, this payment must be actual, and not conditional; nor was this ever done on an execution, unless on the civil side, which Keeling agreed; and though the Kings Counsel should consent, they could not do it; but the retorn being filed, it was excepted, that it was said in issues joyned in indictment of trespass in contemptum domini Regis, and not Curiæ; sed non allocatur. 2. They are said, committed for going against direction of the Court on issues in several trespasses, &c. not saying perpetrat' & commissis, but only whereof the then prisoners were indicted; sed non allocatur, this being the question then to be tried. 3. The jury (per Curiam on Yelvert. 23, *Whartons case*, and in Noy 48, Bendlows Rep. *Norris's case*, which was *Henego Pierce's case*) are not judges of fact, so as to go clearly against it. It was further urged, that it would be inconvenient that every Inferiour Court might make this retorn to fine of jury for going contrary to the direction of the steward, or mayor, or Judge of the Court in materia legis, the party, this being not issuable, would be remediless, for no writ of error lyeth hereon; nor is it necessary, by Maynard, for trust must be laid some where; and this contempt being in Court, cannot receive higher determination, no more then fine by steward in leet. Also by Glyn, goal-delivery is not like Inferiour Courts, for they are known to the law, and never retorn their jurisdiction as Inferiour Courts do: also in civil causes, if the jury misbehave themselves, they may be fined: also no attaint lyeth in this, being a criminal cause, nor can there be a new trial, therefore if the Court cannot fine, the law would be very defective, which the Court agreed: this is a judgment, and not avoidable but by writ of error, for the Court hath a good jurisdiction. Also at common law, and at this day no bill of exception lyeth in matters of the Crown, though the Court direct contrary to law, therefore the particulars need not be set forth more then in retorn of judgment in debt **[939]** had in B. R. &c. And thus was the opinion, they said, of all the Judges in England, and of the Kings Counsel; wherefore the Court remanded them.

56. PLEDALL *against* THE INHABITANTS OF THISTLEWORTH. *Ante. Monday, June* 12.

Hill. 16 & 17 Rot. 447.

Fresh suit.

Action upon the Statute of Winton. Jones excepted in arrest of judgment, that count was on the loss of a gorget and cuffs, which are incertain how many: but by Wild for the plaintiff, this action is only for damages, and not like replevin, which is to have retorn of the thing it self, but like trover of a billiard table with sticks and

balls, not saying thereto belonging, yet held good here, which the Court agreed in omnibus, Windham absente; and it's all one with the loss of band and cuffs, which carries a strong intendment that they belonged to the band, otherways if of cuffs only, then it would be ill, like the case de vergis & velis, Angl. curtains and curtain-rods. Judgment for the plaintiff.

57. RACHEL SANDERSON EXECUTRIX OF MICHAEL, EXECUTOR OF LAWSON.

Legacy.

Tourner prayed a prohibition to the Spiritual Court of for that in suit there for a legacy given by Lawson, she pleaded fully administred, and the Court refused that plea, as Latch. 144, *Watkins's case*, and Noy 77, Goldsb. 141. Sed per Curiam, this plea is properly triable before them, and if they refuse the plea, the party must appear for the gravamen, but cannot have a prohibition on such suggestion.

[940] 58. TOPHAM, LAW, AND HAWLY *against* GOODSON.

Pasch. 16 Car. 2, Rot. 154.

In enfant, F. 6.

In trespass against three, after judgment, Pawlet assigned for error, that one of the defendants, viz. Hawly, was an infant at the time of the plea by attorny pleaded, which, per Curiam, is error, as 2 Cr. 303, *Marlboroughs case:* but being after verdict, it had not been error if one of the plaintiffs, for whom it was, had been an infant, that being saved by the statute of 21 Jac. cap. Judgment reverst totally. So is the case of *Buckly* against *Symons*.

59. THE KING *against* CORNHILL.

Peace.

The King being satisfied on search of presidents, that there were none to bind any to good-behaviour for the same offence that is pardoned, nor any other misdemanors whereof they were indicted; therefore they discharged her ex motione Walker.

60. BAYSURE *against* LUNNE. In Debt, Br. 4.

Utlary.

On reading a record in indebitatus assumpsit for mony heretofore lent: to which the defendant, after imparlance, pleads an utlary in the plaintiff since the mony lent. To which the plaintiff demurred, it being not under seal; and, per Curiam, it ought to be so; but in action upon the case it's not pleadable after imparlance; but here being a duty before, which was thereby forfeited, for which the party might have had debt: the Court doubted on the *Lord Gorings case* in an action upon the case for mony due on sale of horse, for which the party might have covenant, which was never resolved. Et adjornatur, Windham absente.

[941] 61. THE KING *against* DREW. *Ante.*

Perjury.

If interrogatories be not material to the cause depending, the perjury is punishable, because as to the extravagancies, the party doth not answer on his oath; but otherways as to the bill and answer. But on search of presidents, the Court conceived the best way in an indictment at common law, is to set forth neither bill nor answer. Judgment pro Rege, nisi.

62. BROOMLY *against* DAUBYN.

Error.

Stroud prayed the quashing of a writ of error which is directed to the steward and baylies, which is retorned by the steward only: sed per Curiam, The record is before us: also this is brought by the bayl, quod tam in redditione judicij, as 1 Cr. 551, against the principal, error intervenit manifestus, which, per Curiam, is ill, and as *Souths case*, 1 Cr. the bayl must recite the principal judgment, and say only error intervenit in the judgment, and execution against the bayl ad damnum of the bayl; so being contrary, it's clearly error: but this writ being mis-retorned, was quasht; but the party must bring a new one here, de record quod coram vobis, &c.

[942] DE TERMINO MICHAELIS, 17 CAR. II. IN B. R. ANNO 1665.

Twisden, Windham, Keeling, Justices.

1.

Adjornment. Dyer 225 b. pl. 35.

Memorandum, that this term, by proclamation 29 of Sept. and adjornment by writ on the essoyn-day by the puisne Judge of each Court, was adjorned to Oxford to be held 15 Mart. viz. the 18 of November, and so on, which was held accordingly: and there Keeling, puisne Judge, was made Chief Justice, and being sworn at the Chancellors lodging, came up privily and took his place on the 22 of November in the Logick School, where the Court of B. R. sate, and in the same manner upon the 24 of November the Friday after came up Moreton, the Kings Serjeant, to be the puisne Judge. The business was only motions, to prevent any concourse of people, the sickness, by reason whereof this was removed, being spread into most countries, especially eastward, whence it was supposed to be brought from Holland, during the war; and in London dyed the week before 7165 of the plague; and in all 8297, beside Papists, Quakers, and some others that were not put into the bill of mortality. See Hutt. 129.

[943] DE TERMINO SANCTI HILLARII, 17 & 18 CAR. II. B. R. ANNO 1665.

1.

Adjornment.

Memorandum, that this term also, by reason of the plague, was adjorn'd by proclamation dated at Oxon, Friday Jan. 12, in and from the first to the third retorn of Cras Purific. Saturday Febr. 3, to be held at Windsor Castle, published at London Jan. 18, by occasion of a small increase of the continued plague, which was 158, and in all 375, which much terrified such as had left their houses here, and on Saturday Febr. 3, the Judges, viz.

Keeling Chief Justice; Twisden, Windham, Moreton

sate accordingly, having given strict orders no records of the plea on criminal side should be removed, and the several writs of adjornment were read on the essoin days, and the Judges sate till the 4 die post, which here was Tuesday Febr. 6, at which day by reason of the sickness decreasing to 227 in all, whereof of the plague 56, the King removing from Oxon to Hampton Court, and so to London, sent another writ without any proclamation, by vertue whereof the Judges then at Windsor adjorn'd to Westminster the last retorn, which was to Friday Febr. 9, and on that day without reading the writ proceeded on.

[944] 2. COLLINGWOOD *against* BISHOP.

Baron & feme.

In trespass for mean profits, it was moved after verdict for the plaintiff in arrest of judgment, that the count was against baron & feme of trespass done, cum averijs suis, and doth not say whither they were their beasts after, or hers before coverture, and for this cause judgment was staid on allegation of excessive damages, in regard the tenant of the glebe, who was defendant in the action, was charged with the whole arrears of rent, and not recount what he had paid, but he that had the tyths of the rectory, which were of greater value, only proportioned, which by Windham is well enough: but by Keeling there is no inconvenience that the tenant should be allowed in damages for what fee-ferm he hath paid, and not put him to an equitable contribution against the rest; and the Court being divided, the solicitor proceeded in his exception, which, Wild for the plaintiff, conceived after verdict, is good enough, as 3 Cr. *Charwells case*, she may be executrix, and so by marriage they may be his goods: but by Finch this cannot be, because for this they cannot be sued, as *Herns* against *Palmer*, the actions should have been several, according to their several capacities. Twisden, If the goods of executrix after the taking husband be stoln, the indictment must be of taking his goods, but yet this exception will not hold. Windham, In debt against one as executor, and declares that the testator entred into bond, and the issue was non est factum suum which is idle, and being relative shall relate, if it can, if not void; and so after verdict, judgment for the plaintiff, nisi, 100l. be brought into Court and costs paid to the plaintiff, and then a new trial rule by consent.

3. THE KING *against* RHODES.

Certiorari.

He took out a certiorari to remove an indictment of perjury in the sessions below, which after the retorn expired, the party delivered to the justices, and they allowed it, and yet proceeded to trial, which by Osley, on Dyer 244, they ought not, the fact being thereby to be removed as well as the record: but the Court inclined, that nothing can be removed by certiorari after the retorn. 2. On 2 Cr. 239. *Canninghans case*, it was moved in arrest of judgment, that the perjury is laid at the Assizes at the Castle of York, and the venire facias of Ponfract, which is [945] another riding, which per Curiam is ill, but yet the indictment remains good, and only a new trial. 2. The solicitor prayed amendment pro Rege of the indictment, which per Curiam cannot be, but a new indictment may be preferr'd at the Assizes, which the justices will not remove; but in regard this must be found by a new grand jury, and doubtful whither they can try it the same Assizes without special rule of Court: also for that the perjury is laid in the West-Riding, before justices of the West-Riding, and the visne is from the Castle of York, and doth not say the Castle of York is in the West-Riding, which on Co. Entries 343, is ill, the Court ordered a new trial by consent at next Assises.

4. JACKSON *against* ADAMS. *Ante.*

Det.

The defendant was arrested by bill of Middlesex, with an ac etiam of 300l. debt, not saying per contract. or per oblig'. or super judicium, which per Curiam is needless.

5. REEVES *against* BOULD. *Saturday, Febr.* 10.

Tyths.

Coleman prayed a prohibition to suggesting the lands in question are within the precinct of a free-chappel within the said parish, which being excepted for tyths, and belonging not to the parson, its all one as the bounds of a parish, which are triable at common law: sed Curia contrà; and by Keeling Chief Justice, This is all

one as vill in the same parish, which is triable in the Spiritual Court: but contrà, by Windham, of a distinct vill from the vill of the parish, for here the right of a third person cometh in question; but in the case at Bar the chappel belongs to the parson, and by the same reason the right of each particular ferme would be triable at common law, which without particular custom shall never be; and here only the right of tyths is questioned: also a pension payable by constitution to a chappelrie is not payable at common law, and a prohibition was denied by the whole Court.

[946] 6. GRENE *against* SYMSON. In Conusance Br. 7.

Cognizanc.

Sir Ed. Tourner, in ejectment ore tenus shewing his warrant of attorny, demanded conusance for the Bishop of Ely, being for Downham, which is his seat, as *Lucas case* in annuity, H. 7, which, per Curiam is not allowable on suggestion, but as Cinque Ports, aunc. dem. &c. it must be aver'd on record. for though the Court take notice that Ely is a Royal franchis, yet this must be so aver'd or pleaded, and may be after imparlance, when any third person is concern'd, since the new way of ejectments used; though for this reason before conusance was denied in the case of *Neal* against *Denny*, and they agreed to enter it accordingly, and prayed a venire facias of the franchis, and this may be at any time, but when the Court is to be ousted of jurisdiction, it must be pleaded. *Post*, 948, pl. 11.

7. RUSSELL *against* CUMBER.

Execution.

On the case of *Chapman* against *Woodly*, in action upon the case for laying pipes to others, and doth not aver that others were laid, yet good after verdict; so is the case of Hub. 209, and therefore in this action upon the case for fraudulent omission of execution of goods that were in conspectu suo, not saying that he knew them to be the goods of the defendant in that action; after verdict it was moved for judgment, which was arrested at Oxon for this omission, and so Keeling conceived now, this being the substance of the action, contrà, by Twisden and Windham, the gift of the action is the fraud, which cannot be without notice, which is enwrapt in the verdict, though it could not be pleaded, which Moreton agreed, the sheriff being bound to take notice whose goods they were. Judgment for the plaintiff, nisi.

8. BOND *against* SMYTH.

Lieu.

Winnington prayed a prohibition to Inferior Court in Marlborough, in account of several rents collected, and doth not say infrà jurisd. Curiæ; after verdict, and judgment quod computet, which Keeling granted, and there is but one case, and that is on 23 H. 8, 9, of suing out of diocess, in which case no prohibition lieth after judgment, the parties having there agreed the jurisdiction, but in all cases else a prohibition lieth, as well after judg-**[947]**-ment as before, which Twisden agreed, on F. N. B. 45, and 2 Inst. 230, but Windham contrà, it being without president after judgment, that prohibition should be granted in any transitory actions; sed Curia contrà, and prohibition granted, nisi.

9. SIR ANDREW HENLEY *against* DR. BURSTOW.

Peace.

The defendant being convicted of a riot, in aggravation of his fine, it was now offered that he had since denied the plaintiff and his witnesses the sacrament, which sheweth his impenitence; but the Court refused to take any notice of the spiritual

matter: but by Maynard for the plaintiff, An action upon the case lieth against him, for refusing the sacrament, which the Court agreed, on 1 Eliz. cap. because the party is bound to receive on penalty.

10. PICARD *against* THE BISHOP OF ELY AND PAITON. *Monday, Febr.* 13.

Ordinary. Siderf. 276, pl. 3.

On recovery of debt on fi. fa. directed to the sheriff into London, he return'd clericus est beneficiatus in Ely, whereupon went a fi. fa. to the bishop, reciting the former, upon which the bishop return'd nulla bona ecclesiastica, because in truth he had let his parsonage: the Court on Process Br. 14, conceived this return of the Sheriff of London improper, in regard there should have been a suggestion on the roll, after the return of the Sheriff of London, that the defendant had goods in Ely, and the sheriff of that county should have made this return of clericus beneficiatus, Hetly 20 and had the proceeding been thus, an action upon the case would have lain against the bishop for his false return, if the letting or alienation, or permutation had been after the first fi. fa. and before the bishops return; but as this case is, no action upon the case lieth, nor would they grant any process against the bishop, to make a better return.

[948] 11. In Conusance Br. 7. *Ante* 946, pl. 6.

Cognizance.

Sir Ed. Tourner prayed conusance by entry, quod episcopus Ely petit cognitionem in this action of ejectment which was grounded on the Book of Entries; Twisden said, he ought to say, that time out of mind he hath had conusance: but by Keeling one cannot prescribe for conusance, but may have it by auncient grant, and allowance time out of mind; and such is this vouching the record of H. 21 Ed. 3, inter Catherine Anks; but it doth not vouch the roll, which was Rot. 21, and therefore the Court would advise before they make this a president. But all agreed that the Court takes notice of Ely for a Royal franchise; and that had it not been so, he must prescribe on the allowance clearly, and not only vouch the record, but also the roll, see Pl. Com. 143 b. the pleading of exemption, and yet the record shall not be sent hence, but only a day appointed below.

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